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THE TIMES LAW REPORTS,

FRIDAY, NOVEMBER 4, 1927.

Prob., Divorce, and Adm. Div. (Hill, J.) } 1927. Oct. 17.

THE GERTRUD.*

Ship—Collision—Action against owners—Writ—Acceptance of service—Appearance—Bail—Solicitors' undertaking—Alleged mistake as to their authority—Motion by them to set aside acceptance and undertaking—Refusal.

This was a motion by Messrs. Bramwell, Clayton, and Clayton, solicitors, of Newcastle-upon-Tyne, to set aside the acceptance of service of the writ and an undertaking to appear and put in bail, which they had given in an action of collision brought by the owners of the Italian steamship Favignana against the owners of the Norwegian steamship Gertrud.

Mr. Harold Stranger supported the motion; Mr. R. H. Balloch appeared for the plaintiffs.

Mr. STRANGER said that the motion was made on the ground that Messrs. Bramwell, Clayton, and Clayton, in giving their undertaking through their Liverpool agents, had acted under a mistake as to their authority. They had received their instructions through Messrs. Wilsons, underwriters' agents, of Newcastle, who were acting for the underwriters of the Gertrud, but in fact they had no authority from the defendants, the owners of the Gertrud, to appear or intervene in the action. So soon as they had discovered their mistake they had communicated with the solicitors on the other side. The Gertrud was still in the Mersey, where the collision occurred, and could be arrested by the plaintiffs.

Mr. BALLOCH submitted that the Court had no power to make the order asked for, and, in any event, ought not to do so on the material before it. The position was quite clear. An undertaking by a solicitor to appear and put in bail was a contract, and failure to perform it rendered a solicitor liable to attachment. It was a contract by the solicitor on behalf of his principal, and, if he had no authority from his alleged principal, he was liable to an action for breach of warranty of authority. The Court could not set aside a contract merely on the ground that there had been a mistake by one party. There was no desire to embarrass Messrs. Bramwell, Clayton, and Clayton, but the plaintiffs were not satisfied that the defendant owners had not given authority. There was no direct evidence from them to that effect.

MR. JUSTICE HILL, in dismissing the motion, with costs, said that he did not think that he could set aside the undertaking, because to do so would be to destroy that which would be the basis of an action by the plaintiffs for breach of warranty of authority. The Court had not before it any statement by the owners of the Gertrud with reference to the matter of authority. But if it were the fact that, at the moment of giving the undertaking, Messrs. Bramwell, Clayton, and Clayton had no authority from the owners, and if he were asked by motion to compel Messrs. Bramwell, Clayton, and Clayton to carry out their undertaking, different considerations would arise. In the event of an action for breach of warranty of authority it might be that the solicitors would have an action over against the agents of the underwriters. He hoped that the result of these proceedings would be that all the persons who were, or ought to be, liable would very quickly enter an appearance.

[Solicitors—Messrs. Stokes and Stokes, for Messrs. Bramwell, Clayton, and Clayton, Newcastle-upon-Tyne; Messrs. Wm. A. Crump and Son, for the owners of the Favignana.]

* Reported by A. W. GRANT, Esq., Barrister-at-Law.

Judicial Committee of the Privy Council. (Viscount Cave, L.C., Viscount Haldane, Lord Wrenbury, Lord Warrington of Clyffe, and Duff, J.) } 1927. Oct. 18.

ATTORNEY-GENERAL FOR NOVA SCOTIA v. LEGISLATIVE COUNCIL OF NOVA SCOTIA.*

Canada — Nova Scotia — Constitution — Legislative Council—Number of members—Tenure of office—British North America Act, 1867 (30 and 31 Vict., c. 3), ss. 88, 92 (1)—Revised Statutes of Nova Scotia of 1923, c. 2, ss. 1, 2.

The Lieutenant-Governor of Nova Scotia, acting by and with the advice of the Executive Council of Nova Scotia, has power to appoint in the name of the Crown so many members of the Legislative Council of Nova Scotia that the total number would (*a*) exceed 21 or (*b*) exceed the total number at the union mentioned in section 88 of the British North America Act, 1867. The membership of the Council is not limited in number. The tenure of office of members of the Council appointed before May 7, 1925, is during the pleasure of his Majesty the King represented in that behalf by the Lieutenant-Governor of Nova Scotia acting by and with the advice of the Executive Council of Nova Scotia.

This was an appeal relating to the Constitution of the Province of Nova Scotia.

The Hon. W. Lorimer Hall, K.C. (Attorney-General for Nova Scotia), and Mr. S. E. Pocock appeared for

* Reported by SIR W. J. SOULSBY, Barrister-at-Law.

the appellant ; Mr. Stuart Jenks, K.C., and Mr. W. C. Macdonald (both of the Canadian Bar) for the respondents.

The Lord Chancellor, in delivering their Lordships' judgment, said :—This appeal, which is brought by leave of the Supreme Court of Nova Scotia, raises some questions of great importance relating to the Constitution of that Province.

On May 14, 1926, the Lieutenant-Governor of Nova Scotia in Council, acting under section 226 of the Revised Statutes of the Province, referred to the Supreme Court of Nova Scotia for hearing and consideration the following matters :—

"1. Has the Lieutenant-Governor of Nova Scotia, acting by and with the advice of the Executive Council of Nova Scotia, power or authority to appoint in the name of the Crown by instrument under the Great Seal of the Province so many members of the Legislative Council of Nova Scotia that the total number of the members of such Council holding their offices or places as such members would

"(*a*) exceed twenty-one or

"(*b*) exceed the total number of the members of said Council who held their offices or places as such members at the union mentioned in section 88 of the British North America Act, 1867 ?

"2. Is the membership of the Legislative Council of Nova Scotia limited in number ?

"3. Is the tenure of office of members of the said Council appointed thereto prior to May 7, 1925, during pleasure or during good behaviour or for life ?

"4. If such tenure is during pleasure, is it during the pleasure of his Majesty the King, or during the pleasure of his Majesty represented in that behalf by the Lieutenant-Governor of Nova Scotia acting by and with the advice of the Executive Council of Nova Scotia ? "

The matters so referred to the Supreme Court were heard and considered by a Court consisting of four Judges, who differed in opinion. The Chief Justice answered parts (*a*) and (*b*) of question No. 1 in the affirmative. His answer to question No. 2 was that at present a full house is 21 members, but the number can be increased at any time by the Lieutenant-Governor. His answer to question No. 3 was "during pleasure" ; and his answer to question No. 4 was "during the pleasure of his Majesty represented in that behalf by the Lieutenant-Governor of Nova Scotia acting by and with the advice of the Executive Council for Nova Scotia." The opinion of Mr. Justice Chisholm was substantially in agreement with that of the Chief Justice ; but Mr. Justice Mellish and Mr. Justice Carroll took other views. Thereupon the Supreme Court, in accordance with Rule 3 of the rules regulating appeals to his Majesty in Council from Nova Scotia, certified *pro forma* for all purposes of appeal to his Majesty in Council that its opinion on the matters referred to with the reasons therefor was according to the opinion of the Chief Justice and his reasons therefor, and ordered that final judgment be entered accordingly *pro forma* for all purposes of appeal to his Majesty in Council. It is from the judgment so pronounced that this appeal is brought.

In order to arrive at a decision on the matters in controversy, it is necessary to go some way back into the history of Nova Scotia. There had been for some time a Council with legislative and executive authority when, on February 6, 1838, her Majesty, Queen Victoria, issued her Commission to the Earl of Durham appointing him Captain-General and Governor-in-Chief of the Province, and directing that (in addition to the general Assembly of freeholders and settlers referred to in the Commission) there should be within the Province two distinct and separate councils to be respectively called the Legislative Council and the Executive Council and to have the powers therein mentioned ; and the Commission proceeded as follows :—

"And we do hereby appoint and declare that the said Executive Council and the said Legislative Council respectively, shall hereafter consist of such and so many members, as shall from time to time for that purpose be nominated and appointed by us, under our Sign Manual and Signet, or as shall be provisionally appointed by you, the said John George, Earl of Durham, until our pleasure therein shall be known. Provided, nevertheless, and we do hereby declare our will and pleasure to be that the total number of the members for the time being of our said Executive Council, resident within our said Province, shall not at any time, by any provisional appointment, be raised to a greater number in the whole than nine, and that the total number of members of the said Legislative Council, resident within our said Province, shall not at any time by any such provisional appointments be raised to a greater number in the whole than fifteen ; and we do further direct and appoint that five members of our said Executive Council shall be a quorum for the despatch of the business thereof, and that eight members of our said Legislative Council shall be a quorum for the despatch of the business thereof ; and we do further direct and appoint that the members of our said respective Councils shall hold their places therein during our pleasure and not otherwise."

The Commissions subsequently issued to Sir John Colburne (afterwards Lord Seaton) in December, 1838, to Mr. Charles Poulett Thomson (afterwards Lord Sydenham) in September, 1839, to Sir Charles Bagot in October, 1841, and to Sir Charles Theophilus Metcalfe in February, 1842, appointing them successively to be Captains-General and Governors-in-Chief of Nova Scotia, contained directions as to the constitution and appointment of the two Councils similar to those contained in Lord Durham's Commission. In the Commission issued to Earl Cathcart on his appointment to the Governorship in March, 1846, the same directions were repeated with the substitution of 21 for 15 as the maximum number of members of the Legislative Council who might be provisionally appointed by the Governor ; and like directions were contained in the Commissions issued successively to the Earl of Elgin in October, 1846, to Sir Edmund Walker Head in September, 1854, and to Viscount Monck on November 2, 1861. As the Commission to Viscount Monck remained in force until the Confederation of Canada in 1867, it is desirable to quote here the exact terms of the directions as to the number and constitution of the Legislative Council which were contained in that Commission. They ran as follows :—

"And we do hereby declare our pleasure to be that the said Legislative Council shall consist of such and so many members as have been or shall hereafter be from time to time for that purpose nominated and appointed by us under our Sign-Manual and Signet, or as shall be provisionally appointed by you until our will therein shall be known, all which members shall hold their places in the said Council during our pleasure : Provided, nevertheless, and we do hereby declare our pleasure to be that the total number of the members of the said Legislative Council for the time being resident within our said Province shall not at any time by any such provisional appointments be

raised to a greater number in the whole than twenty-one."

This, then, was the position when the British North America Act of 1867 was passed. That Act provided (by section 88) as follows :—

"The constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the union, until altered under the authority of this Act; and the House of Assembly of New Brunswick existing at the passing of this Act shall, unless sooner dissolved, continue for the period for which it was elected."

By section 92 (1) of the same Act it was provided that in each Province the Legislature might exclusively make laws in relation to "the amendment from time to time, notwithstanding anything in this Act, of the constitution of the Province except as regards the office of Lieutenant-Governor." By an Act of the Province of Nova Scotia passed on April 18, 1872, it was enacted as follows :—

"After the passing of this Act the appointment of members of the Legislative Council in the Province of Nova Scotia shall be vested in the Lieutenant-Governor, who shall make such appointments in the Queen's name by instrument under the Great Seal of the Province."

In the Revised Statutes of Nova Scotia of 1923, cap. 2, the above enactment appeared in the following form :—

"Section 1.—In this chapter, unless the context otherwise requires, the expression 'Council' means the Legislative Council.

"Section 2.—The appointment of members of the Council is vested in the Governor-in-Council, who shall make such appointment in the name of the Crown by instrument under the Great Seal of the Province."

The word "Governor" in this enactment is defined as meaning the Lieutenant-Governor. Lastly, by an Act of the Province passed on May 7, 1925, the section last quoted of the Revised Statutes of 1923 was amended by adding thereto a provision that every member of the Council thereafter appointed should hold his seat in the Council for the term of ten years from the date of his appointment. It is by reason of this enactment that the third question referred to the Supreme Court was confined to members appointed before May 7, 1925.

These being the relevant statutes and documents, their Lordships proceed to consider the questions referred to the Supreme Court in their order.

The first and second questions may conveniently be dealt with together.

It is plain from the above statement that the Commissions issued to successive Governors from the year 1838 until the union of Canada did not by their terms impose any limit upon the number of members of the Legislative Council of the Province who might be appointed by the Sovereign. There was indeed a limit—originally of 15 and afterwards of 21—upon the number of such members who might be provisionally appointed by the Governor subject to confirmation by the Queen; but this provision in no way purported to restrict the power of the Queen herself to appoint "such and so many members" of the Council as she should from time to time think fit. In the year 1838, when the number of Legislative Councillors to be provisionally appointed by the Governor was limited by the Commission to 15, Queen Victoria, in fact, appointed 19 such Councillors; and, although the number was never, in fact, raised above 21, there was nothing in the Commissions which would have prevented her Majesty from so raising the number at any time during that period.

Then was there anything outside the Commissions to limit the number to 21? For this purpose stress was laid on behalf of the respondents on a correspondence which passed between the Lieutenant-Governor for the time being of the Province (Viscount Falkland) and Lord Stanley, as Colonial Secretary, in the year 1845, and it is true that in a letter dated August 20, 1845, Lord Stanley seemed to concur in the view that, as a part of certain changes then contemplated, the number of Legislative Councillors might be fixed at 21. But in the Commission issued to Lord Cathcart shortly after the date of this correspondence, while the maximum number of provisional appointments to the Council was for the first time raised to 21, no limit was placed upon the number of members who might be permanently appointed by the Sovereign; and the inference must be that it was the intention of Queen Victoria, while in practice confining her appointments to 21, not to impose any limit on her own power to make appointments exceeding that number. Similar observations apply to a letter of May 4, 1846, written by Mr. W. E. Gladstone as Secretary of State for the Colonies; and it is noticeable that in February, 1864, the Duke of Newcastle, while declining on grounds of policy to advise her Majesty to increase the number of the Council above 21 for the mere purpose of giving a majority in that body to the Government of the day, expressed no doubt as to the power of the Queen to take that course if she had thought fit to do so. Their Lordships find nothing in this correspondence to limit the number of the Legislative Council.

But it was argued that section 88 of the British North America Act, 1867, which provided that the constitution of the Legislature of Nova Scotia should, subject to the provisions of that Act, "continue as it exists at the union, until altered under the authority of this Act," had the effect of limiting the number of Legislative Councillors either to 18—the number of Councillors who were actually in office at the date of the union—or to 21, the number then ordinarily appointed. Their Lordships are unable to accept this contention. It is the constitution of the Legislature, and not the number of persons actually or usually holding office under that constitution, which was to continue until altered under the authority of the Act; and the constitution then existing provided for the appointment of a Legislative Council not limited except by the decisions from time to time taken by the Sovereign under the advice of her Ministers.

It was further argued that, even assuming that before and at the date of the union the Sovereign had power on the advice of her Ministers in the United Kingdom to increase the membership of the Legislative Council of Nova Scotia, that power has not passed to the Lieutenant-Governor of the Province but remains vested in the Sovereign in this country. Their Lordships cannot agree with that view. Whether on the passing of the British North America Act, 1867, the power to appoint the members of the Legislative Council was delegated by virtue of that Act to the Lieutenant-Governor of Nova Scotia, as the representative of the Crown for all purposes of provincial government, it is unnecessary to inquire; for at all events that power has been vested in him since the passing of the Nova Scotia Act of 1872 and is now exercisable by him on the advice of his Executive Council. It has not been suggested that either the Act of 1872, which vested the appointment of members of the Legislative Council in the Lieutenant-Governor, or the statute

of 1923, which declares the appointment of such members to be vested in the Lieutenant-Governor in Council, was not within the powers conferred upon the provincial Legislature by section 92 (1) of the Act of 1867; and in their Lordships' opinion the right to increase the membership of the Council is not severable from the right to appoint new members. The power which was formerly reserved to the Sovereign was a power to appoint "such and so many members" of the Council as might from time to time appear expedient; and it is this power—which includes the power of increase—which has now become vested in the Lieutenant-Governor in Council. No doubt the exercise of the Lieutenant-Governor's power to increase the number of Legislative Councillors would be restrained by the considerations of policy set out in the letter of the Duke of Newcastle above referred to; but in law the membership of the Legislative Council is unlimited.

Their Lordships would therefore answer both parts of question 1 in the affirmative and question 2 in the negative.

The answer to the third question referred to the Supreme Court is dictated by similar considerations based on the history of the Province. It was expressly provided by Lord Durham's Commission of 1838 and by the Commissions issued to successive Governors after that time and before the union that the members of the Legislative Council should hold their places therein during the Queen's pleasure; and, notwithstanding a suggestion made by the Council in the year 1846 that their tenure should be for life, no change was made in the form of the Commissions. It follows that, according to the constitution of the Legislature as it existed at the time of the union, the members of the Legislative Council were appointed during pleasure; and in this respect, as in others, the constitution was continued by section 88 of the Act of 1867.

With regard to the fourth question, their Lordships agree with the opinion of the Chief Justice and Mr. Justice Chisholm that the tenure is during the pleasure of the Sovereign represented in that behalf by the Lieutenant-Governor of Nova Scotia acting by and with the advice of the Executive Council of the Province. The effect of the Nova Scotia Act of 1872 as re-enacted in the Revised Statutes of 1923 is to vest in the Lieutenant-Governor in Council the appointment of members of the Legislative Council during pleasure; and in their Lordships' opinion this means that they are to be appointed during the pleasure of the appointing authority. It would be strange if the effect of the legislation of 1872 and 1923 were to enable the Lieutenant-Governor to make appointments which might be revoked by the Sovereign acting under the advice of his Ministers in this country; and in their Lordships' opinion this was not the intention or effect of the statutes in question. This view is supported by section 23, subsections 37 and 39, of c. 1 of the Revised Statutes, which provide as follows:—

"(37) Words authorizing the appointment of any public officer or functionary, or any deputy, include the power of removing him, reappointing him, or appointing another in his stead, from time to time, in the discretion of the authority in whom the power of appointment is vested.

"(39) Every officer appointed by the Lieutenant-Governor, unless it is otherwise provided in the enactment under which the appointment is made, shall remain in office during pleasure only."

The result is that their Lordships find themselves substantially in agreement with the opinions of the Chief Justice and Mr. Justice Chisholm on every point; and they will humbly advise his Majesty that the questions referred to the Supreme Court should be answered as follows:—

Question 1 (*a*) and (*b*).—Yes.

Question 2.—At present a full house is 21, but the number can be increased by the Lieutenant-Governor in Council.

Question 3.—During pleasure.

Question 4.—During the pleasure of his Majesty represented in that behalf by the Lieutenant-Governor of Nova Scotia acting by and with the advice of the Executive Council of Nova Scotia.

No question arises as to costs.

[Solicitors—Messrs. Burchells; Messrs. Linklaters and Paines.]

Court of Criminal Appeal. (Lord Hewart, C.J., Avory and Salter, JJ.) — 1927. Oct. 24.

REX v. MOSCOVITCH.*

Criminal Law—Bigamy—Foreign marriage—Evidence of validity.

On an indictment for bigamy the validity of a foreign marriage must be proved by the evidence of a professional lawyer or of a person who is to be deemed by reason of his office to be skilled in the law of the country where it was celebrated.

This was an appeal by Barnett Moscovitch, who had been convicted at the Central Criminal Court of bigamy, sentence on him being postponed pending this appeal, for which a certificate was given.

The case raised questions regarding the proof of a marriage between Jews celebrated in a foreign country.

Mr. Hyman Harris appeared for the appellant; Mr. Frederick Levy for the prosecution.

Mr. Harris said that it was alleged that Moscovitch married Leah Moscovitch in 1881 at Lodz, Poland, which was then under the dominion of Russia. He lived with her there for 18 months, and they then both came to England, and lived here until he left her and went to America. He returned from America in 1920, and in 1925 he contracted what had been alleged to be a bigamous marriage with a widow named Sarah Evalanka. For the purposes of proving a charge of bigamy a Jewish marriage celebrated abroad was on precisely the same footing as any other marriage celebrated abroad. To sustain the indictment experts must give evidence that the marriage at Lodz was recognized by the law of the country of its celebration and was not merely binding according to Jewish law. No such evidence, however, was called in the present case.

Mr. Levy said that, even if there were no expert evidence of the relevant Russian law, there was a presumption that a marriage contracted abroad according to the rites of a religion was good without any proof that it was valid according to the law of the country where it was celebrated: *Reg. v. Griffin* (14 Cox C.C., 308). In *Rex v. Shapiro* (unreported), tried at the Central Criminal Court on December 10 and 11, 1925, the facts were precisely the same as in the present case, and the same point was taken by the defence, but the defendant was convicted and sentenced and there had been no appeal from that decision.

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

The Lord Chief Justice, in giving the judgment of the Court, said that the expert evidence on which the prosecution relied at the trial to prove the validity of the first marriage was that of a witness who was described as a rabbi and an ecclesiastical assessor of the chief rabbi's court. That witness, however, admitted that he could not say whether or not the marriage was valid by the law of Russia, although it would be binding on any Jew. He did not purport to speak with authority on Russian law, and, apart from his testimony, there was nothing that could be called expert evidence.

The law on the matter was quite clear. It was restated a few years ago in *Rex v. Naguib* ([1917] 1 K.B., 359), where it was held that on an indictment for bigamy the validity of a foreign marriage must be proved by expert evidence. That evidence might be that of a professional lawyer or that of a person who was *peritus virtute officii*: *Reg. v. Povey* (Dears., 32). The witness called for the prosecution in the present case was not a professional lawyer, nor was he to be deemed by reason of his office to be skilled in Russian law.

In the opinion of the Court there was no evidence which the Recorder of London was entitled to admit at the trial on the question whether Moscovitch's first "marriage" was legal according to Russian law. The appeal, therefore, succeeded, and the conviction must be quashed.

[Solicitors—Messrs. C. V. Young and Co.; Messrs. Wontner and Sons.]

Judicial Committee of the Privy Council.
(Viscount Cave, L.C., Viscount Haldane, Lord Wrenbury, Lord Darling, and Lord Warrington of Clyffe.)

1927. Oct. 18.

HALIFAX CORPORATION v. FAIRBANKS' ESTATE.*

Canada—Nova Scotia—Direct taxation—Powers of Province—Business tax—Imposition on owner of premises instead of occupier—Whether a "direct" tax—British North America Act, 1867 (30 and 31 Vict., c. 3), s. 92 (2).

The respondent estate, which was the owner of premises in Halifax, Nova Scotia, and leased them to the Crown for use as a railway ticket office, the Crown to pay the business taxes (if any), was assessed and rated to business tax on the premises by the Halifax Corporation under its charter, which provided that the owner of property let to the Crown or to any person exempt from taxation should be deemed to be in occupation thereof and should be assessed and rated to business tax if the premises were used for business purposes.

Held, that the tax was a direct tax falling within the authority of s. 92 (2) of the British North America Act, 1867, and was therefore within the powers of the Province under that section.

This was an appeal from a judgment of the Supreme Court of Canada in a suit raising questions as to the validity and effect of certain legislation of the Province of Nova Scotia dealing with municipal taxation in the city of Halifax.

Mr. F. H. Bell, K.C. (of the Canadian Bar), and Mr. W. Gordon Brown appeared for the appellants; Mr. I. C. Rand, K.C. (of the Canadian Bar), and Mr. D. N. Pritt, K.C., for the respondents.

The Lord Chancellor, who delivered their Lordships' judgment, said:—The substantial question raised in this appeal is whether a tax imposed by the city of Halifax on the estate of John P. Fairbanks as the owner of certain premises in the city is valid, or whether (as the Supreme Court of Canada has held) it is void as not being "direct taxation" within the meaning of section 92 (2) of the British North America Act, 1867.

The city of Halifax levies under its charter three taxes called respectively a business tax, a household tax, and a real property tax. The business tax is payable by every person occupying real property for the purpose of any trade, profession or calling for purposes of gain, and is assessed on 50 per cent. of the capital value of such property. The household tax is payable by every occupier of any real property for residential purposes, and is assessed on 10 per cent. of the capital value of such property. The real property tax is a tax on the owners of all real property and is assessed on its capital value. By section 391 of the charter real property which is the property of his Majesty used for Imperial Dominion or Provincial purposes, or which is used for certain charitable and other public purposes there described, is exempt from real property tax. By section 392 no household tax or business tax is to be paid by the occupiers of any of the properties declared exempt from real property tax if such occupiers are the owners or lessees thereof and are occupying the same solely for the purposes of the association or other body specified as entitled to exemption. By section 394 it is enacted that property let to the Crown or to any person, corporation, or association, exempt from taxation, shall be deemed to be in the occupation of the owner thereof for business or residential purposes, as the case may be, and he shall be assessed and rated for household tax or business tax according to the purpose for which it is occupied.

The respondent estate is the owner of certain ground floor premises in the city and has let them to his Majesty the King, represented by the Minister of Railways and Canals of Canada, for a term of years, the lease providing that the demised premises shall only be used as a ticket office of the Canadian National Railways, and that the lessee shall pay the business taxes, if any; and the property is in fact used as a ticket office. The respondent estate, having been assessed and rated to business tax in respect of these premises, appealed to the Court of Tax Appeals for the city of Halifax, which confirmed the assessment, and the decision was affirmed by the Supreme Court of Nova Scotia; but on a further appeal to the Supreme Court of Canada that Court (by a majority) set aside the decision of the Courts in Nova Scotia, and held the tax to be *ultra vires* and void. Hence the present appeal.

In the course of the argument for the respondent estate it was suggested that an occupation by the Crown cannot be held to be for purposes of gain, and accordingly that the premises in question were not assessable to the business tax; but in their Lordships' view there is no substance in this argument. A business is undoubtedly carried on upon the premises, though on behalf of the Crown, and they are therefore within the ambit of the tax. It was also urged that the tax in dispute is a tax on property belonging to

* Reported by Sir W. J. Soulsby, Barrister-at-Law.

Canada, and so is void under section 125 of the British North America Act, 1867 ; but their Lordships do not consider that a tax on the owner of premises let to the Crown in right of the Dominion can be held to be a tax on the property of Canada. The real and substantial question to be decided is whether the tax is a direct tax falling within the authority of section 92 (2) of the British North America Act, 1867, or whether it is an indirect tax and so beyond the powers of the Province under that section ; and it was because the Supreme Court held the tax to be indirect that they declared the respondent estate not legally liable for payment.

The reasons for the decision of the majority of the Supreme Court of Canada were stated by Mr. Justice Newcombe in a lucid judgment, in the course of which he relied upon the often quoted statement of John Stuart Mill ("Political Economy," ed. 1886, vol. 2, p. 415), that "a direct tax is one which is demanded from the very persons who it is intended or desired should pay it," while "indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another." The learned Judge held that such an expectation or intention might be inferred from the form in which the tax is imposed, or from the results which in the ordinary course of business transactions must be held to have been contemplated ; and he expressed the opinion that in the present case, where the owner is made liable for a tax which is imposed in respect of the purposes for which the tenant occupies the premises, it was only to be expected that the landlord would exact indemnity from the tenant. He held, therefore, that the tax was an indirect tax upon the tenant and beyond the powers of the Provincial Legislature. On the other hand, Mr. Justice Duff, who dissented from the judgment of the Court, called attention to the great difficulty of determining the actual incidence of local rates on occupiers, building owners and land owners ; and he quoted the opinion of Professor Seligman ("Income Tax," 1914), that the incidence of such rates in an urban district is determined by a great variety of factors depending on the demand for houses or business premises and the general state of trade. He declined therefore to act upon any general theory as to such incidence, and held the tax to be direct.

In considering the question so raised it is, their Lordships think, important to bear in mind that the problem to be solved is one of law, the answer to which depends upon a true understanding of the meaning of the expression "direct taxation within the Province" as used in the British North America Act, 1867. In this connexion some observations made by Lord Hobhouse in delivering the judgment of this Board in *Bank of Toronto v. Lambe* (3 *The Times* L.R., 742 ; 12 App. Cas., 575, at p. 581) are of value. The tax there in question was a tax imposed upon banks and insurance companies carrying on business within the Province of Quebec, and Lord Hobhouse dealt with the point as follows :—

"First, is the tax a direct tax ? For the argument of this question the opinions of a great many writers on political economy have been cited, and it is quite proper, or rather necessary, to have careful regard to such opinions, as has been said in previous cases before this Board. But it must not be forgotten that the question is a legal one, viz., what the words mean, as used in this statute ; whereas the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the words 'direct,' and 'indirect,' according as they find that the burden of a tax abides more or less with the person who first pays it. This distinction is illustrated very clearly by the quotations from a very able and clear thinker, the late Mr. Fawcett, who, after giving his tests of direct and indirect taxation, makes remarks to the effect that a tax may be made direct or indirect by the position of the taxpayers or by private bargains about its payment. Doubtless, such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it ; and of every direct tax that it affects persons other than the first payers ; and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies."

The result of these observations, which are closely applicable to the present case, is that their Lordships have primarily to consider, not whether in the view of an economist the business tax imposed on an owner under section 394 of the Halifax city charter would ultimately be borne by the owner or by someone else, but whether it is in its nature a direct tax within the meaning of section 92 (2) of the Act of Union. The framers of that Act evidently regarded taxes as divisible into two separate and distinct categories—namely, those that are direct and those which cannot be so described, and it is to taxation of the former character only that the powers of a provincial government are made to extend. From this it is to be inferred that the distinction between direct and indirect taxes was well known before the passing of the Act ; and it is undoubtedly the fact that before that date the classification was familiar to statesmen as well as to economists, and that certain taxes were then universally recognized as falling within one or the other category. Thus, taxes on property or income were everywhere treated as direct taxes ; and John Stuart Mill himself, following Adam Smith, Ricardo, and James Mill, said that a tax on rents falls wholly on the landlord and cannot be transferred to anyone else. "It merely takes so much from the landlord and transfers it to the State" ("Political Economy," vol. 2, p. 416). On the other hand, duties of customs and excise were regarded by everyone as typical instances of indirect taxation. When therefore the Act of Union allocated the power of direct taxation to the Province, it must surely have intended that the taxation of property and income should belong exclusively to the provincial legislatures, and that without regard to any theory as to the ultimate incidence of such taxation. To hold otherwise would be to suppose that the framers of the Act intended to impose on a provincial legislature the task of speculating as to the probable ultimate incidence of each particular tax which it might desire to impose, at the risk of having such tax held invalid if the conclusion reached should afterwards be held to be wrong.

What then is the effect to be given to Mill's formula above quoted ? No doubt it is valuable as providing a logical basis for the distinction already established between direct and indirect taxes, and perhaps also as a guide for determining as to any new or unfamiliar tax which may be imposed in which of the two

categories it is to be placed ; but it cannot have the effect of disturbing the established classification of the old and well-known species of taxation, and making it necessary to apply a new test to every particular member of those species. The imposition of taxes on property and income, of death duties and of municipal and local rates is, according to the common understanding of the term, direct taxation, just as the exaction of a customs or excise duty on commodities or of a percentage duty on services would ordinarily be regarded as indirect taxation ; and although new forms of taxation may from time to time be added to one category or the other in accordance with Mill's formula, it would be wrong to use that formula as a ground for transferring a tax universally recognized as belonging to one class to a different class of taxation.

If this be the true view, then the reasoning of the majority of the Supreme Court of Canada requires reconsideration. It may be true to say of a particular tax on property, such as that imposed on owners by section 394 of the Halifax charter, that the taxpayer would very probably seek to pass it on to others ; but it may none the less be a tax on property and remain within the category of direct taxes. Probably no one would say that the income-tax levied in this country under Schedule A of the Income Tax Acts, although levied upon the occupier of property who is authorized to recover it from the owner, is not a direct tax. So, although a customs duty paid by a person importing commodities for his own use is not passed on to anyone else, it would hardly be contended that such a duty is a direct tax within the meaning of the British North America Act, 1867. It is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity ; and, judged by that test, the business tax imposed on an owner under section 394 is a direct tax.

The authorities cited by Mr. Justice Newcombe show the use made by this Board of Mill's definition in determining whether a new or special tax, such as a stamp duty, a licence duty or a percentage on turnover, should be classed as direct or indirect ; but, with the possible exception of *Cotton v. The King* (30 *The Times* L.R., 71 ; [1914] A.C., 176), which seems to have turned on its own facts, they do not afford any instance in which a tax otherwise recognized as direct has been held to be indirect for the purposes of the British North America Act, 1867, by reason of any theory as to its ultimate incidence. On the other hand, the case of *City of Montreal v. Attorney-General for Canada* (39 *The Times* L.R., 17 ; [1923] A.C., 136), where land in Montreal belonging to the Crown in right of the Dominion and let to a tenant was held to have been validly assessed under a section of the city charter which enacted that persons occupying for commercial purposes land belonging to the Federal Government should be taxed as if they were the owners, appears to be directly in point and to support the contention of the appellants in this case.

Upon the whole their Lordships have come to the conclusion that the tax here in dispute is direct taxation within the meaning of the statute, and accordingly that this appeal should be allowed and the decision of the Supreme Court of Nova Scotia restored, and that the respondent estate should be ordered to pay the costs of the appellants here and below ; and they will humbly advise his Majesty accordingly.

[Solicitors—Messrs. Linklaters and Paines ; Messrs. Freshfields, Leese, and Munns.]

K.B. Div. (MacKinnon, J.) 1927. Oct. 19.

ELLERMAN LINES, LIMITED v. READ AND OTHERS.*

Ship — Salvage — Contract—Breach—Damages —Foreign judgment—Whether *res judicata.*

The plaintiffs' steamer stranded in the Black Sea, and the defendant L. agreed to try to salve her on the terms (*inter alia*) that security for payment of his remuneration should be arranged in London and that he would not arrest the ship unless there was an attempt to remove her before the security had been given. Security was given in London in accordance with the salvage contract, and the ship was refloated and taken to Constantinople for temporary repairs. Before she was ready to leave, the defendant L. brought an action against the master in the Turkish Court on the ground that the ship was about to be removed without security having been given. By order of the Turkish Court the ship was arrested, and, as the master had no evidence of what had been done in London and L. took an oath that security had not been given, the Turkish Court awarded L. £23,890. L. then disposed of the ship, and the plaintiffs brought this action, (1) for damages for breach of contract, (2) for a declaration that the Turkish judgment was invalid, and (3) for an injunction to prevent the Turkish judgment from being enforced.

Held, (1) that as the plaintiffs were not parties to the Turkish proceedings the doctrine of *res judicata* could not apply to the question of breach of contract and the plaintiffs were entitled to damages, but these damages did not include the loss of the ship, since this was not a necessary consequence of the breach ; (2) that the Court had power to make the declaration asked for, and there would be a declaration that the plaintiffs were not liable to be sued in England on the Turkish judgment ; but (3) that the Court could not grant an injunction restraining the enforcement of the Turkish judgment in any part of the world.

In this case the plaintiffs, Ellerman Lines, Limited, brought an action against three defendants, Landi, Grech, and Read, for damages for breach of contract, for a declaration, and for an injunction.

Mr. Raeburn, K.C., and Mr. David Davies appeared for the plaintiffs ; Mr. Wilfrid Lewis for the defendant Read ; and Mr. Wilfrid Lewis and Mr. G. K. Rose for the defendant Landi. The other defendant was not present and was not represented.

In November, 1924, a steamer, the Falernian, belonging to the plaintiffs, stranded in the Black Sea. A salvage steamer, the Semper Paratus, of which, the plaintiffs said, the three defendants were joint owners, and of which the defendant Landi was master, came up. After negotiations the master of the

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

Falernian entered into a salvage agreement with Landi on the terms of "no cure no pay." The agreement was in the usual form approved by Lloyd's and contained, *inter alia*, provisions that the remuneration for the salvage services should, in default of agreement, be fixed by arbitration in London; that security for payment of that remuneration should be arranged in London; and that the salvor would not arrest the ship except in the case of an attempt to remove her before security had been given.

The Falernian was refloated and taken to Constantinople, and was there placed in dry dock for temporary repairs to enable her to be towed to Marseilles for permanent repairs. The plaintiffs sent out a Dutch tug to tow her to Marseilles, and on July 6, 1925, she was ready to start. Meanwhile, Landi had taken steps to present her leaving Constantinople, and by order of the Turkish Court she was arrested on July 1. Landi had begun an action in that Court against the master of the Falernian on the ground that the ship was about to be removed without security having been given. The Court decided that the onus of showing that security had been given was on the master of the Falernian, and as he had not evidence at Constantinople of what had been done in London, he could not discharge the onus. Landi took an oath that security had not been given, the master of the Falernian took no further part in the proceedings, and the Court gave judgment against him by default.

It appeared that in default of appearance by a defendant the Turkish Court did not go into the merits of the dispute, but gave judgment for the amount claimed by the plaintiff. They accordingly awarded Landi a sum amounting in English money to £23,890. Later, Landi allowed his brother to obtain judgment against him for an alleged debt of £2,500, and the brother took over the Falernian in satisfaction. He then sold her, and in the result she had passed irrevocably out of the hands of the plaintiffs.

Security had, in fact, been given in London in March, 1925, in accordance with the salvage contract, and by swearing that security had not been given Landi obtained the judgment of the Turkish Court by fraud.

In September, 1925, while the Falernian was still lying at Constantinople, the plaintiffs began this action in the English Courts. In the course of the proceedings they had obtained an interim injunction, which was still in force, restraining the defendants from enforcing their Turkish judgment. In the action the plaintiffs claimed, first, damages for breach of contract; secondly, a declaration that the Turkish judgment had been obtained in circumstances which rendered it invalid; and thirdly, an injunction to prevent the defendants from enforcing the Turkish judgment. The defendants counterclaimed to enforce their judgment for the £23,890.

Mr. Justice MacKinnon said that Landi committed a clear and shameless breach of contract in procuring the arrest of the ship. On that part of the case damages were claimed under four heads—namely, the hire of the tug; the wages of the crew and other expenses of the Falernian while she was lying at Constantinople after arrest; the legal expenses of the Turkish proceedings; and the value of the Falernian.

Mr. Lewis had contended that the Turkish Court had already decided that no breach of contract had taken place, and that therefore the matter was *res judicata*. But there were two answers to that contention. First, the present action was brought by the Ellerman Lines, and they were not a party to the Turkish proceedings. The doctrine of *res judicata* only applied where the parties to the second action were precisely the same as those to the first. And secondly, the plea of *res judicata* could only apply to the actual decision of the Court, and here there had been no formal decision of the Turkish Court that Landi had not committed a breach of contract. He held, therefore, that the plaintiffs were entitled to recover damages for Landi's breach of contract.

He thought that the cost of the tug was clearly recoverable, as were also the wages of the crew and expenses while the Falernian was lying at Constantinople, and the legal expenses of resisting the arrest and trying to get the ship released. But as to the value of the Falernian, he did not think that the final loss of the ship was a necessary consequence of Landi's breach of contract. If the master had not let judgment go by default, but had stayed and had been able to tell the Turkish Court the true facts, probably the Court would not have given that judgment. He therefore held that the plaintiffs could not recover for the loss of the ship.

Then came the more serious question whether, if the defendants sued the plaintiffs here upon the Turkish judgment, the plaintiffs could prevent the judgment from being enforced here on the ground that it had been obtained by fraud. Mr. Lewis contended that the plaintiffs, before being attacked in this Court, could not obtain a declaration that, if attacked, they would have a good defence. If an action had been begun for the sole purpose of getting such a declaration, that might possibly be so; but, in his view, where a plaintiff had, quite properly, brought an action for damages for breach of contract and the claim for a declaration arose in such action, the Court had power under Order XXV., r. 5, to make the declaration asked for. The matter was one which came within the rule as to declaratory judgments, and if the defendants sought to enforce their Turkish judgment he would make the declaration.

As to the defendants' counterclaim to enforce the Turkish judgment for £23,890, Landi had obtained that judgment by saying that security had not been given, knowing it to be untrue. On the authority of *Abouloff v. Oppenheimer* (10 Q.B.D., 295), which laid down the general principle that the Court would not allow a party to take advantage of his own wrong, he held that the counterclaim could not be enforced. He therefore gave judgment for the plaintiffs on the counterclaim, and made a declaration that the plaintiffs were not liable to be sued on the Turkish judgment so as to make it an effective English judgment against them.

Then there was the question of an injunction. He was asked to grant an injunction restraining the defendants from enforcing their Turkish judgment. Although the English Courts would refuse to enforce that judgment here, it was beyond the power of the English Courts to say that it should not be enforced anywhere in the world. On that point, therefore, to his regret, he could not give judgment for the plaintiffs.

As to the position of the other two defendants, Grech had appeared to the writ, but had not put in any defence. Judgment would go against him by default. The other defendant, Read, was sued as a partner of Landi, and the evidence against him was that he was registered with Landi as one of the joint managing owners of the Semper Paratus. That being so, on the authority of *Frazer v. Cuthbertson* (6 Q.B.D., 93, at pp. 97-8) Read must be assumed to

have been a part-owner unless the contrary was shown. No evidence to the contrary having been given, judgment must be given against him as well as against Landi.

On the application of Mr. RAEBURN, the injunction was to continue if notice of appeal was given within 14 days.

[Solicitors—Messrs. Parker, Garrett, and Co.; Messrs. Amery Parkes and Co.; Messrs. Leader, Plunkett, and Leader.]

Chan. Div. (Tomlin, J.) 1927. Oct. 20.

J. I. THORNYCROFT AND CO., LIMITED v. THORNYCROFT.*

Companies — Shares — Participating preferred ordinary shares—Whether dividend cumulative—Resolutions sanctioning creation of shares—Construction.

This summons raised the question whether the dividends payable in respect of certain Seven-and-a-Half per Cent. Participating Preferred Ordinary shares issued by J. I. Thornycroft and Co., Limited, were cumulative or non-cumulative dividends, and this question turned on the construction of the resolutions of the company creating the shares.

The company was incorporated in May, 1901, with a capital of £260,000, divided into 160,000 Six per Cent. Cumulative Preference shares of £1 each and 100,000 Ordinary shares of £1. Increases took place from time to time in the capital of the company, which amounted in August, 1919, to 200,000 Six per Cent. Cumulative Preference shares and 300,000 Ordinary shares. On August 12, 1919, an agreement was entered into between the company and Sir John Edward Thornycroft, contracting on behalf of the Ordinary shareholders, sanctioning the creation of 250,000 additional shares on the conditions that the agreement was confirmed by an extraordinary resolution of the Ordinary shareholders and that the resolutions scheduled to the agreement were passed. Those conditions were duly complied with. The resolutions were as follows:—

"(1) That the capital of the company be increased from £500,000, divided into 200,000 Preference shares and 300,000 Ordinary shares, all of £1 each, to £750,000 by the creation of 250,000 new shares of £1 each.

"(2) That the said 250,000 new shares be and be called Participating Preferred Ordinary shares and . . . do confer upon the holders thereof the following rights, namely:—

"(*a*) The right to a fixed preferential dividend on the amounts paid-up thereon at the rate of 7½ per cent. per annum, payable next after the fixed Six per Cent. Cumulative dividend on the Preference shares for the time being in the company's capital, but in priority to any dividend on the Ordinary shares.

"(*b*) The right in respect of any financial year or other period for which the company's accounts are made up in respect of which a dividend at a rate exceeding 10 per cent. per annum is paid on the Ordinary shares to receive a further dividend for each year or period on the amounts paid up on the Participating Preferred Ordinary shares at the rate of ½ per cent. for every 1 per cent. by which the dividend paid on the Ordinary shares exceeds 10 per cent. per annum, . . . but so that the total dividend payable on the Participating Preferred Ordinary shares in respect of any such year or period shall never exceed 9 per cent. per annum.

"(*c*) The right in a winding up to have the assets of the company available for distribution amongst the members and remaining after making to the Preference shareholders all payments in respect of such shares to which they are entitled under Article 7 . . . applied in the next place and in priority to any payment being made thereout to the holders of the Ordinary shares in repaying to the holders of the Participating Preferred Ordinary shares the amounts (exclusive of premiums) paid up on such shares, but without any further or other right of participation in such assets."

Mr. Peel appeared for the company; Mr. Luxmoore, K.C., and Mr. Roxburgh for a holder of Ordinary shares; and Mr. Spens, K.C., and Mr. Lionel Cohen for a holder of Participating Preferred Ordinary shares.

MR. JUSTICE TOMLIN, in giving judgment, said that the question which he had to determine was a question of the construction of the resolutions relating to the Participating Preferred Ordinary shares, for the purpose of ascertaining whether those shares had or had not a right to a cumulative dividend. It was quite true that, if a preferred dividend was given without more, that was, *prima facie*, a cumulative dividend, but the question whether a cumulative dividend had been conferred must always be a question of the construction of the articles or resolutions relating to the shares. The Court had to examine the language employed and come to a conclusion as to what was intended from the whole of the language used.

He had done this and had arrived at a conclusion. One or two points emerged on such an examination. First, in the resolutions, the existing Preference shares were referred to as Preference shares entitled to a "fixed 6 per cent. cumulative dividend," while the Participating Preferred Ordinary shares were only stated to be entitled to "a fixed preferential dividend." Again, it was to be observed that the shares were not called Preference shares, but Ordinary shares with certain preferential rights. It was further to be noticed that the Preferred Ordinary shares were given no right to be paid arrears in a winding up. No doubt Preference shareholders might be entitled to a cumulative dividend without having a right to arrears in a winding up, but it would be more natural that Cumulative Preference shares should have arrears provided for in a winding up. There were in the resolutions other matters which suggested that the dividends were to be cumulative, but, on the whole, he had come to the conclusion that the dividends were not cumulative.

That view was confirmed by the provision at the end of sub-clause (*b*) of the second resolution that "the total dividend payable on the Participating Preferred Ordinary shares in any such year or period shall never exceed 9 per cent. per annum." That was really irreconcilable with the view that there was a right to a cumulative dividend. He therefore held that the Participating Preferred Ordinary shares (apart from the participating rights) only carried a non-cumulative dividend at 7½ per cent.

[Solicitors—Messrs. Rashleigh, Turner, Mann, and Rosher; Messrs. Linklaters and Paines.]

* Reported by H. C. GARSIA, Esq., Barrister-at-Law.

K.B. Div. (Wright, J.) } 1927. Oct. 25.

COMPAGNIE CONTINENTALE D'IMPORTATION v. HANDELSVERTRETUNG DER UNION DER S.S.R. IN DEUTSCHLAND.*

Contract—Sale of goods—Conditions—Notice of appropriation—Date of bill of lading to be stated—Notice to be given within seven days from such date—Provisional invoice—Whether a good notice of appropriation—Whether despatch within the seven days sufficient.

The respondents in Rotterdam contracted to buy from the appellants in Hamburg 6,000 tons of South Russian wheat, the conditions of the contract providing that notice of appropriation with ship's name and date of bill of lading should be given by the shippers to the buyers within seven days from date of bill of lading and that provisional invoice with ship's name and date of bill of lading should be sent by the shippers' London house to the buyers within three days from the arrival of the documents in London. The sellers shipped the wheat at Novorossisk, and within the seven days the sellers sent to the buyers a telegram and confirming letter, which the sellers alleged to be a notice of appropriation, but neither document stated the date of the bill of lading. On the same day the sellers posted to the buyers a provisional invoice which gave the date of the bill of lading, but the provisional invoice was not received by the buyers until after the expiry of the seven days. The buyers contended that there had been no tender in conformity with the contract, and it was found by the appeal committee in an arbitration that there had been no good notice of appropriation in the telegram and confirming letter and that the provisional invoice was not intended as a notice of appropriation and that it was a recognized custom that notice of appropriation and provisional invoice should be separate documents, and that therefore the buyers were under no liability to the sellers.

Held, on a case stated, that even if the provisional invoice constituted a notice of appropriation, yet, as it was not received by the buyers within the contract time, the sellers had not satisfied the contract, and that, as the custom was not unreasonable and was not inconsistent with the contract, the provisional invoice was not a notice of appropriation, and the award of the appeal committee must be upheld.

This award stated in the form of a special case by the Appeal Committee of the London Corn Trade Association raised a question of the construction of a condition printed on the back of a formal contract for the sale of grain.

Mr. Somervell appeared for the appellants, the sellers; Mr. Le Quesne, K.C., and Mr. Lilley for the respondents, the buyers.

On November 26, 1926, the sellers, the German representatives of the Russian Soviet Republics, carrying on business at Hamburg, entered into a contract with the buyers, a company carrying on business at Rotterdam, to sell to the buyers 6,000 tons of South Russian wheat. The contract was in the form of the London Corn Trade Association, Black Sea and Danubian Grain Contract, and was subject to a number of conditions printed on the back thereof. The sellers shipped the wheat on a steamer at Novorossisk, and the bills of lading were dated December 30, 1926. It was agreed that the period of seven days from the date of the bills of lading included January 6, 1927. On January 4, 1927, the sellers telegraphed, and confirmed the telegram by letter:—

"Contract twenty-sixth November tender 6099 .737 ke wheat no. K.O.5 S.S. Marigo L Novorossisk Gibraltar for order."

On January 6 the buyers wrote in reply that they could not accept that as a notice of appropriation because the date of the bill of lading was not stated. On the same day the sellers posted to the buyers a provisional invoice (which did give, *inter alia,* the date of the bill of lading), which the buyers received on January 7. On receipt of it the buyers returned it on the ground that no tender had been made in conformity with the contract.

The dispute was then referred to arbitration, and the arbitrators decided that the sellers had given a proper and sufficient notice of appropriation. The buyers appealed from that decision to the Appeal Committee of the London Corn Trade Association, and the Appeal Committee awarded, subject to the opinion of the Court on a special case, that the buyers had not received a proper and sufficient notice of appropriation within the meaning of Condition 1 of the contract, and were, therefore, under no liability to the sellers, and that the award of the arbitrators should be set aside.

Condition 1 on the back of the contract was as follows:—

"Notice of appropriation with ship's name, date of bill or bills of lading, and approximate quantity loaded shall be given by the shipper of the grain tendered under this contract direct or through his house or representative or agent in London to his buyer within seven days from date of bill of lading and by each other seller within the seven days, or in due course if received by him after that time; . . . Provisional invoice based on bill of lading weight with ship's name and date of bill or bills of lading shall be sent by shipper's house or representative in London to his buyer within three business days after arrival of documents in London . . ."

The Appeal Committee found as facts that the letter of the sellers confirming their telegram on January 4 was intended to be a notice of appropriation, but that it was not a good notice of appropriation, because it did not state the date of the bills of lading, and was properly rejected by the buyers. They also found that the provisional invoice of January 6 was not intended as a notice of appropriation, and that it was a well-recognized custom that notice of appropriation and provisional invoice were separate and distinct documents.

It was contended on behalf of the sellers (1) that the provisions as to appropriation were complied with if the ship's name, date of bills of lading, and approximate quantity loaded were given by the seller

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

within the time stipulated in Condition 1; (2) that the communication dated January 6, 1927, was a valid notice of appropriation, and a compliance with the provisions of the contract as to appropriation; (3) that there was no custom of the trade inconsistent with contentions (1) and (2), or, alternatively, that evidence of such custom would be inadmissible as inconsistent with the contract; (4) that notice of appropriation was given within Condition 1 if despatched by the sellers within seven days of the date of the bill of lading; and (5) that there was no custom of the trade inconsistent with contention (4), or, alternatively, that evidence as to such custom would be inadmissible as inconsistent with the contract.

It was contended on behalf of the buyers (1) that the notice of appropriation and the provisional invoice contemplated by the contract were to be separate documents, and the provisional invoice could not be treated as notice of appropriation; (2) that by a custom of the trade they were invariably treated under this and similar forms of contract as distinct and separate documents; (3) that the contract itself properly construed treated them as separate and distinct documents; (4) that the provisional invoice was neither intended nor understood by either party to be a notice of appropriation or to fulfil the functions of a notice of appropriation; (5) that the functions of the two documents were quite different; (6) that, even if the provisional invoice could be treated as a notice of appropriation, it did not satisfy the requirements of the contract as to time, because it was not "given" by the shipper to his buyers within seven days from the date of the bill of lading; (7) that "given" meant not merely "despatched," but "caused to be received"; (8) that by the custom of the trade notice of appropriation must reach the buyer within the said seven days, and this meaning of the word "given" was established by the said custom; and (9) that Condition 1 clearly did not mean that notice of appropriation should be deemed to have been given to the buyer before its coming to his knowledge, or, indeed, without its ever coming to his knowledge.

Mr. Somervell submitted that notice of appropriation simply meant that the required information should be communicated in some unambiguous manner; no formality was required, and it was enough if the information was given by the provisional invoice. The alleged custom, if it existed, was of no importance, for it was inconsistent with the terms of the contract. The word "given" was ambiguous, and was satisfied by the construction "sent" and did not mean "caused to be received."

Mr. Le Quesne contended that the contract itself clearly meant that the notice of appropriation and the provisional invoice should be separate documents. It gave them different names and subjected them to different provisions. The committee had found that the custom existed, and that was a finding of fact which should not be disturbed. To give notice meant to "bring information to the knowledge of," and did not merely mean to "despatch." The condition made a distinction: the notice was to be "given," the provisional invoice was only to be "sent."

Mr. Justice Wright, after stating the facts and reading the documents, said that two points had been taken: (1) that the provisional invoice was enough to constitute a notice of appropriation, and (2) that it had been given in time because it had been sent off within the stipulated time. Mr. Somervell contended that as soon as the seller had posted his notice within the seven days he had satisfied the contract, but he (his Lordship) could not accept that contention. In his view it was the essential feature of the contract that the buyer should have information of the grain tendered to him under the contract as soon as possible, and the proper construction was that the seller must actually see that the buyer received the information within the stipulated time. On the facts of this case, therefore, he thought that the information was not conveyed to the buyers within the contract time.

That was really enough to decide the case in favour of the buyers, but he must consider Mr. Somervell's other point also, that if the provisional invoice contained the necessary information it could be treated as giving the notice of appropriation. Against that, the Appeal Committee had found as a fact that there was a custom that the notice and the invoice should be separate documents, and he could not reject that finding unless he found that such a custom was unreasonable, and he did not think that it was. It was not inconsistent with the terms of the contract, and, even if the contract itself did not contemplate two separate documents, the custom could properly be incorporated with the contract. There were good business reasons why the notice of appropriation and the provisional invoice should be separate documents, and in his view the present contract contemplated that they should be so. Both on the construction of the contract, and on the custom, he thought that the award of the appeal committee was right and must be upheld.

[Solicitors—Messrs. Coward, Chance, and Co.; Messrs. Thomas Cooper and Co.]

Court of Appeal. (Scrutton, Atkin, and Greer, L.JJ.) 1927. Oct. 13.

NANCE v. NAYLOR.*

Landlord and Tenant—Rent in arrear—Forfeiture—Judgment for rent and possession—Subsequent agreement by tenant to yield up possession at end of quarter—Application by tenant for relief against forfeiture—Effect of agreement—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 46.

The rent of certain premises being in arrear, the landlord obtained judgment against the tenant for possession of the premises. Subsequently a document was signed by the tenant which provided that if the landlord would withhold the writ of possession, he, the tenant, would pay the rent and give up possession of the premises at the end of the quarter.

Held, that the document was not inconsistent with the tenant's right to obtain relief against forfeiture under s. 46 of the Supreme Court of Judicature (Consolidation) Act, 1925.

This was an appeal by the plaintiff from the decision of Mr. Justice Clauson, sitting as Vacation Judge.

The plaintiff, Walter Norris Nance, was the landlord of premises No. 69, Broad-street, Reading, which he leased to the defendant at an annual rent of £200. The rent due at Lady Day, 1927, not having been

* Reported by E. J. M. Chaplin, Esq., Barrister-at-Law.

paid, a writ was issued by the plaintiff claiming possession of the premises, one quarter's rent due Lady Day, 1927, and mesne profits, and judgment was recovered accordingly by the plaintiff on May 14, 1927. The defendant was subsequently notified that execution would be levied unless the terms of the judgment were complied with. The defendant, who asked for further time, on June 28 signed a document in the following terms :—

"In consideration of the plaintiff withholding the above writ of possession, I hereby undertake to pay out the amount of debt and costs under the *fi-fa* not later than Friday next, July 1, to give vacant possession of the premises No. 69, Broad-street, Reading, on or before September 29 next, and also to give independent security for the mesne profits from June 25, 1927.

"I further undertake to carry out the repairs which I am liable for, and of which I have received notice, under the terms of the lease."

Upon that document being signed the defendant continued to remain in possession.

On July 27 the defendant took out a summons in the Reading District Registry for relief against forfeiture. The summons was dismissed by the District Registrar on August 2, but his decision was reversed by Mr. Justice Clauson on August 9 upon the ground that the document signed by the defendant was no bar to his right to relief against forfeiture under section 46 of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides : "In the case of any action for a forfeiture brought for non-payment of rent, the High Court or a Judge thereof shall have power to give relief in a summary manner and subject to the same terms and conditions in all respects as to payment of rent, costs, and otherwise as could formerly have been imposed in the Court of Chancery."

The plaintiff appealed.

Mr. J. B. Matthews, K.C., and Mr. A. F. Engelbach appeared for the appellant ; and Mr. C. J. Radcliffe for the respondent.

Lord Justice Scrutton, in giving judgment, after stating the facts, said that this was a case in which the tenant did not pay with regularity. Therefore an action was brought by the landlord for ejectment for non-payment of the rent and other relief, and judgment was signed in May.

The tenant did not pay, so the landlord proceeded to execute the judgment by *fi-fa*, whereupon the agreement above set out was entered into. His Lordship read the agreement and said that before September 29 the tenant applied for relief against forfeiture. The question ultimately came for decision before Mr. Justice Clauson, who granted the relief asked for. The question, therefore, was whether in face of the agreement that decision was right. There could be no doubt that the right of granting relief against forfeiture had always been jealously guarded by the Courts and that relief might be granted in a case where a tenant had been turned out. The question here was whether the agreement on the part of the tenant to give up possession before September 29 was so inconsistent with the grant of relief against forfeiture that it must be taken that the right to relief had ceased to exist.

Speaking for himself, he had some doubt on the matter, because it seemed to him to be possible to say that the agreement to go out on September 29 was not consistent with a right to stay on after that date. But, as he had already said, the right to grant relief had always been jealously preserved in favour of tenants, and after some hesitation he had come to the conclusion that he was not in a position to say that Mr. Justice Clauson was wrong in holding that he had power to grant relief.

Lord Justice Atkin said that he agreed. The right to relief against forfeiture was recognized by section 210 of the Common Law Procedure Act, 1852, which began by giving the landlord the power to recover the demised premises when a half-year's rent was in arrear and there was a right of re-entry. The section then proceeded to say that if the lessee permitted judgment to be recovered "and execution to be executed thereon, without paying the rent and arrears, together with full costs and without proceeding for relief in equity within six months after such execution executed, then and in such case the said lessee . . . shall be barred and foreclosed from all relief or remedy in law or equity." Section 211 provided that if the lessee proceeded in equity he was not to have an injunction or relief without payment of rent and costs. The provisions of section 1 of the Common Law Procedure Act, 1860, had now been substantially embodied in section 46 of the Supreme Court of Judicature (Consolidation) Act, 1925, which provided as follows : "In the case of any action for a forfeiture brought for non-payment of rent, the High Court or a Judge thereof shall have power to give relief in a summary manner, and subject to the same terms and conditions in all respects as to payment of rent, costs, and otherwise as could formerly have been imposed in the Court of Chancery. . . ." It was quite plain that the equitable right was a right to proceed for relief in Chancery even although the judgment had been fully executed and possession had been taken under the judgment. In the present case the landlord had obtained judgment for possession, and the writ was duly put in the hands of the sheriff's officer, but then an arrangement was made by virtue of which time was given to the respondent on the terms set out in the document of June 28. He could well understand that an agreement might be made on the terms that if time were given the tenant would surrender his right to relief against forfeiture, or an agreement might be made on such terms that a term by the tenant to surrender his right to obtain relief must necessarily be implied. It was a question of inference in each case. In this case he (the Lord Justice) could find no evidence that the tenant knew anything about his right to relief against forfeiture. That was not conclusive, but it did not seem to him that an agreement to allow further time was inconsistent with a right to relief still existing.

For these reasons he was not satisfied that the learned Judge was wrong in the decision to which he had come.

Lord Justice Greer said that he agreed that the appeal turned on the proper interpretation of the document of June 28, 1927. The landlord was entitled to have the *fi-fa* executed and possession of the premises given up to him, but that did not prevent the tenant from applying for relief under the section. The agreement to give vacant possession upon the date specified did not deprive the tenant of his right to apply for relief against forfeiture. In order to deprive him of that right plainer words would have to be used than those contained in the agreement. In his judgment, therefore, the appeal failed.

[Solicitors—Messrs. Paice and Cross, for Messrs. Nance and Son, Reading ; Messrs. Dodd, Blaker and Handley, Reading.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) } 1927. Oct. 18.

FLETCHER v. FLETCHER.*

Husband and Wife — Maintenance — Order— Refusal by justices—Wife's appeal—Application against husband for security for wife's costs — Summary Jurisdiction (Married Women) Act, 1895 (58 and 59 Vict., c. 39)— Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 and 16 Geo. V., c. 51).

A wife who has failed in her application before justices for a maintenance order on the ground of her husband's desertion is not entitled to an order against her husband for the security of the costs of her appeal against the justices' decision.

This was a summons adjourned into Court by the Registrar. The wife applied to the Bury (Lancashire) Justices on July 28, 1927, for an order for maintenance on the ground of her husband's desertion. The application was dismissed after evidence had been given by and on behalf of both parties. The wife gave notice of appeal and issued a summons asking for security for the costs of her appeal. The Registrar on September 7, 1927, decided that he had no power to make such an order without the husband's consent.

Mr. F. S. Laskey appeared for the wife ; Mr. Noel Middleton for the husband.

Mr. Laskey said that there was no precedent for the relief asked for here, but on the other hand there was no reported case where a wife in these circumstances had been refused security for the costs of her appeal. He invoked the usual practice of the Divorce Court in regard to a husband's liability for his wife's costs and referred to *Sirrell v. Sirrell* (27 *The Times* L.R., 155 ; [1911] P., 38).

Mr. Noel Middleton said that Order LIX., Rule 4A, and Rule 17, of the Rules of the Supreme Court governed the question of security for costs in appeals of this class to a Divisional Court. Rule 17 applied Order LVIII., Rule 15, which concluded with the words :—

"Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal."

In this context "special circumstances" meant residence abroad or insolvency of an appellant. He submitted that a wife should not, any more than an insolvent person, be allowed to drag her husband from one Court to another at his expense. He cited passages from the judgments of Lord Justice Bowen in *Cowell v. Taylor* (31 Ch.D., 34, at p. 38) and of Mr. Justice A. L. Smith in *Swain v. Follows* (18 Q.B.D., 585) in support of this contention. He referred to *Shufflebotham v. Shufflebotham* (39 *The Times* L.R., 206), in which the Court of Appeal refused to order a husband's appeal against the grant of a decree *nisi* to his wife to be stayed until her costs of trial had been paid by him and he had given her security for her costs of the appeal. The rule as to the wife's costs was based on the duty of the husband to provide necessaries for his wife, but an appeal was not a "necessary." The foundation of the old rule in the Ecclesiastical Courts was that the wife should be able to secure a hearing.

Lord Merrivale.—This question has been quite properly raised and well and precisely argued. The wife, who is now an appellant, took proceedings before the justices on the ground of desertion to obtain provision for her maintenance, and she was unsuccessful, and she now moves under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, that the husband may be ordered to give security for her costs of appeal. In the ordinary jurisdiction of this Division as between husband and wife there is an inveterate practice of ancient origin whereby the common law presumption is acted upon that a wife has *prima facie* no means of prosecuting her suit. Out of that common law presumption there arose a practice whereby in this Court, if the wife is a suitor and if there is no ground by reason of the means of the parties for refusing the order, she obtains an order, as of course, that proper provision be made for the conduct of her part of the litigation.

The real question in the case is whether the principle must be held to apply to an appeal to this Division, under the Summary Jurisdiction (Separation and Maintenance) Acts, by a wife who has been unsuccessful in the Court below. There is no precedent which provides that, as a matter of course or as a matter of discretion, an order for security for her costs should be made against the husband in such a case. Until the decision of the Court in *Sirrell v. Sirrell* (27 *The Times* L.R., 155 ; [1911] P., 38) there was, so far as I am aware, no decided case in which the general practice of the Court as to security for costs where the wife was a suitor was held to apply in cases under the Summary Jurisdiction Acts. But in that case it was held that, where a wife had been successful and the husband appealed, the practice of the Division was to direct him to give security for the proper costs. That decision has been embodied in the practice of the Court and has been followed ever since. It is, indeed, the every-day practice, where a wife under the Summary Jurisdiction (Separation and Maintenance) Acts has succeeded, that the husband shall not be allowed to proceed with his appeal without giving security for her costs. But different principles obviously apply where the wife has been the applicant below and has been unsuccessful. In the first place she is not a suitor in this Court within the ordinary definition of a suitor in the divorce jurisdiction. She is a complainant against the failure of justice before the bench of justices. There is in the statutes nothing which encourages the application. So far as the statutes and the Rules of the Supreme Court applicable in common law practice throw any light upon the matter, as Mr. Middleton pointed out, on the whole they are rather opposed to such an application because obviously the application would not succeed in an ordinary appeal to the King's Bench Division under the common law practice, and the practice of the Court of Appeal in respect of appeals from the King's Bench Division certainly would not give the wife any such security as she seeks here. I do not say that that was made clear in the case of *Shufflebotham v. Shufflebotham* (39 *The Times* L.R., 206). But it is a matter of common knowledge that where the wife is a litigant in this Court and has appealed in such litigation, although her costs have been provided for her under the general jurisdiction of the Court, if the case goes to the Court of Appeal the procedure of the Court of Appeal operates. The matter has then ceased to be a proceeding in this jurisdiction, and therefore the old rules of common law jurisdiction apply. There is no statutory authority for the order which is sought here. There is no precedent in any decided case and there is in the established practice

* Reported by William Latey, Esq., Barrister-at-Law.

nothing which renders it necessary or proper that the order which is sought in this case should be made. I must hold that this application is outside the settled practice of the Court under the decision in *Sirrell v. Sirrell* (*supra*) and is not warranted either by statute or by any decided case, and therefore must fail.

I may point out that there are great facilities now in the Poor Persons Rules for poor persons who come into litigation. Moreover, if the wife has good grounds for appeal it may be that the appeal will be necessary and that the husband is under the common law liable to solicitors who take up the wife's case. That has nothing to do with the jurisdiction or the practice with regard to the wife's costs in this Court.

His Lordship dismissed the application, with costs.

[Solicitors—Messrs. Thompson, Quarrell, and Attneave, for Messrs. Pickstone and King, Radcliffe ; Messrs. Gregory, Rowcliffe, and Co., for Messrs. Hall and Smith, Bury.]

K.B. Div. (Salter and Talbot, JJ.) } 1927. Nov. 2.

DRUMMOND v. HERVEY.*

County Court — Appeal — Dismissal — Costs—Appeal under Poor Persons Rules—Discretion to award costs against appellant.

The Court may award costs against an appellant who appeals under the Poor Persons Rules, if the appeal is entirely frivolous and vexatious and is an abuse of the process of the Court.

On November 1 the Divisional Court dismissed this appeal from the Brentford County Court. The facts were of no public interest. The Court reserved judgment on the question whether there was jurisdiction to order the appellant, who appealed as a poor person, to pay the respondent's costs on the ground that the appeal was frivolous.

Mr. H. Harcourt appeared for the appellant ; Mr. H. H. Edmunds for the respondent.

MR. JUSTICE SALTER, in giving judgment, said that the case raised a question of some importance with regard to costs in appeals under the Poor Persons Rules. In the present case the appellant, having lost his case in the county court, went to the Poor Persons Committee, who, after the customary inquiries, granted his application for assistance in his appeal. It was to be observed that on such applications to the committee the proposed respondent had no *locus standi*. It might be that if he could have been heard he would have convinced the committee that the appeal was frivolous or hopeless and ought not to be allowed.

When the present appeal came before the Court it turned out to be, he would not say frivolous, but so wholly unfounded as to approach the frivolous. There was no evidence of misconduct on the part of the appellant in the sense that he misled the committee ; his only fault was that he had that undue optimism which sometimes existed in litigants. In those circumstances, the only question was whether the Court could, or ought to, award costs against the poor person, or whether the certificate of the committee was conclusive.

On the question whether the discretion of the Court extended so far as to order costs against a poor person appellant, he was of opinion that it did so extend, and that the Court could award costs if the appeal was entirely frivolous, vexatious, and an abuse of the process of the Court. But he thought that it ought not to make an order in the present case as there had been no misconduct by the appellant. The appeal would be dismissed, without costs.

MR. JUSTICE TALBOT concurred.

[Solicitors—Messrs. Liddle and Liddle ; Mr. Wilfrid Firth.]

* Reported by J. W. HALL, Esq., Barrister-at-Law.

Court of Appeal. (Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.) } 1927. Oct. 21.

IN RE NATIONAL BENEFIT ASSURANCE COMPANY, LIMITED.*

Companies — Winding-up — Proof—Contract of marine insurance—No stamped policies—Rejection of proof.

The Court held that the liquidator had rightly rejected a proof by the English Insurance Company, Limited, in the winding-up of the National Benefit Assurance Company, Limited, in that the contract between the two companies in respect of which the proof of debt was advanced was a contract of marine insurance and no stamped policy of marine insurance was issued to the English Insurance Company, Limited, as required by law, and therefore the contract was invalid.

Decision of Eve, J. (43 *The Times* L.R., 594), affirmed.

This was an appeal from a decision of Mr. Justice Eve (43 *The Times* L.R., 594), which raised the question whether a contract entered into between the English Insurance Company, Limited (hereinafter called the English Company), and the National Benefit Assurance Company, Limited (hereinafter called the National Company), was or was not a contract of marine insurance. The National Company was in liquidation, and the liquidator rejected a proof of debt by the English Company arising out of the contract on the ground that its subject-matter was marine insurance ; and that, as no properly stamped policies of marine insurance had been issued to the English Company, it was invalid under the provisions of section 93 of the Stamp Act, 1891, and sections 22 and 23 of the Marine Insurance Act, 1906.

The English Company issued a summons to determine whether the rejection of their proof was justified, and in his judgment Mr. Justice Eve found the facts as follows :—

"The contract is embodied in a document dated January 27, 1922, with a schedule and addendum attached, but not affecting its construction. It is described as a participation agreement and it provides in article 1 that the National Company shall be entitled to, and shall accept, a quota participation equal to one-eighth share of all and every risk, excluding obligatory reinsurance agreements with other companies, arranged by the head office of the English Company upon any marine insurance or upon any war risks, whether alone or in conjunction with marine risks, accepted by the English Company

* Reported by G. T. WHITFIELD-HAYES and H. LANGFORD LEWIS, Esqrs., Barristers-at-Law.

(including their agencies and branches at home and abroad) through their marine department.

"The expression 'marine insurance' as used in the agreement means all forms of insurance, including war risk and reinsurance, transacted by the marine department of the English Company.

"By article 2 the participation was fixed at 50 per cent. of the share retained by the English Company at their own risk of all marine insurances accepted on and after a date therein mentioned. The maximum limit of the National Company by any one ship was fixed at £1,875, and any special reinsurances effected by the English Company of risks within the scope of the agreement were to be for common account of the two parties. Under article 3 the liability of the two parties was to begin automatically, at the same time any cover given by the English Company becoming immediately binding on the National Company, the expressed intention being that the two companies should participate *pari passu* in all the marine insurances accepted by the English Company through its marine department.

"Articles 4 to 7, inclusive, free the English Company from any obligation to furnish any particulars in regard to risks accepted and limit the right of the National Company to the receipt of monthly statements of premiums and losses only. It is to be entitled to a proportionate part of the net premiums, salvages, and other benefits received by the English Company and is to bear its proportionate share of all losses, including any loss due to failure on the part of the original assured to pay the premium. The whole control of the business, including the settlement of all claims and the institution or defence of legal or other proceedings, is committed to the English Company, which is to receive as consideration for the agreement and as remuneration for obtaining, managing, and supervising the business a commission of 2½ per cent. on the net premiums paid or allowed to the National Company in respect of its participation, and a commission of 10 per cent. on the profits derived by the National Company from the whole of the business under the agreement.

"Article 10 begins with these words :—'This being an agreement executed in a spirit of trust, one with the other, the participator' (that is the National Company) 'is absolutely bound in every case to follow the fortunes of the (English) Company.' And in the arbitration clause it is agreed that all disputes shall be settled by an equitable and liberal interpretation of the provisions of the agreement according to the spirit thereof, and that the arbitrators are relieved from all judicial formalities and may abstain from following the strict rule of the law."

Upon these facts his Lordship thought that there could be no doubt as to the true character of the document. It was intended to cover marine risks ; it was, therefore, a policy of marine insurance ; and, no stamped policies having been issued, it was void.

The English Company appealed.

Mr. Porter, K.C., Mr. Andrewes-Uthwatt, and the Hon. Michael Morris appeared for the appellants ; Mr. Dunlop, K.C., and Mr. L. W. Byrne for the liquidator.

The Master of the Rolls, in giving judgment, said that the appeal was from a decision of Mr. Justice Eve, who had confirmed an objection to a proof in the liquidation of the National Company. His Lordship then stated certain of the terms of the agreement of January 27, 1922, and continued : The English Company never furnished any particulars as to the risks, and did not ask for an insurance policy to cover them. The only question was whether the English Company was disentitled to prove in the liquidation of the National Company by reason of the fact that no stamped policies were issued. A policy of sea insurance included a policy of reinsurance of sea risks. There were in this case no such policies of sea insurance issued as could satisfy sections 92 and 93 of the Stamp Act, 1891. His Lordship then referred to the facts as to how business was conducted between the companies, and said that there was merely a statement made of the premiums payable and the losses incurred.

The claim of the English Company was to be indemnified against losses under policies issued by the company in respect of marine risks and paid by them directly. The appellants were really driven to say that the National Company could have been sued on the policies directly, but the claim negatived that contention. By section 23 of the Marine Insurance Act, 1906, "a marine policy must specify (1) the name of the assured, or of some person who effects the insurance on his behalf ; (2) the subject-matter insured and the risk insured against ; (3) the voyage or period of time or both, as the case may be, covered by the insurance ; (4) the sum or sums insured ; and (5) the name or names of the insurers." There was no policy on which the name of the National Company appeared as insurers. There were no losses for which the English Company sought indemnity against the National Company which that company were liable to make good to the English Company. The agreement was described as a "participation agreement," and by article 1 the National Company agreed to accept and share a quota participation of the risks insured by the English Company. Bearing in mind the sections which he had referred to, and considering the nature of the agreement, he thought Mr. Justice Eve was right in coming to the conclusion to which he came. The only way in which the agreement could be effective between the parties was by way of reinsurance. There was no direct liability to the assured. The observations of Mr. Justice Mathew in *Home Marine Insurance Company, Limited v. Smith* (14 *The Times* L.R., 366 ; [1898] 1 Q.B., 829), a decision affirmed in the Court of Appeal (14 *The Times* L.R., 459 ; [1898] 2 Q.B., 351), applied to this case. The agreement was a contract of marine insurance, and the proof tendered must be rejected. The appeal would be dismissed, with costs.

Lord Justice Sargant delivered judgment to the same effect, and Lord Justice Lawrence concurred.

[Solicitors—Messrs. Parker, Garrett, and Co. ; Messrs. William A. Crump and Son.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)

1927.
Oct. 27.

PICKFORD v. QUIRKE.

PICKFORD v. INLAND REVENUE COMMISSIONERS.*

Revenue — Income-tax — Carrying on trade—Successive adventures—Additional assessment —When made—Time limit—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 125 (2), Schedule D.

During the "boom" in the Lancashire cotton trade in 1919, the appellant, in company with

* Reported by H. Langford Lewis, Esq., Barrister-at-Law.

other persons, engaged in the operation known locally as "turning over" a cotton mill—*i.e.*, acquiring a controlling interest in the mill, organizing its administration and finances, and reselling it to a new company. The operation was successful and the appellant was asked to join and did join other syndicates, composed partly, but not entirely, of the same persons engaged in "turning over" three other mills. In each case a profit resulted to the appellant. On March 24, 1923, the Additional Commissioners for the Division in which the appellant resided signed the book containing an estimated assessment upon the appellant to income-tax under Schedule D for the year 1919-20. The book was not delivered to the General Commissioners until April 18, 1923; notice was given to the appellant on May 5, 1923, and the assessment was signed by the General Commissioners on September 5, 1923.

Held, that though each adventure of "turning over" a mill, taken singly, was not a trade, but a capital transaction, yet the succession of such adventures, in each of which the appellant took part, might constitute the carrying on of a trade, and the Special Commissioners on an appeal against the assessment were not estopped by their previous decisions from reconsidering the whole of the facts, and finding that the appellant in so doing was carrying on a trade on the profits of which he was liable to income-tax and excess profits duty on the profits.

Held also, that the assessment was made in time, having been made when it was signed by the Additional Commissioners within the three years allowed by s. 125 (2) of the Income Tax Act, 1918. The subsequent steps need not be within that time.

These were appeals from the decision of Mr. Justice Rowlatt (43 *The Times* L.R., 659) on cases stated by the Special Commissioners under the Income Tax Acts on appeals against assessments made on the appellant to income-tax and excess profits duty respectively.

The appellant, Mr. G. Pickford, appealed against an assessment to income-tax under Schedule D in the sum of £15,000 for the year ending April 5, 1920, made on him in respect of promotion profits by the Additional Commissioners for the Middleton Division of Lancashire. On March 24, 1923, the Additional Commissioners for the Division in which the appellant resided signed the book containing an estimated assessment upon the appellant to income-tax under Schedule D for the year 1919-20. The book was not delivered to the General Commissioners until April 18, 1923; notice was given to the appellant on May 5, 1923, and the assessment was signed by the General Commissioners on September 5, 1923.

The case arose out of the profits made in the process locally described as "turning over" cotton mills during the boom in the Lancashire cotton spinning trade in 1919. Many spinning mills were being sold by their old proprietors, and when this was done it often happened that the old mill manager was dismissed by the new board of directors, and a new man engaged who was personally known to the group who had obtained control of the business. As a consequence the position of mill managers in 1919 tended to become insecure and their future prospects uncertain.

In 1919 John William Wroe was manager of the Commercial Mills Spinning Company, Limited, Oldham. Knowing that many mills in the neighbourhood were changing hands, and that another local spinning company wished to purchase the Commercial Mills, he approached Mr. C. H. Pickford, the chairman of directors of the old company, and put the position before him. Mr. Pickford, who was about 70 years of age, was willing to sell his shares and retire from the business, and proposed that Mr. Wroe should join forces with his son, Mr. George Pickford, the appellant, and buy out the shareholders. These two, together with three others, Messrs. J. S. Higham, T. Norcliffe, and Frank Partington, having command of sufficient funds, bought up all the shares in the old company for £118,770, including a sum of £6,600 paid to the directors for loss of office. They then determined to liquidate the old company and form a new company called Commercial Mills Spinning Company (1919), Limited, to purchase the assets and business of the old company for the sum of £150,000, in 150,000 £1 shares, of which 10s. per share was paid up upon allotment. It was agreed that the appellant George Pickford and J. S. Higham should retain for themselves and divide all profit made on the sale by the old company to the new company, and might allot the shares in the new company to any persons and retain any profit made by selling the shares at a premium. The old company went into voluntary liquidation. The new company was duly incorporated on November 13, 1919, the five associated persons being directors of the new company. They received £150,000 from the liquidator of the old company as shareholders therein, and they then allotted to themselves 150,000 shares of £1 each (10s. paid up) in the new company. They retained 2,000 shares each as directors' qualification shares and sold the remainder at the price of 12s. 6d. per share.

Transactions of this character were very common in Lancashire at the time, and the appellant, at the request of the managers, shortly afterwards assisted in carrying out a "turning over" of three other cotton mills, the Glodwick Mill, the Lime Mill, and the Olive Mill. He was approached to assist in many other reconstructions and promotions, but declined to be associated with them. At the time of the hearing of the appeal to the Special Commissioners the appellant was still a director of the four new companies formed in connexion with these transactions, being a shareholder therein and having money on loan with each of them.

It was contended for the appellant: (*a*) That the signing of the assessment by the Additional Commissioners did not constitute the making of the assessment, and that the assessment appealed against was therefore invalid as not having been made within three years after the expiration of the year of assessment; (*b*) that the appellant was not in those transactions carrying on a trade the profits of which were assessable under Case I. of Schedule D of the Income Tax Act, 1918; (*c*) that the profits arising from those transactions were not assessable under Case VI. of Schedule D; and (*d*) that the assessment should be discharged.

For the Crown it was contended: (1) (*a*) that it was not competent for the appellant to raise or for the Special Commissioners to decide in proceedings by way of appeal against an assessment, the question whether in making that assessment the procedure of

the Income Tax Act, 1918, had been strictly followed, and therefore no evidence as to the dates when the assessment in question was signed should be received by the Special Commissioners; (*b*) that the assessment was "made" when it was signed by the Additional Commissioners, and therefore that it was made within the time limited by law; (2) that the profits arising to the appellant from the four transactions in question were assessable as profits of a trade or adventure in the nature of trade under Case I. of Schedule D, or alternatively, were assessable under Case VI. of Schedule D.

The Special Commissioners came to the conclusion that although each transaction considered separately might not have constituted a trade under Case I., yet taken together they showed that the appellant had entered habitually into profitable contracts of the kind and had in fact made a business of "turning over" cotton mill companies. In two other similar appeals the appellants had "turned over" in one case eleven and in the other no fewer than sixteen cotton mills, and the Special Commissioners had held that the appellants had made a business of "turning over" mills. They could not distinguish the case of the present appellant, though he had carried out these transactions on a smaller scale than others, and had not made as much profit from them as he might have done.

Mr. Justice Rowlatt affirmed their decision and decided the contention of the appellant that the assessment was out of time, having been signed more than three years after the expiration of the year in which the first assessments were signed, in favour of the Crown.

The appellant appealed.

Mr. Latter, K.C., and Mr. Edwardes Jones, K.C., appeared for the appellant; the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. Reginald P. Hills for the Crown.

The Court, without calling upon counsel for the Crown, dismissed the appeal.

The Master of the Rolls, in giving judgment, said that the appeal arose on the separate claim against Mr. Pickford in respect of the four cases tabulated. It appeared to him (his Lordship) that the Special Commissioners had rightly appreciated the problem before them. There might be an isolated transaction which did not give any indication that a trade was being carried on. When, however, one came to look at four successive transactions of the same kind, one might properly draw quite a different inference from those incidents taken together. The Special Commissioners found that the question as they had stated it was a question of degree. He (his Lordship) thought they were right. If it was a question of degree, it was a question of fact. The case on this point was one of fact, and the matter was determined by their conclusion on the facts. But a further point was taken, and it was said that the Special Commissioners knew all the facts before, and in coming to a previous conclusion they had prejudged the facts in the appellant's favour. They had held that each of the cases was a single capital transaction, and one which did not connote trading at all. Thus it was said that the Special Commissioners were estopped from treating those as trading transactions. It appeared to him (his Lordship) that the argument which had been based on estoppel was unfounded. The case which had been cited to the Court as establishing the doctrine of estoppel—*Hoystead v. Commissioner of Taxation* (42 *The Times* L.R., 207; [1926] A.C., 155)—did not in its terms cover the present case.

Lord Shaw, in delivering the judgment of the Privy Council in that case, said at p. 170, quoting the judgment of Vice-Chancellor Wigram in *Henderson v. Henderson* (3 Hare, 100, at p. 114): "The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

But here the Special Commissioners were quite right in resetting all the facts before themselves and considering whether on those facts the appellant was not carrying on a trade. The appeal, therefore, on this point should be dismissed, and the judgment affirmed. That covered both cases of income-tax and excess profits duty. But it did not touch the income-tax point as to the time-limit being exceeded when the assessment was "made" under section 125 (2) of the Income Tax Act, 1918.

He (his Lordship) agreed with the reasoning of Mr. Justice Rowlatt on this point, and it was only out of deference to the argument that he would add a few words. Decisions on the Stamp Act, 1891, or on rating Acts, which had been cited were of no value or assistance at all. When one came to look at subsection (2) of section 125 of the Income Tax Act, 1918, it provided that "an assessment may be amended or an additional first assessment may be made at any time not later than three years after the expiration of the year of assessment." By the Taxes Management Act, 1880, section 52 (2), the additional assessment which might be made by the Additional Commissioners was of an amount which ought in their judgment to be charged on the taxpayer, subject to objection by the surveyor and to appeal. The words which the Court had to construe were an "assessment made" not a "charge" which rested on the taxpayer. It was plain that much work had to be done at an early stage, and an assessment could be made in respect of which an appeal could be entered and it might be reversed. There was intended to be given to the original assessment a certain importance, as it ultimately crystallized into a charge on the taxpayer. Here the assessment was made on March 24, 1923, and therefore it was within the time-limit. The appeals, therefore, failed on all points.

Lord Justice Sargant and Lord Justice Lawrence delivered judgment to the same effect.

[Solicitors—Messrs. Field, Roscoe and Co., for Messrs. Wrigley, Claydon and Fripp, Oldham; the Solicitor of Inland Revenue.]

Court of Appeal.
(Lord Hanworth, M.R., [Sargant and Lawrence, L.JJ.)
1927. Oct. 27.

TREDEGAR v. HARWOOD.*

Landlord and Tenant—Covenant by lessee—Insurance against fire—Named office—Alternative—Other responsible office to be approved by lessor—Extent of lessor's discretion.

A covenant by a lessee to insure the demised premises in the joint names of the lessee and the lessor, "in the Law Fire Office or in some other

* Reported by G. T. Whitfield-Hayes and H. Langford Lewis, Esqrs., Barristers-at-Law.

responsible insurance office to be approved by the lessor," confers upon the lessee an alternative to be exercised at his volition ; and the lessor, upon an office being submitted to him, provided that it is a responsible one, must come to a reasonable decision from the point of view of the question whether the office is suitable for meeting loss by fire, and he must not be influenced by external and extraneous considerations such as convenience of estate management.

This was an appeal from a decision of Mr. Justice Tomlin.

The plaintiff, Lord Tredegar, was the ground landlord of large property in the neighbourhood of Newport, Mon., and Cardiff, upon which some thousands of houses had been erected. The defendant, Mrs. Annie Harwood, was the assignee of a building lease under which a house had been built. The lease was for 99 years and contained the usual covenant by the lessee to insure the house, the covenant being in the following words :—". . . insure and ever afterwards during the said term keep insured the said messuage . . . in the joint names of the lessee and the lessor in the Law Fire Office or in some other responsible insurance office to be approved by the lessor. . . ."

The defendant, when the lease was assigned to her, did not continue the then existing policy in the Law Fire Office, but insured in the Atlas Company. The plaintiff refused to accept that insurance, or to "approve" the Atlas Company, and he brought the action against the defendant in the form of an action for forfeiture of the lease by reason of breach of covenant. At the hearing of the action, however, and during the present appeal counsel stated that the plaintiff did not desire to obtain a forfeiture of the lease, but desired to know whether he could require a lessee or an assignee to insure in the Law Fire, or in some other office of his (the plaintiff's) selection, or whether he was bound to approve an insurance effected with a company chosen by a lessee. In his statement of claim and subsequent particulars he stated that the reason for requiring insurance in the Law Fire was to facilitate estate management.

Mr. Justice Tomlin decided in favour of the plaintiff.

The defendant appealed.

Mr. Archer, K.C., and Mr. Foa appeared for the appellant ; Mr. Gavin Simonds, K.C., and Mr. Romer for the respondent.

It was submitted on behalf of the appellant that the form of the covenant obviously gave an alternative choice to the lessee, who was to effect the insurance. The lessor was to "approve," but he was not to "select." There was no mention of "estate management" in the covenant, and no indication that it governed the spirit of the arrangement between the parties.

The Master of the Rolls, in his considered judgment, after stating the facts, said that the plaintiff did not question the Atlas policy as to amount, terms, or conditions ; nor did he dispute that the Atlas was a "responsible" insurance office within the meaning of the covenant. His case was that the covenant was directory, and that the so-called "alternative" part of it only came into play if, and when, for some reason, the Law Fire Office were not available ; and further, that in any case the lessor could refuse his consent at his absolute discretion. The defendant alleged that the covenant offered a true alternative, which ought not to be refused upon a ground extraneous to the purpose of the insurance.

The form of the covenant had appeared for years in many text-books. The purpose of taking the policy in the joint names of both lessor and lessee was to make the money available for both parties, who had each an interest in the matter. The form of the covenant appeared on the face of it to give an option to the lessee. Although direct authority was lacking, Lord Justice Warrington, as he then was, in *Upjohn v. Hitchens* (34 *The Times* L.R., 412 ; [1918] 2 K.B., 48), read such a covenant as conferring a choice upon the lessee subject to approval by the lessor.

The meaning put upon the words by the plaintiff really required the addition of some such words as "failing which" to indicate that the alternative was really a subservient clause, only coming into play upon the failure of the Law Fire Office to accept the risk. He could see no reason for adopting a device to avoid the plain meaning of words expressing an alternative. The words "to be approved" also seemed to indicate that the submission of another office was to be originated by the lessee, with the right and duty of the lessor to give his decision as to approval or disapproval.

Cases had been cited in which the right to an arbitrary or capricious negation of approval was not accepted—*Braunstein v. Accidental Death Insurance Company* (1 B. and S., 782) ; *Scott v. Barclays Bank, Limited* (39 *The Times* L.R., 198 ; [1923] 2 K.B., 1), and *Houlder Brothers and Co. v. Gibbs* (41 *The Times* L.R., 487 ; [1925] Ch., 575). He was unable to see why the covenant should not be construed according to its terms and be given a reasonable meaning. It appeared to confer an alternative upon the lessee to be exercised at his volition. And the lessor, upon an office being submitted to him, provided that it fulfilled the condition of being a responsible one, must come to a reasonable decision. He must not come to a capricious decision, nor one that could be used by him to secure a personal end, even if that end were both purposeful and useful from his point of view.

The decision must be in accordance with such considerations as were appropriate and would guide a reasonable man in coming to a decision whether a particular insurance office was or was not suitable for the purpose of meeting loss by fire. There was no reason to say that an absolute discretion was given to the lessor, if that term were intended to allow him complete freedom in introducing external and extraneous considerations. The appeal must be allowed, with costs.

Lord Justice Sargant said that the first question was what was the true construction of the covenant in question. The respondent had contended that it did not give the lessee an alternative, but that the lessee was bound to insure in the Law Fire Office, and that it was only if such an insurance was impossible that he could insure in another office. In his (his Lordship's) judgment that view was unsound as involving the insertion, after the word "or" of some such words as "failing that office," and further as not giving due effect to the word "approved."

The words of the covenant in their ordinary meaning imposed on the lessee an alternative obligation only, and he could fulfil it by insuring either in the Law Fire Office or in some other responsible office approved by the lessor. If the lessee elected for the second alternative it was for him to submit the name or names of one or more other responsible office or

offices, and it was for the lessor to consider whether he did or did not approve the office or one of the offices submitted. The use of the word "approved" indicated that the original selection or choice of an office was in the lessee, and that the right of the lessor was limited to considering and approving or declining to approve the office so selected or chosen.

It was worth while to note that the form of covenant given alike in the 3rd and 12th editions of Key and Elphinstone's Precedents, published in 1890 and 1926 respectively, provided for insurance in an office "approved" by the lessor, and contained as a variant the word "prescribed," thus making a distinction between the more stringent form where the lessor definitely prescribed the alternative office, and the less stringent form found in the present case where his function was limited to approving the office. His Lordship's own experience had been that the less stringent form was the ordinary one, and it was the form found in Woodfall on Landlord and Tenant (21st ed., at p. 204), though Mr. Foa in his work on the same subject used the word "direct" as being that in ordinary use (6th ed., at p. 274). But it was at least clear that the wording of such a covenant had been carefully considered by those dealing with the matter, and that there was a clear differentiation between the forms in common use.

In his (his Lordship's) opinion, there were limits to the exercise of the lessor's right or discretion in approving of an office selected by the lessee, similar to those which, in the recent case of *Houlder Brothers and Co. v. Gibbs* (41 *The Times* L.R., 487; [1925] Ch., 575), the Court held applicable to a lessor's right or discretion in the matter of consenting to an assignment to a proposed assignee. Here, as there, the lessor could not act arbitrarily or capriciously, but must have regard to the purpose of the covenant, and could not take into account extraneous or collateral considerations unconnected with the relationship of landlord and tenant. Here the subject-matter of the demise was a single building only, and the purpose of the covenant obviously was to give adequate security for the reinstatement of the building in the case of damage by fire. It was not suggested by the plaintiff that the office proposed by the defendant, viz., the Atlas, afforded security which was insufficient or inferior to insurance with the Law Fire Office. All the reasons given by the lessor had reference to the circumstance that he owned a large building estate of which that building formed part, and that it was for his convenience as the owner of the estate that the insurance of that particular building should be in the same office as the insurances of his other buildings. In his (his Lordship's) judgment the fact that the plaintiff was the freeholder of the other buildings was an extraneous or collateral circumstance unconnected with the demise of the particular house, just as were the special circumstances relied on in *Houlder Brothers and Co. v. Gibbs* (*supra*) and in the cases there relied on. Further, it was to be noted that the plaintiff had not expressed a want of approval of the Atlas office and had only expressed a preference for the Law Fire Office.

But there was another and shorter way of dealing with the case. Assuming, as was in his Lordship's opinion clear, that the covenant gave the lessee an alternative or option, then the plaintiff in declining to approve of any office except the Law Fire Office had in effect claimed to strike out the alternative and deprive the lessee of his option. Such a claim was, in his Lordship's judgment, quite inadmissible. He agreed that the appeal must be allowed and the action dismissed.

Lord Justice Lawrence, having stated the question raised, said that it was one of importance to the plaintiff and his lessees. As regards the plaintiff, it was to his advantage from the point of view of estate management that he should be able to compel his lessees to insure in the Law Fire Office, with which he had made an arrangement for the notification to him of the non-payment of premiums under all policies affected by his lessees. As regards the lessees it was to their advantage to have the power to select the insurance office so as to be in a position to comply with any demand which might be made upon them by their mortgagees to insure in some office suggested by them.

The question turned entirely on the true meaning and effect of a few simple words in the covenant to insure. The covenant was in one of the well-known common forms, and it was worthy of note that the lessor had not adopted another equally well-known form which provided for insurance in a named insurance office or in such other insurance office as the lessor should direct, which if it had been adopted would have justified the plaintiff in selecting the insurance office, but might have rendered his leases less attractive. He (his Lordship) confessed that, but for the opinion of the learned Judge and the arguments of counsel for the respondent, he would have thought that the construction of the covenant did not present any real difficulty. The lessee was given the option of complying with his covenant in one or other of two different ways, namely, either by insuring in the Law Fire Office or by insuring in some other responsible office to be approved by the lessor. The expression "to be approved" connoted that the choice of the other office was in the lessee and that the lessor was to sanction or ratify that choice and not make it himself. The practical effect of the covenant was that the lessee, if so minded, might insure in some responsible office other than the Law Fire Office and might choose such other office, which however must be submitted to the approval of and be approved by the lessor. If that were the true meaning and effect of the covenant, then it followed that the lessor was placed under an implied obligation to consider any responsible insurance office selected by the lessee, and to approve of it unless he had some reasonable ground for objecting to that office, otherwise the option given to the plaintiff would be altogether illusory. The attitude adopted by the plaintiff in insisting on the Law Fire Office was in his (his Lordship's) opinion clearly wrong as it amounted to a complete negation of the right of the lessee to fulfil his obligation under the covenant by insuring in some responsible office other than the Law Fire Office. The lessor was in effect treating the covenant as if it were one to insure in the Law Fire Office only. In the face of the declared intention of the lessor not to approve of any insurance office other than the Law Fire Office, the question of the nature of the grounds upon which he would be justified in withholding his approval of any particular office selected by the lessee did not, in his (his Lordship's) opinion, arise. The plaintiff did not suggest that the Atlas Assurance Company was not in all respects a suitable office in which to insure the buildings comprised in the lease. As, however, the question had been debated, he (his Lordship) desired to express his entire concurrence with the opinions expressed on the point by the Master of the Rolls and Lord Justice Sargant. The implied obligation resting on the lessor to approve of a responsible insurance office selected by the lessee necessarily involved an obliga-

tion not to withhold such approval arbitrarily or unreasonably. The principle of *Houlder Brothers and Co. v. Gibbs* (41 *The Times* L.R., 487 ; [1925] Ch., 575) applied as much to a case (such as the present) where the obligation not to withhold approval unreasonably was implied as to a case where such obligation was expressed. On that principle the plaintiff was not entitled to withhold his approval for reasons which, though rational in themselves, were extraneous to the subject-matter of the contract. He agreed that the appeal succeeded.

[Solicitors—Messrs. Church, Adams, Tatham and Co., for Messrs. Merrils, Ede and Nicholls, Cardiff ; Messrs. Rider, Heaton, Meredith and Mills, for Messrs. Davis, Lloyds and Wilson, Newport, Mon.]

K.B. Div. (Wright, J.) } 1927. Nov. 3.

COTTAGE CLUB ESTATES, LIMITED v. WOODSIDE ESTATE COMPANY (AMERSHAM), LIMITED.*

Arbitration — Contract — Assignment to third party of moneys due thereunder—Arbitration clause—Whether transferred to third party—Power of arbitrator—Effect of assignment—Law of Property Act, 1925 (15 Geo. V., c. 20), s. 136 (1).

Building contractors assigned to a bank all moneys due and to become due to them under the building contract, which contained an arbitration clause, and the proper notice of the assignment was served on the building owners. Disputes having arisen regarding a claim by the contractors for compensation and extra payment, recourse was had to arbitration.

Held, that the arbitrator had jurisdiction to entertain the arbitration since the contractors' rights under the arbitration clause did not constitute a "legal" or "other remedy" for the debt within the meaning of s. 136 (1) of the Law of Property Act, 1925, and were, therefore, not passed and transferred to the bank by the assignment.

Held, further, that the arbitrator had to consider not merely the terms of the contract within the limits of the document but also the application and enforcement of those terms having regard to the whole legal position which the parties had created, including the relinquishment by the contractors themselves by the assignment of their right to claim the debt, and, therefore, that he must make his award in favour of the building owners.

His Lordship delivered a considered judgment on this award made in the form of a special case by the arbitrator in an arbitration between the claimants, the Cottage Club Estates, Limited, a firm of building contractors, and the respondents, the Woodside Estate Company (Amersham), Limited, building owners, in which were submitted disputes arising out of a claim by the claimants for £705 compensation and extra payment in connexion with 16 houses erected by the claimants on land belonging to the respondents and pursuant to their instructions.

By their defence the respondents pleaded that by a deed dated August 30, 1926, the claimant contractors had assigned to the Bank of Liverpool and Martins, Limited, all moneys due and to become due under the building contract on which the claim was founded and that written notice of such assignment was served on the respondent building owners by letter dated August 31, 1926, from the solicitors of the bank.

The building owners accordingly contended that the deed of assignment and the notice thereof precluded the contractors from maintaining their claim either in whole or in part. They also submitted that on the interpretation of the contract and on the facts they were not liable for the amount claimed.

The building contract contained an arbitration clause and the disputes regarding the building owners' liability to pay the sum claimed were referred to an arbitrator.

Before the arbitrator the contractors denied that the deed of assignment and the notice thereof were any defence to their claim. They said that the arbitration was under the building contract and under a submission and that the proper parties to the arbitration were the parties to that contract and that submission.

The arbitrator was of opinion that the contentions of the contractors were correct and found that £448 7s. 5d. and costs were due to them from the building owners. At the request of the parties he stated his award in the form of a special case for the opinion of the Court whether the deed of assignment and the notice thereof precluded the contractors from maintaining their claim. If the Court took the view that they did, he awarded, alternatively, that the contractors were not entitled to recover anything, but were liable to pay to the building owners their costs.

Mr. Barrington-Ward, K.C., and Mr. Bensley Wells appeared for the claimant contractors ; Mr. Cave, K.C., and Mr. Graham Mould for the respondent building owners.

His Lordship reserved judgment.

On November 3, Mr. Justice Wright delivered a considered judgment, in which he said :—Mr. Cave, for the building owners, relied on section 136, subsection 1, of the Law of Property Act, 1925, which is as follows : "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—(*a*) the legal right to such debt or thing in action ; (*b*) all legal and other remedies for the same ; and (*c*) the power to give a good discharge for the same without the concurrence of the assignor. . . ." Mr. Cave submitted that by virtue of those provisions the contractors' rights under the arbitration clause were transferred from them and vested in the bank as coming within the description "all legal and other remedies" for the debt. That argument is not well founded. An arbitration clause is a personal covenant, and in my judgment it cannot be transferred. Nor indeed was it in any sense transferred in this case. If there had been any cross-claim by the building owners against the contractors the arbitration clause

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

would have remained in full force and effect with reference to that claim and, in my opinion, it also remains in full force and effect with reference to all claims made by one of the parties against the other. I think that the parties were entitled to go to arbitration and that the arbitrator was bound to entertain the claim and to come to such conclusion as, on the terms of the contract and the relevant legal considerations, he thought just and proper.

Mr. Cave further, and principally, relied on the contention that the effect of the assignment was to divest the contractors of their right to claim from the building owners the moneys due under the contract. He relied on the express terms of section 136, subsection 1, and maintained that the legal right to a debt or any chose in action had passed from the contractors entirely, and they were now unable to give a good discharge for the debt.

Mr. Barrington-Ward, for the contractors, contended that the award of the arbitrator was right. He admitted that the assignment was absolute and was a good legal assignment of an unquantified debt within the meaning of section 136, subsection 1, of the Act, but he said that the arbitrator was bound to quantify by his award the amount of that unascertained debt.

I do not think that those contentions are right. In my opinion, the arbitrator had jurisdiction under the arbitration clause to deal with this dispute and, in doing so, it was his duty to consider not merely the terms of the contract within the limits of the document, but also the application and enforcement of those terms having regard to the whole legal position which the parties had created. The contractors by their own act had divested themselves of their right to claim the debt. The arbitrator, in considering the rights of the parties, was bound to give effect to that legal position. He has awarded that the contractors are entitled to recover £448 from the building owners. If that award were to stand and to receive effect the position would be that the building owners would have to pay the money to persons who are not now their creditors and who cannot give them a discharge for the debt. They would be liable to pay the same amount—or some other agreed amount—to the bank, and the fulfilment of the award would not be any defence to a claim by the bank.

It may be that, if the contractors sought to enforce the award in its present form, the Court might hold that it was bad on its face, the conclusion expressed in it being inconsistent with the facts stated in it. It cannot be upheld in the form in which, subject to the case, the arbitrator has made it.

As to Mr. Barrington-Ward's contention that the assignment was a matter which was entirely irrelevant to the arbitrator and outside his jurisdiction, an arbitrator may have to take into account matters arising under the general law—for instance, Statutes of Limitation, impossibility of performance or frustration. In the same way he cannot close his eyes to the fact that the claimants have assigned money payable under the contract to a third party who is not a party to the arbitration.

That being so, the award in which the arbitrator in the present case finds that the claimants are entitled to recover £448 from the respondents cannot be upheld. His alternative award must receive the sanction of the Court. According to that award the contractors are not entitled to recover anything from the building owners.

[Solicitors—Messrs. Wingfields ; Messrs. Lea and Lea.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)
1927. Oct. 28.

DALE v. MITCALFE.*

Revenue—Income-tax—Income accumulated for benefit of a person contingently—Beneficiary having only a life interest—Claim to relief—Meaning of "benefit"—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 25.

By s. 25 of the Income Tax Act, 1918 :—"Where in pursuance of the provisions of any will or settlement any income arising from any fund is accumulated for the benefit of any person contingently on his attaining some specified age or marrying, and the aggregate amount in any year of assessment of that income and the income from any other fund subject to the like trusts for accumulation and of the total income of that person from all sources (hereinafter referred to as 'the aggregate yearly income') is of such an amount only as would entitle an individual either to total exemption from tax or to relief from tax, that person shall, on making a claim for the purpose within three years after the end of the year of assessment in which the contingency happens, be entitled . . . to have repaid to him [a sum calculated as therein mentioned]."

Held, that the words "for the benefit of" include a case where the accumulations of income are added to the capital of a trust fund in which the beneficiary has only a life interest and where therefore the accumulations never pass to the beneficiary.

Decision of Rowlatt, J. (43 *The Times* L.R., 481 ; [1927] 2 K.B., 491), affirmed.

This was an appeal from a decision of Mr. Justice Rowlatt (43 *The Times* L.R., 481 ; [1927] 2 K.B., 491) affirming a decision of the Commissioners for the General Purposes of the Income Tax Acts.

At a meeting of the General Commissioners on October 29, 1925, Mary Catherine Louise Mitcalfe (formerly Burn), the wife of William Stanley Mitcalfe, of Oak House, 17, Aigburth Hall-road, Liverpool (the respondent), appealed against an objection made by the Inspector of Taxes for Hexham (the appellant) to a claim made by the respondent for relief under section 25 of the Income Tax Act, 1918, in respect of income accumulated under the trusts of the settlement hereinafter referred to.

By section 25 of the Income Tax Act, 1918 :—"Where in pursuance of the provisions of any will or settlement any income arising from any fund is accumulated for the benefit of any person contingently on his attaining some specified age or marrying, and the aggregate amount in any year of assessment of that income and the income from any other fund subject to the like trusts for accumulation and of the total income of that person from all sources (hereinafter referred to as 'the aggregate yearly income') is of such an amount only as would entitle an individual either to total exemption from tax or to relief from tax, that person shall, on making a

* Reported by G. T. Whitfield-Hayes, Esq., Barrister-at-Law.

claim for the purpose within three years after the end of the year of assessment in which the contingency happens, be entitled . . . to have repaid to him [a sum calculated as therein mentioned]."

By a settlement dated October 18, 1910, made between (1) John Henry Burn and (2) the trustees therein named, John Henry Burn (the settlor) settled certain stocks, securities, and moneys (the trust funds) upon certain trusts in favour of his children, of whom he then had five—namely, two sons and three daughters, all of whom were minors. Such trusts (so far as they were material to the questions raised in this case) were as follows :—

"Cl. 5. Upon trust for all or any the children or child of the settlor now living or hereafter to be born who being male shall attain the age of 21 years or being female shall attain that age or previously marry if more than one in equal shares except that each son shall take double the share of each daughter.

"Cl. 7. Provided further that the said trustees or trustee shall retain the share of each daughter of the settlor now living of and in the trust funds upon the trusts following (that is to say) the said trustees or trustee shall pay the income thereof to such daughter during her life and so that during coverture the same shall be for her separate use without power of anticipation but which restraint shall not preclude the payment of such income to a bank or banker for the credit of such daughter and after the death of such daughter shall stand possessed of her said share upon the like trusts and subject to the like powers and provisions in favour of the issue of such daughter as are hereinbefore declared and contained concerning the share of each of the sons of the settlor now living in the trust funds to take effect after the death of each of such sons in the same manner in all respects as if such trust powers and provisions were herein repeated with the substitution of the name of the said daughter for such son.

"Cl. 10. Provided always that the said trustees or trustee shall apply the whole or such part as they or he in their or his discretion shall think fit of the income of the expectant or presumptive share (whether settled or unsettled) of any child or grandchild of the settlor in the trust funds under the trusts hereinbefore contained for or towards his or her maintenance education or benefit (whether there is any other fund applicable or any person bound by law to provide for such maintenance or education or not) and may either themselves so apply the same or may pay the same to the parents or guardians or guardian of such child or grandchild for the purpose aforesaid without seeing to the application thereof and shall during the minority of any such child or grandchild and in the case of a female spinsterhood accumulate the surplus (if any) of the same income by investing the same and the resulting income thereof in any of the investments hereby authorized in augmentation and so as to follow the destination of the share from which the same shall have proceeded but with power to apply any such accumulations in any subsequent year for or towards the maintenance education or benefit of the child or grandchild for the time being presumptively entitled as aforesaid in the manner in which such accumulations might have been applied had they been income arising in the then current year."

The following facts were proved or admitted :—

The respondent, then Mary Catherine Louise Burn, was a daughter of the settlor and attained the age of 21 years on May 26, 1921, and was married to her present husband, William Stanley Mitcalfe, on August 31, 1922. Income-tax, at the rates appropriate to each tax year, had been duly paid by deduction or otherwise by the trustees for the time being of the settlement, in respect of the whole income of the trust funds up to May 26, 1921. As from that date the income of her share of the trust funds (including the income of her share of the invested accumulations) had been paid to the respondent, and she had been fully repaid all the tax recoverable by her in respect of such income up to the date of her marriage. The respondent claimed on September 12, 1922, under section 25 of the Income Tax Act, 1918, repayment of £380 3s. 11d., for or on account of tax paid or deducted in respect of income accumulated during her minority under the settlement. The appellant refused the claim. The accumulations of income from the trust funds were, during the minority of the respondent, set aside to the credit of a separate accumulations fund in the names of the trustees of the settlement.

The appellant refused the claim on the ground that "as the accumulations of the income are added to the capital of the trust fund, which never passes to the beneficiary, the claim under section 25 of the Income Tax Act, 1918, cannot be admitted."

No question arose as to figures.

It was contended on behalf of the respondent :—That the surplus income of the trust fund had been accumulated during her "minority for her benefit," to the extent of the share thereof to the income of which she became entitled on May 26, 1921, inasmuch as, on attaining the age of 21 years, she became entitled to receive the income from these accumulations in addition to her other income ; that the words "for the benefit of" in section 25 must be given their ordinary meaning, there being nothing in the Act to restrict that meaning in the way suggested by the Crown ; that the surplus income had been accumulating for the benefit of the respondent within the meaning of section 25 none the less because she was not under the trusts of the settlement entitled absolutely to these accumulations ; and that clause 10 of the settlement empowered the trustees of the settlement to apply accumulations in any subsequent year for the benefit of the child or grandchild presumptively entitled to a share in the trust funds in the manner in which such accumulations might have been applied had they been income arising in the then current year.

The Crown contended that the respondent must herself be entitled to the income, and said that, as a matter of fact, it was the income of the trustees.

The General Commissioners held that the respondent was entitled to repayment of the tax, the subject of the claim. The Crown appealed.

Mr. Justice Rowlatt thought that, in substance, the accumulations were "for the benefit" of the respondent, and dismissed the appeal.

The Crown again appealed.

The Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills appeared for the Crown.

Mr. Latter, K.C., and Mr. Cyril King, for the respondent, were not called upon to argue.

The Master of the Rolls, in giving judgment, said that there were no authorities to guide the Court, but the section itself must be looked at. The Attorney-General had contended that the respondent was not entitled to the repayment, as she had never become absolutely entitled to the accumulations of income but they were to be held by the trustees and added to the *corpus*. If that were the correct view, then in many settlements, not in the present one, but in many others, there

would be a marked differentiation between the shares of sons and the shares of daughters; for in many settlements the shares of sons were payable to them upon attaining 21, while the shares of daughters, in their own interests, were settled upon further trusts. In such cases the taxation would be recoverable by a son in respect of his share, but not by a daughter in respect of hers.

Mr. Justice Rowlatt's decision appeared to be the right one. That Judge had pointed out that by section 25 the rebate was allowed, not in respect of any fund accumulated for a person contingently entitled, but of any fund accumulated *for the benefit* of any person contingently entitled. It seemed clear to him (the Master of the Rolls) that the accumulations in question were for the benefit of the respondent, even if she were not allowed actually to receive the *corpus*. They would mean an increased income from a *corpus* increased by the accumulations, and that would surely be for her benefit. It could hardly be contended that an accumulation added to a daughter's share was not for the benefit of that daughter just because the whole share was not handed over to her.

Further, the right given to recover the tax within a certain time seemed to be in the nature of a personal right. The nature of the interest of the person claiming was the result of the settlement and the operation of the time limit. It did not arise out of any relation between the claimant and the Crown. The present claimant's right arose under the trust. The object of section 25 was to relieve from taxation incomes which ought not to have been taxed, and the person entitled to claim was the person who could prove a claim to moneys which had been accumulated, in the broadest sense, for that person's benefit. The appeal would be dismissed, with costs.

Lord Justice Sargant said that certain provisions of the settlement had not been set out in the case stated. Clause 9, for instance, gave a beneficial power to a son or a daughter of the settlor to appoint a life interest to a surviving husband or wife, and it had been held that a power of jointuring was clearly a power for the person's own benefit, and he might dispose of it or deal with it for a valuable consideration to come to him. Again, clause 11 of the settlement enabled the trustees to raise any part of the capital of a presumptive or vested share, and apply it towards the purchase of any business, or for the purpose of a settlement on an intended marriage of a daughter—again a clause markedly for the benefit of a child, son or daughter. At the time of the passing of the Income Tax Act, 1918, the law was that with regard to the income of a share which was contingent upon a child attaining 21 there was no power to get back any income-tax which had been deducted while the income was being accumulated for the child should the child ultimately reach 21. There was really no reason why such a child, on reaching 21, should not have had the benefit of an income-tax rebate on small incomes, as a child in whom the income was vested would have had; but that was the position of affairs, and section 25 was undoubtedly passed for the express purpose of putting a child whose share was contingent upon the same footing as a child whose share was vested. That being so, it was hardly likely that the Legislature in removing one anomaly would create another, and, looking at a very ordinary form of settlement, where the shares of sons and daughters were both contingent, but a son on reaching 21 was entitled absolutely to his share, and a daughter on reaching that age found that her share was settled on trust for herself for life, with remainder to her issue, it would seem extremely hard in such a case that a son should be able to get back tax deducted from his small income and a daughter should not. With regard to the wording of section 25, "for the benefit of" was not a phrase of art at all. It was a general phrase, to be interpreted in view of the general nature of the subject-matter, and it seemed very difficult to say here that this share of the settled funds was not settled "for the benefit of" the respondent. To put a narrower construction upon the words would defeat the primary object of the section. He agreed that the appeal should be dismissed.

Lord Justice Lawrence said that the argument of counsel for the Crown was that exemption could only be allowed where the income belonged to the person claiming the exemption; but it seemed to him (Lord Justice Lawrence) that the respondent had sufficient interest in the income to put her upon the same footing as a person absolutely entitled to the accumulations. A restricted meaning should not be given to section 25, or to the particular words "for the benefit of."

[Solicitors—The Solicitor of Inland Revenue; Messrs. Gregory, Rowcliffe, and Co., for Messrs. Cooper and Jackson, Newcastle-on-Tyne.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1927.
Oct. 13.

REX *v.* WOOD—EX PARTE ANDERSON.*

Coroner—Inquest—Coroner present during jury's deliberations — Misconduct — *Certiorari*—Inquisition quashed.

At the conclusion of the evidence in an inquest on the body of a man killed by a motor-car the jury retired and after some time sent for the coroner who went into the jury room and remained with the jury in private for a quarter of an hour. The jury returned a verdict of "Accidental death," but added a rider censuring the driver of the motor-car.

Held, that in going into the jury room during the deliberations of the jury, the coroner was guilty of misconduct, and the inquisition must be quashed and a fresh inquest held before the coroner for an adjoining district.

Reg., at the prosecution of O'Brien and Bourchier (17 Ir. L.T., 34) and *In re Mitchelstown Inquisition* (22 L.R.Ir., 279) approved and followed.

This was a rule *nisi* for a *certiorari* to quash the inquisition taken before Mr. John Richardson Wood, the coroner for the Thirsk Division of the North Riding of Yorkshire, on an inquest to inquire into the death of Mr. Walter Tindall, a veterinary surgeon, of The Hollies, Stillington. On August 4, 1927, Mr. Tindall was knocked down and killed by a motor-car driven by Mr. Henry Yarborough Anderson, of The Cottage, Bishopthorpe, near York. The inquest was held on August 6 and 9, and the jury returned a verdict of "Accidental death," but added a rider that they thought that there had been a certain

* Reported by J. W. Hall, Esq., Barrister-at-Law.

amount of negligence and they desired to censure severely the driver of the motor-car.

Mr. Anderson obtained a rule *nisi* for a *certiorari* to bring up and quash the inquisition on the grounds, (*a*) that the coroner was in the jury's retiring-room while they were considering their verdict and he took the verdict in private, and (*b*) that the verdict and the rider were contradictory and bad on the face of them.

Mr. Guy Lailey showed cause for the coroner; Mr. H. J. Wallington supported the rule for the applicant; and Mr. A. R. Linsley appeared for the Chief Constable of the North Riding of Yorkshire.

Mr. LAILEY read long affidavits describing in detail the proceedings at the inquest, and suggesting that the coroner, who was an old man, was unable to appreciate the evidence; that he failed to direct the jury or give any sufficient summing-up; and that after the jury retired he went, at their request, to their room and remained with them for a quarter of an hour. That fact was admitted by the coroner in his affidavit. Mr. Lailey admitted that the going to the jury room was irregular, but said that what was complained of was not the actual verdict, but the rider. He submitted that the Court had power at common law to strike out the rider, but he contended that it was not inconsistent with the verdict. If, in the jury's opinion, the negligence was not criminal and would not justify a verdict of "Manslaughter," "Accidental death" was the right verdict.

Mr. WALLINGTON said that, while he desired to say as little as possible to wound the feelings of the coroner or his family, it was clear on the evidence, which was uncontradicted by the coroner, that the coroner was not in a fit state to conduct the inquiry, and that the jury had really never had the case put before them by a coroner fit to do so.

On the question of his presence in the jury room, reference was made to *Reg., at the prosecution of O'Brien and Bourchier*—the *Ballyragget* case—(17 Ir. L.T., 34); and to *In re Mitchelstown Inquisition* (22 L.R.Ir., 279). There appeared to be no English or Scottish authority.

The LORD CHIEF JUSTICE.—This is a rule *nisi* for a writ of *certiorari* to remove into this Court an inquisition taken before one of the coroners for Yorkshire on August 6 and 9, 1927, on the body of one Walter Tindall. It is sought to bring that inquisition into this Court in order that it may be quashed without further order. Various grounds are set out in the rule. It is enough, I think, to refer to the first of them: that is, the ground that the coroner was guilty of misconduct in, first, being present in the jury's retiring room; secondly, taking the verdict from the jury privately. With regard to the facts of the case there does not appear to be any substantial dispute. According to the affidavit of Mr. Anderson, who was present at the inquest, the following matters happened after the jury had retired to consider their verdict: "The jury had been absent for approximately 20 minutes when they sent a message asking to see the coroner. The coroner then went to the room into which the jury had retired, remaining alone with them at least a quarter of an hour. The coroner then came back into the room where the inquiry was held, and, sitting down at the top of the table, turned to Mr. Crombie" (that is a gentleman who was engaged as a solicitor on behalf of one of the parties) "and whispered certain words to him. Mr. Crombie, who was seated next to me, whispered to me saying that the coroner had told him, 'Verdict of accidental death but they wish the driver to be censured.' The jury then returned to the room, and on being asked by the coroner whether they had agreed on their verdict, the foreman answered, 'Yes' and read, from a piece of paper in his hand, the following words, 'We find after carefully considering all the evidence that Mr. Tindall was accidentally killed by being knocked down by a motor-car, but the jury are of the opinion that there has been a certain amount of negligence on the part of the driver of the car and they wish to pass a severe vote of censure upon him.'" In like manner, Mr. Crombie in his affidavit says, "The jury accordingly, under the guidance of the police, then retired into another room on the ground floor. The jury had been absent for about 20 minutes when I was informed and believe that they sent for the coroner, and that he accordingly went into their retiring room and remained with them for about a quarter of an hour. I was with Mr. Anderson in the room on the first floor where the adjourned inquest was being held. The coroner returned into this room just prior to the jury returning and sat in his seat. I was sitting immediately on his left. The coroner whispered to me, 'It is all right, it is a verdict of accidental death, but the jury want the driver censured.' I repeated these words in a whisper to Mr. Anderson. The jury then returned, and, on being asked by the coroner whether they were agreed on their verdict, the foreman of the jury stood up and said, 'Yes,' holding in his hand a piece of paper from which he read the following words,"—those are the words I have already referred to. Now what is the observation of the coroner himself upon this matter? It is very brief. All he says is this, "I went to the jury's retiring room at their request as alleged in the affidavit of Mr. Anderson and dealt with the questions upon which they sought my direction." It is not necessary, I think, to enter into other questions which are raised by the affidavits and by the arguments in this case. Speaking for myself I confine my judgment to this sole ground. It seems to me to be clearly contrary to public policy that a coroner should go into the jury's room after they have retired to consider their verdict, even though it be for the purpose of answering an inquiry which the jury seek to make of him, or of giving the jury further directions which they request. The principle, it seems to me, was clearly stated in a few words in the Irish case, to which reference has been made, in the year 1882, the case of *Reg., at the prosecution of O'Brien and Bourchier* (17 Ir.L.T., 34). That was a case which came before a Court consisting of Lord Chief Justice May, Mr. Justice Fitzgerald, and Mr. Justice Barry, and one of the allegations was that during the time when the coroner's jury in that case were in deliberation, the coroner and his clerk remained present. In giving judgment, in which Mr. Justice Fitzgerald and Mr. Justice Barry concurred, Chief Justice May said at page 36: "As to his not interfering in the discussion when the jury were deliberating, this is no excuse. He has violated the principle to be observed in such cases. The jury should have been segregated from all the rest of the public. This is the proper practice, and it is no answer to the complaint to say that the coroner read the evidence to the jurors when they returned to the room." In like manner in another Irish case, in the year 1888, *In re Mitchelstown Inquisition* (22 L.R.Ir., 279), an inquisition was quashed on the ground of irregularity and of misconduct. In that case also after the jury had retired, the coroner, being informed that the jury had agreed, but before their verdict was declared, entered the room where they were in consultation and took their verdict in the room before returning into Court. Those matters having been proved, it became common ground

that that inquisition could not be supported. The case was heard before a Court consisting of Chief Justice Sir Michael Morris, Mr. Justice Harrison, Mr. Justice O'Brien, and Mr. Justice Murphy ; and Chief Justice Morris, in giving the judgment of the whole Court, used these words at page 301 : "I now approach a portion of the case with considerable reluctance, because I am obliged to discuss the conduct of the coroner. I am not going to enter into a pedantic exposition of the whole line of authorities showing that an inquisition could be quashed for misconduct on the part of the judicial officer who held it. The cases were to be found in Grady and Scotland's Crown Practice. I will only refer to the *Ballyragget* case"—that is the case in 17 *Irish Law Times* I have already mentioned—"which was decided in this Court before Lord Chief Justice May, the present Lord Fitzgerald and the present Lord Justice Barry. In that case it was held that the coroner, being in the room with the jury before they found their verdict, was an irregularity for which there was no excuse." And having referred to the facts of the case then before the Court the Chief Justice went on to say : "The coroner called his apprentice into the jury room and the apprentice swore that the coroner took no part in the deliberations of the jury, although the apprentice was not there when the coroner first went in, and the apprentice said that the finding which he wrote down was dictated to him by the coroner and not by the jury. But the question did not depend on any groping to ascertain whether or not the coroner interfered. It was public policy that the coroner should not go into the jury room, but that the jury should declare their verdict in open Court." Those words, and all those words, seem to me to apply clearly to the present case. I forbear to enter into other matters ; especially do I refrain from making any observations upon the very things which the coroner said and did. It is not suggested by anybody that when he was in the jury room he was doing anything other than helping the jury according to their request with their verdict ; but so doing in that place, in those circumstances, he was doing something which ought not to have been done. I am clearly of the opinion, therefore, that this rule should be made absolute and this inquisition quashed.

Mr. Justice Avory.—I am of the same opinion. I think the cases which have been quoted in the Irish Courts are sufficient authority for quashing this inquisition upon the first ground on which the rule was granted. Quite apart from that there appear to me to be general grounds for saying that the proceedings in this case before the coroner were quite unsatisfactory and that the jury never had any proper direction before them as to what their duty was in this case. I agree that the inquisition should be quashed.

Mr. Justice Salter.—I agree. I think that the segregation of the jury while considering their verdict is an essential principle in all jury trials and that principle was not observed on this occasion.

The Lord Chief Justice.—The order of the Court is that an inquest be held touching the said death and that that inquest be held by the Coroner for the Pickering district of the North Riding of Yorkshire, Mr. J. F. Porter. There need be no view of the body.

[Solicitors—Messrs. Eland, Nettleship and Butt, for Mr. J. R. Wood, York ; Messrs. Long and Gardiner, for Messrs. Geo. Crombie and Sons, York ; Messrs. Lambert and Hale.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1927. Oct. 14.

WILSON v. YATES.*

Animals—Disease—Notice to police constable—Knowledge of owner—Diseases of Animals Act, 1894 (57 and 58 Vict., c. 57), ss. 4, 52, 57.

This was a case stated by Derbyshire Justices.

At a Court of summary jurisdiction sitting at Belper, in the county of Derby, a complaint was preferred by Joseph Wilson (a superintendent of police, hereinafter called "the appellant") against John Thomas Yates (hereinafter called "the respondent"), "for that he on February 5, 1927, in the county of Derby, being the owner of two cows affected with foot and mouth disease did fail to give notice with all practicable speed of the fact of the animals being so affected to a constable of the county of Derby," in contravention of the provisions of section 4 of the Diseases of Animals Act, 1894. The said Court of summary jurisdiction dismissed the said complaint.

Upon the hearing of the said complaint the following facts were proved or admitted :—

(1) That the respondent was a farmer carrying on business at Champion Farm, Quarndon, in the county of Derby.

(2) That on February 5, 1927, he was the owner of two cows which were affected with foot and mouth disease.

(3) That the respondent did not give notice as required by section 4 of the Diseases of Animals Act, 1894, until February 7, 1927.

(4) No evidence was called on behalf of the respondent, but it was contended on his behalf that as there was no evidence before the Court that he knew the said animals were suffering from foot and mouth disease before February 7, 1927, he had discharged the onus which lay upon him under section 4 of the before-mentioned Act by giving notice upon that date. It was contended on behalf of the appellant that as it was proved that the said animals were in fact affected with foot and mouth disease on February 5, 1927, section 57 of the Diseases of Animals Act, 1894, placed the burden of proof upon the respondent, and that the justices were not entitled to dismiss the said complaint until the respondent had shown to the satisfaction of the Court that he had no knowledge that the animals were so affected and could not with reasonable diligence have obtained that knowledge.

The justices accepted the contention on the part of the respondent, and rejected the contention on the part of the appellant, and accordingly unanimously dismissed the said complaint.

The question upon which the opinion of the Court was desired was whether upon the above statement of facts the justices came to a correct determination and decision in point of law.

By the Diseases of Animals Act, 1894, section 4 (1): "Every person having in his possession or under his charge an animal affected with disease shall . . . (*b*) with all practicable speed give notice of the fact of the animal being so affected to a constable of the police force for the police area wherein the animal so affected is."

The omission to give such notice is, by section 52, made an offence against the Act.

By section 57 (1) : "Where the owner or person in charge of an animal is charged with an offence

* Reported by J. W. Hall, Esq., Barrister-at-Law.

against this Act, relative to disease or to any illness of the animal, he shall be presumed to have known of the existence of the disease or illness, unless and until he shows to the satisfaction of the Court that he had no knowledge thereof, and could not with reasonable diligence have obtained that knowledge."

Mr. H. H. Maddocks appeared for the appellant; the respondent was not represented.

The LORD CHIEF JUSTICE.—This is a perfectly clear case. The justices dismissed this charge on the contention by the respondent that as there was no evidence before the Court that he knew these animals were suffering from foot and mouth disease before February 7 he had fulfilled his duty under section 4 by giving notice on that date. The respondent chose in the Court below to hold his tongue and not give evidence. The appellant in those circumstances contended that section 57 placed the burden of proof on the respondent. That is manifestly true. In other words, the present respondent succeeded below in arguing that the presumption of knowledge was the exact opposite of that which the statute says it shall be. The case must go back to the justices with a direction to convict.

MR. JUSTICE AVORY.—I agree.

MR. JUSTICE SALTER.—I agree.

[Solicitors—Messrs. Hamlins, Grammer and Hamlin, for Mr. Bendle W. Moore, Derby.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1927.
Oct. 20.

REX v. ELECTRICITY COMMISSIONERS—EX PARTE YORKSHIRE ELECTRIC POWER COMPANY.*

Electricity—Supply—Company—Special Act—Application by local authority to take over supply—Whether consent of company required—Yorkshire Electric Power Act, 1901 (1 Edw. VII., c. cxvi.), s. 49.

The Yorkshire Electric Power Company were by the Yorkshire Electric Power Act, 1901, empowered to supply energy within an area including the urban district of Silsden. Section 49 of the Act provided: "Nothing in this Act shall prejudice any application which is now being or may hereafter be made by any local authority company or person for a Provisional Order under the principal Acts for power to supply energy within the area of supply under this Act and in any Provisional Order to be granted by the Board of Trade [now the Electricity Commissioners] authorizing any local authority company or person so to supply energy provision may be made as to the taking over of any supply then given by the company for use exclusively within the area of supply defined in such Order."

The Silsden Urban District Council having applied to the Commissioners for a Special Order (taking the place of the former Provisional Order) for power to supply energy within their urban district, and to take over the supply given by the Yorkshire Electric Power Company, the company sought to prohibit the Commissioners from proceeding with the consideration of the Draft Special Order, on the ground that the consent of the company was required.

Held, that s. 49 clearly contemplated proceedings *in invitum* and that the consent of the company was not necessary, and that the Commissioners were not usurping jurisdiction in proceeding to consider the Draft Order.

This was a rule *nisi* for a writ of prohibition at the instance of the Yorkshire Electric Power Company, directed to the Electricity Commissioners, to prohibit them from proceeding with the further consideration of an application by the Silsden Urban District Council for the amendment of the Silsden Electricity (Draft) Special Order, whereof notice was given on June 2, 1927; and from making an order giving effect to the application. The rule was obtained on the ground that the provisions which the council sought by the amendment to include in the Order were *ultra vires* of the Electricity Commissioners.

The Yorkshire Electric Power Company was incorporated by the Yorkshire Electric Power Act, 1901, its area being a portion of the West Riding, including the whole of the urban district of Silsden. By section 48 of the Act the company was restricted to supplying energy to authorized undertakers and to persons requiring a supply for power. These restrictions were removed by a later Act. By section 49:—

"Nothing in this Act shall prejudice any application which is now being or may hereafter be made by any local authority company or person for a Provisional Order under the principal Acts for power to supply energy within the area of supply under this Act and in any Provisional Order to be granted by the Board of Trade authorizing any local authority company or person so to supply energy provision may be made as to the taking over of any supply then given by the company for use exclusively within the area of supply defined in such Order."

On April 20, 1926, the Silsden Urban District Council served upon the company notice of an application to the Electricity Commissioners for a special order under the Electricity (Supply) Acts, 1882 to 1922, to authorize the council as undertakers to supply electrical energy for all public and private purposes. The council later intimated that they proposed to ask for the inclusion in the order of a provision enabling the council to take over the distribution mains of the company in the Silsden urban district. Notice of an application for amendment of the order accordingly was served on the company on June 2, 1927.

On July 4, 1927, the company sent to the Electricity Commissioners their objections that it was *ultra vires* of the Electricity Commissioners to make, and of the Minister of Transport to confirm, an order containing the proposed provisions as to the transfer of the supply of electricity and of low-tension mains without the consent, and against the wishes, of the company. The company's view was that the intention of section 49 of the Yorkshire Electric Power Act, 1901, was that where the parties were agreed upon a transfer of supply the Commissioners might make an order giving statutory effect to that agreement.

The Commissioners intimated their intention to proceed with the consideration of the proposed amendment, whereupon the company obtained this rule *nisi*.

* Reported by J. W. HALL, Esq., Barrister-at-Law.

The Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. W. Bowstead showed cause for the Electricity Commissioners ; Mr. Tristram Beresford appeared for the Silsden U.D.C. ; and Mr. Rowand Harker, K.C., Mr. W. P. Donald, and Mr. H. M. Paul supported the rule.

The SOLICITOR-GENERAL submitted that the company's contention involved the insertion of the words "with the consent of the company" in section 49. That section was, in terms, intended to prevent prejudice to the applications therein described. Anything more certain to prejudice these applications than a requirement that the consent of the company should be given was hard to imagine.

The COURT suggested that the application for prohibition was premature. It was not clear that the Commissioners would make the order asked for by the urban district council ; it might be that they would decide to make an order quite satisfactory to the company.

The LORD CHIEF JUSTICE.—This seems like a substitute for a consultative case under section 19 of the Arbitration Act, 1889, whereby the Court is asked to give an arbitrator its opinion on law to guide his decision beforehand.

MR. JUSTICE AVORY.—Is this not within the rule that where there is jurisdiction the proper remedy is by appeal, not by prohibition ? Have not the Commissioners clearly jurisdiction to entertain the application of the urban district council ?

The SOLICITOR-GENERAL agreed that it would be more convenient to wait till the order was made and then, if necessary, proceed by *certiorari*. He was, however, quite prepared to argue the case, unless the Court thought it more convenient to decide the question whether the application was premature.

The LORD CHIEF JUSTICE.—The Court's difficulty is that we must beware of making a bad precedent. We should launch upon a sea which has no shore if we began to decide proleptically questions of law which may or may not arise in the future. We should like to hear Mr. Harker on this question.

Mr. HARKER said that if he could satisfy their Lordships that the Commissioners were contemplating making an order in the terms asked by the urban district council, and that they had no power to do so, then he submitted that prohibition was the right remedy. All that the Commissioners could do was to make an order "as to the taking over of any supply then given by the company for use exclusively within the area of supply defined in such order." Suppose that at the date of the order the company were supplying one of their customers with 100 kilowatts, that was the supply "then" given to that customer, and that was all that could be transferred. The Silsden Urban District Council asked for a transfer of the whole supply ; they were not entitled to that.

MR. JUSTICE SALTER.—I have hitherto been reading the section as meaning that the new undertakers may take over any supply then given by the company, provided that when they have got it they use it exclusively within the area defined in the order.

The LORD CHIEF JUSTICE said that he read the words from "supply then given" to "order" as one compound substantive.

Mr. HARKER said that it had been decided by Mr. Justice Tomlin that, in the absence of contract to the contrary, a consumer who received energy within the supply area might use it either within or without the area. It was only in regard to such supplies as were in fact exclusively used within the area that an order could be made for transfer.

Mr. Harker developed at length his argument that the consent of the company was necessary before an order could be made transferring the supply of energy. He submitted that in the absence of any express provision for compensation the Court should not interpret the Act as giving compulsory powers of transfer. Counsel also dealt with the question of transferring the company's low-tension mains as distinct from the right of supply.

The LORD CHIEF JUSTICE.—Suppose that the Commissioners made an order transferring the consumers and the right of supply, would it not be more advantageous to the company that the appropriate mains should be taken over, subject to proper compensation, than that they should lie idle ?

Mr. HARKER said that he had not sufficient information on the technical side to answer that. It seemed to be a question of what was included in "supply." If it were clear, as seemed to be indicated by one of the Commissioners' letters, that they did not intend to make any order dealing specifically with low-tension mains, he must admit that there was no case for prohibition on that point. It might be that the low-tension mains were not used exclusively within the area of the urban district council, and that at some time some tribunal would have to consider precisely what came under the word "supply." The question was one of great importance not only to the Yorkshire Power Company, but to all power companies, all, or nearly all, of which had similar clauses in their Acts.

The LORD CHIEF JUSTICE.—This is a rule *nisi* for a writ of prohibition to prohibit the Electricity Commissioners from proceeding with the further consideration of a certain application by the Urban District Council of Silsden for the amendment of the Silsden Electricity Draft Special Order and from making an order giving effect to that application. The grounds for the rule were that the provisions which, as it was said, the council seek by the said amendment to include in the order are *ultra vires* of the Electricity Commissioners.

It is not necessary, I think, after the course which the argument before us has taken, to review all the facts leading up to the present application, but it is to be observed that the remedy which is now being sought by the Yorkshire Power Company is the remedy of prohibition ; that is to say, this Court is being asked to issue a writ directed to the Electricity Commissioners for the purpose of preventing them from usurping a jurisdiction with which they are not legally vested. It is therefore material to see exactly upon what ground it is alleged that the Electricity Commissioners are usurping, or are about to usurp, a jurisdiction of that character. The question arises with reference to section 49 of the Yorkshire Electric Power Act, 1901. That Act, of course, was passed at a time when the Electricity Commissioners had not yet come into existence. To-day the Electricity Commissioners stand in the shoes, for this purpose, of the old Board of Trade, and the order of the Electricity Commissioners stands in the place of what at that time was a Provisional Order. Section 49 of the local Act of 1901 provides as follows : "Nothing in this Act shall prejudice any application which is now being or may hereafter be made by any local authority company or person for a Provisional Order under the principal Acts for power to supply energy within the area of supply under this Act and in any Provisional Order to be granted by the Board of Trade authorizing any local authority company or person so to supply energy provision may be made as to the taking over of any supply then given by the company for use exclusively within the area of

supply defined in such order." Now the real ground, and, I think it is strictly accurate to say, at the close of the argument the only ground, upon which it is alleged that the Electricity Commissioners are about to usurp a jurisdiction is that according to the contention of the Power Company these words in the second half of section 49 of the statute with reference to the taking over of an existing supply ought to be, but by the Electricity Commissioners are not about to be, read as if they included the expression, or some such expression as, "with the consent of the company." The gist of the argument for this rule consists, and consists solely, in the contention that the transfer or taking over which is provided for in the second half of section 49 can be ordered only if there is an antecedent agreement between the company and the local authority that such a transfer or taking over shall be made, and as to the terms upon which it should be made; and it is said that when one looks at the correspondence exhibited to the affidavit in this case it is apparent that the Electricity Commissioners are at any rate in a mood to consider an application involving a transfer of that nature in the absence of such assent on the part of the company. The real question, therefore, which has to be decided on the present application is whether it is true to say, as a matter of law, that in the second part of section 49 of the Yorkshire Electric Power Act, 1901, words are to be inserted or are to be regarded as being present which require the antecedent assent of the company. In my opinion that construction would be a misconstruction of this section. In the first place, there are no such words in the section, and, when one looks a few lines higher up the page to the last subsection of the next preceding section, one finds that where consent is being dealt with the statute uses express words about it. Subsection (4) of section 48 provides that "After any place shall have become the whole or part of the area of supply of a distributing authority the company shall not without the consent of such authority supply," &c. The question of consent in a proper case was clearly present to the mind of the Legislature. But when one comes to section 49 it is natural to ask, what is the scheme and purpose of this section? It may be expressed in very simple terms. Where the company has acquired the large powers which are conferred by this statute, nevertheless there may be a local application by, for example, a local authority, and section 49 begins by saying in the clearest, the most unambiguous, language, "Nothing in this Act shall prejudice any application which is now being or may hereafter be made by any local authority . . . for a Provisional Order . . . for power to supply energy within the area of supply under this Act." Could it possibly be suggested, even for controversial purposes, that such an application as that required the consent of the company? The very essence of it is that it is made *in invitum*, and the powers with which the company is by this Act clothed are not in the smallest degree to prejudice such an application, although the effect of granting the application is *pro tanto* to curtail the activities and, it may be, the profits of the company. Section 49, that is to say, begins by providing that, without the consent and, it may well be, very much against the will and, as it is thought, against the interests of the company, the local authority may make such an application, and that application so being made is not to be prejudiced by any of the provisions of this Act. How paradoxical it would be if, when the section has started in that way, we are to import the exactly opposite words, "with the consent of the company," into the second part of the section. If the section were to be re-written as a whole in the way which is suggested, it would have to take some such form as this: "Nothing in this Act shall prejudice any application without the consent of the company made by any local authority for a Provisional Order, and in any Provisional Order to be granted, provision may be made with the consent of the company as to the taking over of any supply," &c. In my opinion not only is the meaning of this section made plain by the omission in this context of any words about consent, but the whole scheme and system, as well as the phrasing of the section, make it plain that consent on the part of the company is not necessary. I think, therefore, that this application for a writ of prohibition fails upon the threshold.

It was said that the transfer or the taking over which is contemplated in the last words of section 49 could not possibly be a transfer without consent, for the reason that nothing is expressly said as to compensation or the mode of assessing compensation, but the words which are used are, "provision may be made as to the taking over of any supply"; and, as has been held again and again, and as was clearly stated in the case of *Cannon Brewery Company v. Gas Light and Coke Company* (20 *The Times* L.R., 543; [1904] A.C., 331), to which Mr. Rowand Harker in the course of his argument referred, it is not to be supposed that any property is to be transferred or taken over by a local authority from a company without payment of compensation unless the statute so provides. The fact that there is no mention of compensation, so far from excluding compensation, shows that compensation is payable for the reason that it is not said not to be payable.

With regard to the remaining points, which turn upon two phrases respectively in the last words of section 49—namely, the word "supply" and the words "given by the company for use exclusively within"—it is not necessary, I think, to express any opinion; and that for two reasons. In the first place, with regard to one of these phrases, Mr. Rowand Harker frankly admits that in view of the letter dated the 4th day of October, 1927, from the Electricity Commissioners the point with reference to the word "supply" cannot be said at present to arise and may never arise; and with regard to the words, "given by the company for use exclusively within," the possible construction which was suggested in the course of the argument is a construction well worthy, no doubt, of consideration, but, as it is conceded, not yet so much as mentioned by the Electricity Commissioners. I do not wish to be led into a superfluous discussion as to the meaning of these phrases at the close of this section, both for other reasons and because any such discussion would tend to obscure what has now become perfectly clear at the close of this long, though not too long, argument, that the real point here is that it is urged by the Power Company that the transfer of the existing supply, if made, must be made with the consent of the company. That, I think, is an erroneous view, and, failing in that, those who seek this writ of prohibition in my opinion fail altogether.

In these circumstances and for these reasons I think that this rule ought to be discharged.

Mr. Justice Avory.—In view of the decision of the Court of Appeal in the case of *Rex v. Electricity Commissioners* (39 *The Times* L.R., 715; [1924] 1 K.B., 171), I do not think that we ought to decide this case upon the ground, as at one time suggested, that the application was in any view premature. That being so, the question is whether there is any evidence

before the Court that the Electricity Commissioners are now about to proceed in any matter which is not within their jurisdiction. I entirely agree with the judgment of my Lord that upon the main question, and the only question upon which it was suggested originally that the Electricity Commissioners were about to exceed their jurisdiction in that they were about to make an order under this section without the consent of the company, there is no ground for saying that section 49 ought to be read as if it indicated that the order could not be made without the consent of the company. Mr. Harker has quite frankly admitted that his contention involves reading at all events into the latter part of the section the words "provision may be made with the consent of the company." I see no ground whatever, especially in view of the comparison between section 48, subsection (4), and section 49, for putting that construction upon this section.

Then with regard to the remaining points which have been argued: first of all as to the question whether taking over the supply involves taking over the low-tension mains, it is now admitted that the Commissioners do not propose to make any order in excess of their jurisdiction in that respect.

With regard to the last contention as to the meaning of the words "supply given for use exclusively within the area," there appears to me to be no ground for saying, and there is no evidence, that the Commissioners are about to put any wrong construction upon this Act of Parliament; and, even if there were any indication that they were about to do that, it appears to me that it is well worthy of consideration whether the case to which I have called attention of *Denaby Main Colliery Company v. Manchester, Sheffield and Lincolnshire Railway Company* (3 Neville and Macnamara's Railway Cases, 426) is not an authority for the proposition that such an anticipated misconstruction of an Act of Parliament by such a body is not subject-matter for prohibition. I observe that that case does not appear to have been quoted in the Court of Appeal when the decision was given in the case of *Rex v. Electricity Commissioners* (*supra*). It is unnecessary to express any opinion upon the proper construction of those words in the last two lines of that section because, as I have said, there is at present no indication that the Commissioners are about to put any particular construction upon them. For these reasons I agree that the rule should be discharged.

Mr. Justice Salter.—I am of the same opinion, and I will give my reasons shortly because this motion raises questions of some general importance, inasmuch as it involves the construction of a section of an Act of Parliament which is in a form frequently employed.

The question is whether the Electricity Commissioners are threatening or intending to make an order in excess of their powers. They are proposing to consider the expediency of making an amendment to the Draft Special Order which would require and compel the Yorkshire Electric Power Company to submit to the taking over by the Silsden Urban District Council of the supply now given by the company within the area of the council. It is said, and it is the only point, that section 49, properly read, does not authorize any such order except by consent. The Yorkshire Electric Power Company are exempt by their private Acts from provisions of certain public Acts under which they would have been liable to be bought out by the district council, so far as the urban district is concerned, upon a mere notice after the lapse of a certain time; but having been thus exempted, they then come under the liability of section 48, subsection 4, the result of which is that, if an order were made (and a draft order has been made) authorizing the Urban District Council to supply energy within their district, the Yorkshire Electric Power Company might continue to supply their present customers; all other consumers in that district would be the customers and the exclusive customers of the local authority, and it may be—I am not sure whether it would be—that the present consumers of the Yorkshire Electric Power Company might transfer themselves to the local authority, or might take a supply from each; the Yorkshire Electric Power Company would have their supply mains in the streets and the local authority would have theirs, and it is obvious that a condition might arise which might not be thought to be in the public interest. That being so, there is the second part of section 49, which provided that a Special Order authorizing a local authority to supply in their district may contain provisions for the taking over of any supply then given by the company. If that be read as being a taking over by consent, it appears to me that it might well render futile the order empowering the local authority. Further, it is obvious that the first part of section 49 contemplates proceedings *in invitum*. It is, I think, exceedingly difficult to read the latter part as confined to cases of transfer by consent. Mr. Harker's reading would involve the writing in of the words "by consent" after the words "as to the taking over," and I can see no warrant for writing these words into that section. It is quite true that the words which we have to construe are apt and necessary in the case of an agreement to transfer. The Yorkshire Electric Power Company could not relieve themselves of their duties and liabilities under that Act except by an order, and if an agreement were made between them and the local authority to transfer the existing supply they would require to have such agreement recorded and sanctioned in the Special Order. To my mind it does not at all follow that because they cannot be relieved of their duties without an order, they cannot be relieved of their duties against their will.

With regard to the second point, as to the meaning of the words which qualify the word "supply" in the closing words of the section, it has already been pointed out—this point has not yet been submitted to the Commissioners—that there is nothing to show that they will read these words in any sense other than that in which Mr. Harker says they ought to be read.

For these reasons I think that the rule must be discharged on these grounds.

The Lord Chief Justice.—Perhaps it would be useful to add that we have not dealt with the question of low-tension mains, for the obvious reason that there is nothing to indicate that in that respect, or in any respect, there is any evidence on the part of the Commissioners of an intention to usurp jurisdiction; but perhaps with a view to the future it may be well to emphasize what was said in argument. Conceivably it might possibly hereafter be suggested that the Commissioners ought to include, or ought to have included, a transfer of the low-tension mains in their order. In view of that possibility (which is no more than a possibility) it may be well to mention and to record the fact that Mr. Rowand Harker expressly stated that he did not ask for that.

[Solicitors—The Treasury Solicitor; Messrs Sherwood and Co., for Messrs Wright and Wright, Keighley; Messrs. Vincent and Vincent, for Messrs. Barr, Nelson, and Co., Leeds.]

Court of Criminal Appeal.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1927. Oct. 17.

REX v. TEESDALE.*

Criminal Law—Vagrancy—Incorrigible rogue—Previous conviction—"Shall be deemed a rogue and vagabond"—Vagrancy Act, 1824 (5 Geo. IV., c. 83), ss. 4, 5.

It is not necessary in order that a person may be dealt with as an incorrigible rogue under s. 5 of the Vagrancy Act, 1824, on a second conviction for any of the offences named in s. 4 of that Act, that the previous conviction should use the actual words "rogue and vagabond," since the statute itself provides that a person convicted of any of those offences "shall be deemed a rogue and vagabond."

This was an appeal against sentence. The appellant, Thomas Teesdale, was convicted on January 7, 1925, at a court of summary jurisdiction at Lincoln, of exposing his person with intent to insult females, which was one of the offences named in section 4 of the Vagrancy Act, 1824. In the conviction as drawn up the words "rogue and vagabond" were not used, the offence being described as "Vagrancy—exposing person with intent to insult certain females in Boultham-lane."

On July 12, 1927, the appellant was again convicted before a court of summary jurisdiction at Lincoln of indecent exposure, and on the previous conviction being proved was committed to Quarter Sessions for sentence as an incorrigible rogue. He was there sentenced to 12 months' imprisonment, with hard labour. Leave was granted to appeal against sentence.

Mr. A. M. Lyons appeared for the appellant; Mr. Tinsley Lindley appeared for the Crown.

Mr. Lyons contended that Teesdale was wrongly convicted as an incorrigible rogue, and that therefore the sentence could not stand. Quarter Sessions had before it a certificate which, after reciting the conviction of the present offence, went on to certify that Teesdale on January 7, 1925, was convicted as a rogue and vagabond. That was inaccurate, for the conviction itself when referred to showed that he had only been convicted of indecent exposure, and the justices had not thought fit to add, as they might have done, an adjudication that he was a rogue and vagabond. Such a previous adjudication was an essential condition precedent to conviction as an incorrigible rogue.

The Lord Chief Justice.—But section 4 says that any person convicted of the offences named in that section "shall be deemed" a rogue and vagabond. Can you contend that a special adjudication using the very words "rogue and vagabond" is necessary? Dose it not automatically follow on conviction?

Mr. Lyons submitted that it did not, but that justices might refrain from adding the description "rogue and vagabond" to the conviction, if in their opinion the case was such that a second conviction ought not to carry with it the very serious consequences of being an incorrigible rogue. He referred to *Rex v. Evans* (31 *The Times* L.R., 410; [1915] 2 K.B., 762, at p. 765) and *Rex v. Johnson* (25 *The Times* L.R., 229; [1909] 1 K.B., 439, at p. 443).

The Lord Chief Justice.—This appellant, Thomas Teesdale, was convicted at a court of summary jurisdiction at Lincoln of being an incorrigible rogue within the meaning of section 5 of the Vagrancy Act, 1824, in that he did indecently expose his person with intent to insult a certain female, the appellant having previously been convicted as a rogue and vagabond under section 4 of the same Act. He was sent to Quarter Sessions and was sentenced by the Recorder to 12 months' imprisonment. His application for leave to appeal was heard on August 18, 1927, when his counsel apparently raised for the first time a point which was not taken below, with the result that on this appeal against sentence we are looking into the merits.

The point urged is that upon a true view of the materials before Quarter Sessions the conditions laid down by the statute were not fulfilled. It is necessary to see what those are. By section 4 of the Vagrancy Act, 1824, it is provided that any person who commits any of a large class of acts "shall be deemed a rogue and vagabond within the true intent and meaning of this Act." Section 5 provides: ". . . every person committing any offence against this Act which shall subject him or her to be dealt with as a rogue and vagabond, such person having been at some former time adjudged so to be and duly convicted thereof . . . shall be deemed an incorrigible rogue within the true intent and meaning of this Act; and it shall be lawful for any justice of the peace to commit such offender . . . to the house of correction, there to remain until the next general or quarter sessions of the Peace. . . ."

In other words, in order that a person may be committed to the house of correction, there to remain until the next general or quarter sessions, he must satisfy the condition that he has committed an offence under this Act, having previously committed an offence which brings him within the category of rogues and vagabonds.

Before Quarter Sessions there was a certificate: "Thomas Teesdale is this day convicted of being an incorrigible rogue"—it enters into particulars and then recites that on January 7, 1925, as was duly proved, the appellant was duly convicted of being a rogue and vagabond. It is not denied that if that certificate is correct, the conditions were complied with, but it is said that in respect of the earlier act there was not in so many words an adjudication that he was a rogue and vagabond, but merely that he was guilty of the offence of exposing his person.

In other words, it is said that he had committed an act which brought him within the category, but that the minute of conviction was insufficient because it did not go on to state what the statute said should be deemed—namely, that he was a rogue and vagabond—and it is said that that was an omission which could not be cured by the certificate before the Quarter Sessions. It is argued that there must be an adjudication in express terms that the person is a rogue and vagabond. Attention has been directed to two cases, *Rex v. Evans* (31 *The Times* L.R., 410; [1915] 2 K.B., 762) and *Rex v. Johnson* (25 *The Times* L.R., 229; [1909] 1 K.B., 439). With regard to both those authorities it is enough to say that they dealt with cases quite different from the present case, and the condition did not arise. Nor do I think it necessary to deal with the question which arose *obiter* in *Rex v. Evans* (*supra*) whether where a person has been twice convicted as a rogue and

* Reported by J. W. Hall, Esq., Barrister-at-Law.

vagabond he must necessarily be convicted of being an incorrigible rogue.

The question what is the true meaning of the words of section 5 may require consideration on some future day. But the position seems to be as to the second offence that no argument is open to the appellant that the first conviction was not a conviction as a rogue and vagabond, merely because the words "rogue and vagabond" do not in terms appear in the conviction setting forth particulars of an offence mentioned in section 4. In the opinion of the Court that argument fails, not only because the certificate was in proper form or because the point was not taken, but because the justices clearly treated the appellant in the earlier case as having committed an act of such a character that under the Act he was deemed to be a rogue and vagabond.

With regard to the sentence we see no ground for interference.

[Solicitors—Messrs. Nelson and Jackson, Lincoln; Mr. J. Baker Anderson, Lincoln.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1927. Oct. 14.

BIRMINGHAM CORPORATION v. MOTHER-GENERAL OF THE CONVENT OF THE SISTERS OF THE CHARITY OF ST. PAUL AND OTHERS.*

Private Street Works — Objection — Ratio of apportionment — No evidence by objectors— Birmingham Corporation (Consolidation) Act, 1883 (46 and 47 Vict., c. lxx.), ss. 46 to 50.

The Birmingham Corporation proposed to execute certain private street works under ss. 46 to 50 of the Birmingham Corporation (Consolidation) Act, 1883, which was substantially identical in these provisions with the Private Street Works Act, 1892. The Corporation duly complied with the formalities required and made a provisional apportionment on the respondents, being the frontagers on the street in question, according to their respective frontages. The respondents objected that the works were unnecessary. On the hearing of this objection the respondents called no evidence. The stipendiary magistrate held that some works were necessary, but was of opinion that the estimated expenses were too heavy. He reduced the estimate and ordered that one respondent should pay one-half and each other respondent two-thirds of the respective sums named in the provisional apportionment.

Held, that inasmuch as the Corporation had not resolved that the apportionment should be on any basis other than frontage, the stipendiary magistrate could not direct an apportionment on any other basis. Subject to that limitation, he must consider and determine, upon evidence, whether the proposed works were in any, and what, respect unnecessary, and must have regard to any alternative proposals (if the respondents made any and supported them by evidence) and to the cost thereof.

* Reported by J. W. Hall, Esq., Barrister-at-Law.

This was a case stated by the Stipendiary Magistrate for the City of Birmingham.

1.—The Lord Mayor, Aldermen and Citizens of the City of Birmingham (hereinafter called "the appellants") resolved in pursuance of the Birmingham Corporation (Consolidation) Act, 1883, to do certain private street works in a street known as Greenland-road, Selly Park, in the said city. All the requisite formalities were duly complied with and certain objections were duly lodged in writing by certain owners of premises shown in the provisional apportionment prepared by the appellants as liable to be charged with the expenses of executing the said works in such street. The appellants duly applied to the stipendiary magistrate to determine the matter of these objections, which were heard on the 8th day of March, 1927.

The material sections of the said Act were as follows:—

Sec. 46. "(1) Where any street (not being a highway repairable by the inhabitants at large or a street belonging to or repairable by a railway company) or the carriageway or footway or any other part of such street is not sewered levelled paved metalled macadamised flagged curbed channelled or made good or is not lighted to the satisfaction of the Corporation the Corporation may from time to time resolve with respect to such street or part to do any one or more of the following works (in this Act called private street works) that is to say to sewer level pave metal macadamise flag curb channel or make good or to provide proper means for lighting such street or part and the expenses incurred by the Corporation in executing private street works shall be apportioned (subject as in this Act mentioned) among the premises fronting adjoining or abutting on such street or part. Any such resolution may include several streets or parts of streets or may be limited to any part or parts of a street.

"(2) Provided always that with respect to any such street as shall be of a suburban character the words 'paved' and 'pave' shall with regard to the carriageway thereof be held to mean unless otherwise agreed a covering of broken stone commonly called macadamising and with regard to the footways of such streets the words 'flagged' and 'flag' shall be held to mean unless otherwise agreed a covering of gravel or tar and limestone.

"(3) The surveyor shall prepare as respects each street or part of a street: (*a*) A specification of the private street works referred to in the resolution with plans and sections (if applicable); (*b*) an estimate of the probable expenses of the works; (*c*) a provisional apportionment of the estimated expenses among the premises liable to be charged therewith under this Act.

"(4) Such specifications plans and sections estimates and provisional apportionments shall comprise the particulars prescribed in the first part of the first schedule to this Act and shall be submitted to the Corporation who may by resolution approve the same respectively with or without modification or addition as they think fit.

"(5) The resolution approving the specifications plans and sections (if any) estimates and provisional apportionments shall be published in the manner prescribed in the second part of the first schedule to this Act and copies thereof shall be served on the owners of the premises shown as liable to be charged in the provisional apportionment. During one month from the date of the first publication the approved specifications plans and sections (if any) estimates and provisional apportionments (or copies thereof certified

by the surveyor) shall be kept deposited at the Council House and shall be open to inspection at all reasonable times.

Sec. 47. "During the said month not fewer than one-third in number of the owners of any premises shown in a provisional apportionment as liable to be charged with the expenses of executing the works or the owners or owner of any premises shown in a provisional apportionment as liable to be charged with one-third or upwards of such expenses may by written notice served on the Corporation object to the proposals of the Corporation on any of the following grounds (that is to say) :—

"(*a*) That an alleged street or part is not or does not form part of a street within the meaning of this Act; (*b*) That a street or part is (in whole or in part) a highway repairable by the inhabitants at large; (*c*) That there has been some material informality defect or error in or in respect of the resolution notice plans sections or estimate; (*d*) That the proposed works are unnecessary insufficient or unreasonable or that the estimated expenses are excessive; (*e*) That any premises ought to be excluded from or inserted in the provisional apportionment; (*f*) That the provisional apportionment is incorrect in respect of some matter of fact . . . ."

Sec. 48. "(1) The Corporation at any time after the expiration of the said month may apply to a court of summary jurisdiction to appoint a time for determining the matter of all objections made as in this Act mentioned and shall publish a notice of the time and place appointed and at such time and place any such court may proceed to hear and determine the matter of all such objections in the same manner as nearly as may be and with the same powers and subject to the same provisions with respect to stating a case as if the Corporation were proceeding summarily against the objectors to enforce payment of a sum of money summarily recoverable. The court may quash in whole or in part or may amend the resolution plans sections estimates and provisional apportionments or any of them on the application either of any objector or of the Corporation. The Court may also if it thinks fit adjourn the hearing and direct any further notices to be given.

"(2) No objection which could be made under this Act shall be otherwise made or allowed in any court proceeding or manner whatsoever. . . .

"(4) Provided that so long as there is a stipendiary magistrate for the borough he shall be the court of summary jurisdiction for the purposes of this section.

Sec. 49. "(1) The Corporation may include in any works to be done under this Act with respect to any street or part of a street not being a highway repairable by the inhabitants at large any works which may be reasonably necessary for bringing such street as regards sewerage drainage level or other matters into conformity with any adjoining street (whether repairable or not by the inhabitants at large). . . .

Sec. 50. "(1) In a provisional apportionment of expenses of private street works the apportionment of expenses against the premises fronting adjoining or abutting on the street or part in respect of which the expenses are to be incurred shall unless the Corporation otherwise resolve be apportioned according to the frontage of the respective premises but the Corporation may if they think just resolve that in settling the apportionment regard shall be had to the following considerations (that is to say) :—

"(*a*) The greater or less degree of benefit to be derived by any premises from such works; (*b*) The amount and value of any work already done by the owners or occupiers of any such premises."

The Birmingham Corporation Act, 1924, provided :—

Sec. 28. "(1) In sections 46 to 62 (relating to private street works) of the Act of 1883 the words 'paved' 'metalled' and 'flagged' shall be construed as including macadamised asphalted gravelled or made good by any other method and the words 'pave' 'metal' and 'flag' shall have a corresponding meaning.

"(2) The words 'macadamised' and 'macadamise' in section 46 of the Act of 1883 and sub-section (2) of that section are hereby repealed."

The Public Health Act, 1925, provided :—

Sec. 81. "Any local authority, by whom notices requiring the execution of works have been served under section 150 of the Public Health Act, 1875, or any provision relating to street works in a local Act, may, if they think fit, at any time resolve to contribute the whole or a portion of the expenses of the works."

2.—On the hearing of the said objections it was proved :—

(*a*) That a certain street known as Greenland-road, Selly Park, in the said city, was an unadopted highway not repairable by the inhabitants at large;

(*b*) That the appellants by resolution dated the 10th day of April, 1924, resolved to do certain private street works in respect of the said street;

(*c*) That a specification of the private street works referred to in the said resolution, an estimate of the probable expenses of the works and a provisional apportionment of the estimated expenses among the premises liable to be charged therewith under this Act were duly prepared and submitted to the appellants and approved by them by resolution dated the 25th day of February, 1926;

(*d*) That the said resolution of the 25th day of February, 1926, was duly published in the manner prescribed by the said Act and that copies thereof were duly served upon the owners, including the respondents, of the premises shown as liable to be charged in the provisional apportionment and that during one month from the date of the first publication thereof the approved specification, plans, estimates, and provisional apportionments were kept deposited at the Council House in the said city and open to inspection at all reasonable times;

(*e*) That objections had been lodged by all the respondents in accordance with this Act on the ground that the proposed work was unnecessary;

(*f*) That the lowest estimated cost of putting the said street into such a state of repair as would enable the appellants to adopt the street thereafter was £5,441, which was apportioned among the 18 owners of the land fronting adjoining or abutting on the said street;

(*g*) That such apportionment, made according to frontage, varied as between the said owners from the sum of £2,709 9s. 3d. in respect of the land owned by the Mother-General of the Convent, the back of which adjoined the said street, to £97 11s. 4d. in respect of the owner of one of the houses fronting the street;

(*h*) That the land fronting on and adjoining the said street consisted of certain fields belonging to a convent, 13 houses and gardens, some allotment land, and an ornamental garden;

(*i*) That the said street was in a very bad state of repair and not fit for the use to which it was subjected.

3.—On behalf of the respondents it was contended :—

(*a*) That the proposed works were unnecessary as

the said street was mainly used by the owners of the houses which fronted the street and tradesmen supplying the said houses ;

(*b*) That the rural nature of the said street would be destroyed if the proposed works were carried out according to the specification ;

(*c*) That the estimate of expenditure was excessive in order to put the said street into such a good state of repair as would meet the requirements to which the street was put ;

(*d*) That such expenditure would impose a very great hardship upon the owners of the land to be charged therewith ;

(*e*) That the respondents did not want the said street taken over or adopted by the appellants and they, the respondents, were prepared to maintain the street in good repair themselves ;

(*f*) And it was further contended on behalf of the Mother-General of the Convent of the Sisters of Charity of St. Paul that the said street was not and would not be used by the convent or the occupiers thereof as the only part of the convent property which fronted on to the said street consisted of certain fields, and the buildings and entrance to the said convent fronted on to another street at a considerable distance from the said Greenland-road.

4.—The stipendiary magistrate found as a fact that the said street was in a bad state of repair and that some street works were necessary but he was of opinion that the estimated expenses were excessive in order to put the said street into a state of repair sufficient to meet the ordinary requirements of such street and imposed too heavy a burden upon the respective owners of the land fronting and adjoining the said street. He therefore reduced the estimate and made an order upon the Mother-General of the Convent to pay half the sum mentioned in the provisional apportionment against her and upon the other owners two-thirds of the sums mentioned against their respective names in the said provisional apportionment.

5.—The question upon which the opinion of the Court was desired was whether or not, upon the above statement of facts, the stipendiary magistrate came to a correct decision upon the law.

Mr. Montgomery, K.C., and Mr. A. P. Marshall appeared for the appellants ; Mr. D. L. Finnemore for the respondent, the Mother-General of the Convent.

The Lord Chief Justice.—It is quite clear that this case must be remitted to the learned stipendiary magistrate for further consideration. Upon the objection taken that the proposed work was unnecessary and in the absence of a resolution by the Corporation to the effect that in settling the apportionment regard should be had to considerations of benefit or work already done, he has revised the apportionment of expense with reference to the benefit and what he conceives to be the suitable burden of the different frontagers ; he has reduced the estimate and made an order upon the Mother-General of the Convent to pay half the sum mentioned in the provisional apportionment against her name, and upon the other owners to pay two-thirds of the amounts mentioned against their respective names in the said provisional apportionment.

Now, whatever else may permit some discussion, one thing is clear, that, in the absence of the appropriate resolution on the part of the Corporation, that mode of apportionment was not open. In the absence of the resolution of the Corporation to a contrary effect, the provisions of the Statute in section 46, subsection (1), are imperative—namely : "The expenses incurred by the Corporation in executing private street works shall be apportioned . . . among the premises fronting, adjoining, or abutting on such street or part" ; and unless there is a resolution to the contrary the apportionment of expenses (section 50, subsection (1)) is to be according to the frontage of the respective premises.

So far, therefore, as the task of apportionment, if it arises, is concerned, the ratio which is to be applied is clear. For the rest, the objection here was, and the only objection, that the proposed work was unnecessary. We are told from the Bar that no evidence at all was offered to the learned stipendiary for the purpose of showing in what sense or in what particular respects the proposed work was unnecessary. The case finds as a fact that the street was in a very bad state of repair and not fit for the use to which it was subjected. When one looks at other expressions there is at any rate a verbal contrast—it is impossible to say whether it is intended to be a real contrast—between a state of repair sufficient to meet the ordinary requirements of the street on the one hand, and on the other hand a state of repair which would enable the appellants to adopt the street thereafter. One does not know, but it is of course open to the learned stipendiary upon evidence to find that the proposed works were in this, that, or the other respect unnecessary ; and it is of course open to him to quash the resolution as a whole or to amend it ; and upon evidence he may quash or may amend the plans, sections, estimates and (subject always to the fundamental rule about frontage) the provisional apportionments.

It seems clear, therefore, that the case ought to go back to the learned magistrate in order that, bearing in mind that the measure of apportionment is fixed by the statute, he may address his mind again to the question whether, and, if so, to what extent and in what respect, these works are unnecessary ; and that of course is a problem to be decided, not by inspiration but upon evidence.

Mr. Justice Avory.—I agree.

Mr. Justice Salter.—I agree.

[Solicitors—Messrs. Sharpe, Pritchard and Co. for the Town Clerk, Birmingham ; Messrs. Stephen Gateley and Sons, Birmingham.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1927. Oct. 14.

BELL AND ANOTHER v. HARKER.*

Insurance (Industrial) — Transfer — Holder of several policies in both old and new societies—Transfer of one policy only — Industrial Assurance Act, 1923 (13 and 14 Geo. V., c. 8), ss. 26 (1), 39.

The provisions of s. 26 (1) of the Industrial Assurance Act, 1923, with reference to the transfer of members of, or persons assured with, a collecting society or an industrial assurance society, apply whether the transaction involves transfer of the whole membership or interest of the assured, or of only one policy out of several, and whether the transferee is or is not already a member of, or a person assured with, the new society.

* Reported by J. W. Hall, Esq., Barrister-at-Law.

Pearl Life Assurance Company, Limited v. Scottish Legal Life Assurance Society, Limited (17 *The Times* L.R., 238 ; [1901] 1 K.B., 528) and *Salvation Army Life Assurance Society, Limited v. British Legal Life Assurance Company, Limited* (45 Sc.L.R., 843) applied.

This was a case stated by Stockport justices.

At a Court of summary jurisdiction sitting at Stockport an information was preferred by Harold Parkinson Harker (hereinafter called "the respondent") under the Industrial Assurance Act, 1923, against Ethelbert Bell and T. Heaword (hereinafter called "the appellants"), for that they were guilty of an offence under section 39 of the Industrial Assurance Act, 1923, in that they were unlawfully concerned in the transfer of Annie Parkinson, a member of the British Empire Collecting Society, a collecting society carrying on industrial assurance business, so that she became assured with the Royal London Mutual Insurance Society, Limited, an industrial assurance company, without the written consent of the said Annie Parkinson in the form prescribed by section 26 of the said Act and the regulations made thereunder. The following were the particulars :—Mrs. Annie Parkinson lived at 19, Stanhope-street, Stockport. The policies concerned in the charge were policies in the British Empire Collecting Society and the Royal London Mutual Insurance Company, Limited, respectively, assuring the life of John Parkinson for a premium of 3d. a week.

The information was heard on March 15, 1927, and the justices convicted the appellants and fined each of them 10s. and ordered them to pay the witnesses' expenses and £5 5s. special costs.

Upon the hearing of the said information one witness only was called—namely, Annie Parkinson, the wife of Christopher Parkinson, of 19, Stanhope-street, Stockport, who attended on Crown Office subpœna. The documents produced or referred to at the hearing were admitted by the appellants' solicitor without formal proof and were annexed to the case. The following facts were proved or admitted :—

(1) Before and on April 26, 1926, Annie Parkinson held policies in the British Empire Collecting Society, including a policy No. 15818 on the life of her son John, in respect of which the sum of £9 9s. was payable on her said son's attaining the age of 16 years, the premium being 3d. per week. The said policy was taken out on April 29, 1918. The premiums on the said policy were collected by Mrs. Bell, the wife of the appellant Ethelbert Bell, who had not himself collected any premiums.

(2) The last premium paid in respect of the said policy was paid on April 19, 1926. Some weeks elapsed before the said Annie Parkinson received from the British Empire Collecting Society a lapse notice. The said policy lapsed on June 10, 1926, on 28 days' notice.

(3) The said Annie Parkinson stopped paying the premiums on the British Empire Collecting Society's policies because she was dissatisfied with them through having seen a report derogatory of the British Empire Collecting Society in a newspaper.

(4) On February 22, 1915, the said Annie Parkinson had taken out a policy on the life of her said son John in the Royal London Mutual Insurance Society, Limited, which was in force on April 26, 1926.

(5) The said Annie Parkinson on August 11, 1913, had taken out two other policies in the same company on the lives of herself and of a William Bywater respectively, which, with a large number of other policies subsequently taken out by her in the same company, were on April 26, 1926, in force.

(6) The appellant Ethelbert Bell called on the said Annie Parkinson shortly before April 26, 1926, and asked her if she would give him some new business as he was taking a book of the Royal London Mutual Insurance Society, Limited, and he asked if he might bring the superintendent of that company to talk the matter over with her husband.

(7) On April 26, 1926, both the appellants called, and the appellant Heaword told the said Annie Parkinson that the policies in the British Empire Collecting Society could not be transferred. Of this Annie Parkinson said that she was aware, and she said that she had decided to give him new business. The said Annie Parkinson thereupon signed a proposal form assuring her son John in the Royal London Mutual Insurance Society, Limited. She also signed a number of other proposal forms of the same company. The proposal form for assuring her son John in the Royal London Mutual Insurance Society, Limited, was filled up by one or other of the appellants, the particulars being supplied by the said Annie Parkinson. The policy assuring her son John in the British Empire Collecting Society was not then produced and was not at any time handed to the appellants or to either of them. The said Annie Parkinson could not say why no answer was given to question 14 in the proposal forms, which was as follows :—"Do you, or does any other person to your knowledge, hold a policy on this life issued by any other office ? If so, give particulars hereunder. If none, state 'Nil.'" The said Annie Parkinson did not pay the premiums on the new policies in the Royal London Mutual Insurance Society, Limited, on that day, but she did so later in the same week.

(8) The new policy was for the sum of £6 15s., payable at the expiration of 10 years if her said son John should then be living. The premium was 3d. per week.

(9) The said Annie Parkinson could not remember whether she signed any other proposal forms, nor could she say whether she signed a form similar to the form then shown to her. The form then shown to the said Annie Parkinson was a print of the Industrial Assurance (Individual Transfer) Regulations, 1923, dated December 11, 1923 (No. 1495 of 1923 Statutory Rules and Orders), containing the prescribed form of consent under section 26 of the Industrial Assurance Act, 1923.

A preliminary objection was taken by the appellants' solicitor that under section 11 of the Summary Jurisdiction Act, 1848, the information should have been laid within six calendar months from the time when the matter of complaint arose—namely, within six months after April 26, 1926, and that subsection (5) of section 39 of the Industrial Assurance Act, 1923, under which proceedings for offences under that Act could be commenced at any time within a year applied only to collecting societies and not to industrial insurance companies. The justices in overruling the objection ordered a note thereof to be made.

The appellants' solicitor submitted that there was no case to answer, and he did not call any evidence. He contended :—

(*a*) That section 26 (1) of the Industrial Assurance Act, 1923, under which the information was laid had no application to the present case, inasmuch as Annie Parkinson and her son John were at the date of the alleged offence and had for many years prior thereto, and prior to the issue of the policy in the British Empire Collecting Society, been members of and

insured with the Royal London Mutual Insurance Society, Limited, with which the new policy was effected, and that there was no transfer of a member of the British Empire Collecting Society, and the policy therein lapsed in consequence of the said Annie Parkinson's ceasing to pay the premiums payable in respect thereof. The appellants' solicitor further contended that there was no transfer of agency, the appellant Bell not having been proved to have collected any premiums from the said Annie Parkinson in respect of the policy issued by the British Empire Collecting Society on the life of her son John on April 29, 1918.

(*b*) That section 26 (1) of the Act did not apply to the transfer of a policy only, and in any event there was no evidence of such transfer.

The respondent's solicitor referred to *Pearl Life Assurance Company, Limited v. Scottish Legal Life Assurance Society, Limited* (17 *The Times* L.R., 238 ; [1901] 1 K.B., 528), and contended that the decision in that case disposed of the appellants' contention, and that there was a transfer of a person assured with one company to another company within the meaning of the section.

The justices, being of opinion that there had been a transfer of a person assured with one company to another company without the written consent of the assured and that the appellants were officers of the company to which the assured person had been transferred and were concerned in such transfer, convicted the appellants and fined each of them 10s., and ordered them to pay the witnesses' expenses and £5 5s. special costs.

The question upon which the opinion of the Court was desired was whether, upon the above statement of facts, the justices came to a correct determination and decision in point of law.

Mr. J. B. Matthews, K.C., and Mr. A. F. Engelbach appeared for the appellants ; Mr. H. M. Giveen for the respondent.

The Lord Chief Justice.—This is a case stated by justices for the county borough of Stockport. The question arises out of an information preferred by the present respondent against the present appellants under the Industrial Assurance Act of 1923. The complaint was that the appellants were guilty of an offence under section 39 of that statute in that they were unlawfully concerned in the transfer of Annie Parkinson, a member of the British Empire Collecting Society, a collecting society carrying on industrial assurance business, so that she became assured with the Royal London Mutual Insurance Society, Limited, an industrial insurance company, without the written consent of the said Annie Parkinson in the form prescribed by section 26 of the Act and the regulations made under it. In the result the justices convicted the appellants and imposed a small fine upon each of them, and ordered them to pay certain expenses and special costs. It is against that conviction that the appellants now appeal by a case stated, and the question for this Court is whether upon the facts the justices came to a correct determination and decision in point of law.

It is not necessary, I think, to repeat all the facts, which are carefully set out in this well-stated case ; it is enough to refer to some of them. One witness only was called, Mrs. Annie Parkinson herself, and she attended upon a Crown Office subpœna, and with the help of documents her evidence proved the following facts :—Before April 26, 1926—the importance of that date, as afterwards appears, being that a certain interview then took place—Annie Parkinson held policies (in the plural) in the British Empire Collecting Society, including a particular policy numbered 15,818, on the life of her son John, and that policy was for a sum of nine guineas, which was to be payable when the son attained the age of 16 years. The premium was 3d. a week. The policy had been taken out on April 29, 1918, and the premiums on that policy were collected by Mrs. Bell, the wife of the present appellant, Mr. Ethelbert Bell. Mrs. Parkinson paid the premium in respect of that policy for the last time on April 19, 1926. Some time after April 26, 1926, she received from the British Empire Collecting Society what is called a lapse notice. The effect of that notice was that the policy was to lapse on 28 days' notice, and it in fact lapsed on June 10, 1926. Mrs. Parkinson ceased to pay the premiums on the British Empire Collecting Society's policies because, as the case says, she was dissatisfied with those policies in consequence of something that she had read in a newspaper. But long previously, and in fact in the year 1915 the same Mrs. Parkinson had taken out a policy on the life of her son John in another insurance society, the Royal London Mutual Insurance Society, and that policy also was in force on April 26, 1926. More than that, in the Royal London Mutual Insurance Society Mrs. Parkinson had years before taken out two other policies on the lives of herself and one William Bywater, and indeed there was also a considerable number of other policies in the Royal Mutual Insurance Society which were in force on April 26, 1926, and had been taken out by Mrs. Parkinson. The effect, therefore, was that upon this important date Mrs. Parkinson had some policies in the British Empire Collecting Society, and some policies in the Royal London Mutual Insurance Society, and in the one society, as in the other, in the case of certain policies the person assured was her son John.

Before April 26, 1926, there had been a conversation between the appellant Bell and Mrs. Parkinson, and Bell had asked her for some new business as he was taking a book of the Royal London Mutual Insurance Society, and he asked if he might bring the superintendent of that society to talk the matter over with her husband. Accordingly on April 26, 1926, both the appellants called, that is to say, Bell himself and a man named Heaword. Heaword told Mrs. Parkinson that the policies in the British Empire Collecting Society could not be transferred, and Mrs. Parkinson said that she was aware of that, but added that she had decided to give him new business. Thereupon she signed a proposal form assuring the same boy, John, in the Royal London Mutual Insurance Society, Limited. She signed also a number of other proposal forms in the same company. The policy whereby her son John was assured in the British Empire Collecting Society was not then produced, nor was it at any time handed to the appellants or either of them. Mrs. Parkinson did not find herself able to answer the question why there was no answer in the proposal form to this question : "Do you, or does any other person to your knowledge, hold a policy on this life issued by any other office ? If so, give particulars hereunder. If none, state 'Nil.'" There was no answer to that question. Mrs. Parkinson did not pay the premiums upon the new policies in the Royal London Mutual Insurance Society on April 26, 1926, but she did pay them later in the same week. The new policy, so far as her son John was concerned, was for a sum of £6 15s. payable at the expiration of ten years if her son was then living, and the premium was 3d. a week.

Those being the material facts, the justices had to

decide whether it was proved that an offence had been committed, and that task was the quite usual task of ascertaining the real and true nature of the transaction as distinguished perhaps from its superficial form. What is the offence which is referred to? By section 39, subsection 3, of the Act of 1923, it is provided: "If any collector of a collecting society or industrial assurance company, or any other person, contravenes or fails to comply with any of the provisions of this Act affecting such collector or other person, he shall be guilty of an offence under this Act and liable on summary conviction," to a certain penalty. The section under which the offence here was said to have been committed is section 26, and that section is concerned with what are called transfers from one society or company to another. Subsection 1 provides as follows:—"A member of or person assured with a collecting society or industrial assurance company shall not," except in cases which for the present purposes are not material, "be transferred from the society or company in which he was so assured so as to become or be made a member of or be assured with any other such society or company without his written consent, or, in the case of an infant, without the like consent of his parent or other guardian, and any society or company and any collector or other officer of any society or company concerned in such a transfer shall, if the provisions of this section are not complied with, be deemed to have contravened the provisions of this Act." That first subsection having made obligatory a consent in writing, the second subsection proceeds to deal with that consent. That consent is to be in the prescribed form; it is to have annexed to it a document in the prescribed form to be furnished by the society or company to which the transfer is to be made, setting out the terms of and rights under the existing policy, and the terms of and rights under the policy to which the assured will become entitled on transfer, and the consideration, if any, which has been or is to be paid for the transfer, and the person to whom such consideration has been or will be paid. Then subsection 3 goes on to provide: "The society or company to which the assured is sought to be transferred shall furnish to the person by whom such consent as aforesaid is signed a copy of such consent and of the document annexed thereto, and shall, within seven days from the date when such consent is signed, give to the society or company from which the assured is sought to be transferred notice of the proposed transfer containing full particulars of the name and address of the assured and the number of his policy, together with such consent as aforesaid, and the document annexed thereto, and then follow consequential provisions in subsection 4. This section, therefore, is obviously dealing with insurance companies or collecting societies of this particular kind, and it is dealing with what it calls transfers from one society or company to another. It is to be observed that the section begins by drawing a distinction between two sets of cases. The transfer may be a transfer of a member of one society to another society, but it may be a transfer of a person assured with one society to another society, or, in other words, it may be a partial transfer or it may be a complete transfer. It may be a change of membership or it may be the substitution, in effect, of one policy for another, and where such transfers or substitutions or changes are to be made the Act provides that they shall be made subject only to certain exceedingly strict conditions.

The reason for such legislation is quite obvious. Several of the various reasons for it were referred to in the Scotch case of *Salvation Army Life Assurance Society, Limited v. British Legal Life Assurance Company, Limited* (45 Sc.L.R., 843). In that case, at page 846, Lord Stormonth Darling referred to at least three mischiefs which the similar Act of that time had in view, and at page 847 Lord Low said:—"I imagine that the main object of that enactment is to protect persons insured against the solicitations of collecting agents of such societies or companies. I suppose that such agents are paid by results, and that therefore the interest of each agent is to obtain as much business as possible for the society or company which he represents." The Lord Justice-Clerk, in his judgment, at page 848, referred specifically to another obvious mischief. He said that one evil against which the small insurer in industrial insurance organizations had to be protected was that the companies, or societies, had to be restrained from cutting off the insured from the benefit of the insurance, and so holding past premiums, while getting rid of their obligation.

In this case in the Court below two points were taken. It was urged, first of all, that section 26, subsection 1, of the Act of 1923 did not apply, for the reason that Annie Parkinson and her son John were, on April 26, 1926, and had for some time, been members of, and insured with, the new society, the Royal London Mutual Insurance Society, and that, therefore, there was no transfer. Secondly, it was urged that the section did not apply to the transfer of a policy only, as distinguished from the transfer of a member. Those were the arguments, and the only arguments, adduced below. It has been attempted, in accordance with the common practice, to raise another point in this Court—namely, the point that in the information Mrs. Parkinson is spoken of as a member of the British Empire Collecting Society, whereas in fact she was not a member, but the case finds again and again that she was a member and held policies in the society; and no such point is open to the appellants on this case as it is stated.

With regard to the two contentions that were raised in the Court below it seems to me that they are clearly disposed of by the combined effect of two cases which have already been decided. One is the case of *Pearl Life Assurance Company, Limited v. Scottish Legal Life Assurance Society, Limited* (17 *The Times* L.R., 238; [1901] 1 K.B., 528), where, upon facts not quite the same as these, but to some extent the same, Mr. Justice Wills said, at page 530:—"The Act of Parliament is not very artificially drawn. Probably the language used is understood by the class of persons who are most concerned with dealings under the Act; but, however this may be, it is clear that the language used in the Act is popular rather than artificial. One knows that frauds are frequently perpetrated in transactions of this kind, and section 4"—that is to say, section 4 of the corresponding Act of the year 1896—"is intended to check the proceedings of the people who carry out these frauds. The first check is imposed by subsection 1: in order that there may be evidence of a transfer, the written consent of the person to be transferred is required." Mr. Justice Phillimore, in giving judgment to the same effect, said that the clause was strange, and strangely worded. But in that case it was argued, and it was argued with success, that notwithstanding that the old policy overlapped the new one so that the two policies were, for a brief period, co-existent, nevertheless that which had taken place was a transfer.

That case was followed, and, indeed, supplemented by, the Scottish case already referred to where, as in the present case, the member had, if I may use the expression, his foot in both camps. There were in-

surances in both societies. In that case Lord Stormonth Darling used these words at page 847 :—"It is always desirable that in the construction of an Imperial statute the Courts of the two countries should speak with the same voice, though a Scottish Court may not, strictly speaking, be bound by the decision of an English one. Now, the only case in which this statute has been construed in England is that of *Pearl Life Assurance Company, Limited v. Scottish Legal Life Assurance Society, Limited* (*supra*). There an Alderman of the City of London had held that there was no transfer, or seeking to transfer, where two insurances had been shown to co-exist. But a Divisional Court, consisting of Mr. Justice Wills and Mr. Justice Phillimore, reversed his decision, holding that there was a seeking to transfer in the sense of the Act." Also in the Scottish case, as Lord Stormonth Darling pointed out, there was a co-existence for a short time of two insurances substantially securing the same benefits in return for the same contributions, although the persons concerned in the transactions may not have known or intended it.

It seems to me that the effect of these two cases is to cover the present case. Indeed, apart altogether from any such decision, when one looks at the words of this Act—whether they be truly described as "strange" or as "popular"—bearing in mind the notorious mischiefs which this Act was intended to meet, I think that the distinction which is drawn at the outset between a member on the one hand, and a person assured with one of these insurance societies on the other hand, makes it plain that the transfer is complete, whether it be a transfer of a member as such, or whether it be a transfer of a particular policy, and it matters not that before the transaction has taken place the member is a member of both the societies in question, or has policies in both the societies in question. What is being dealt with is the individual transaction, whether it affects the member as a whole, or whether it is limited to a particular policy. The Act provides that the individual transaction, whether it be called a transfer, or a substitution, or a change, shall be carried out in so formal a manner, subject to necessary notices, as to prevent the kind of evil which that Act was brought into existence to meet. I cannot see any reason whatever for the contention that the mischief does not arise, and that the Act does not apply, where that which is transferred is not the whole, but a part of the whole, not all the policies, but some of them, or one of them, not the member *qua* member, but the policy *qua* policy. If that were the true interpretation of this statute it seems to me that it would easily be rendered nugatory. Indeed, the argument had to go to the length of saying that the Act would not apply if a person having 27 policies transferred only 26, retaining the 27th so as not to cease to be a member of the old society. That, with great respect to the argument, seems to me to be ludicrous, and I cannot find any support in the vocabulary of this statute for the view that that is what the Legislature intended. I therefore think that this appeal fails, and ought to be dismissed.

Mr. Justice Avory.—I am of the same opinion. For the purpose of my judgment I assume that Mrs. Parkinson was a member of, and a person assured with, the British Empire Collecting Society. Then the only question which really remains is whether there was a transfer within the meaning of section 26 of the Industrial Assurance Act of 1923, or whether there was evidence upon which the justices could find that there was a transfer. Having regard to the two authorities to which my Lord has referred I have come to the conclusion that there was evidence upon which the justices could find that the circumstances of this case constituted a transfer within the meaning of that section. Therefore I agree that the appeal should be dismissed.

Mr. Justice Salter.—I agree.

[Solicitors—Messrs. Wilberforce, Allen and Bryant; the Treasury Solicitor.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1927.
Oct. 25.

HIVES v. DAWSON.*

County Court—Appeal—Review of taxation—Claim less than £20—County Courts Act, 1888 (51 and 52 Vict., c. 43), s. 120.

There is no appeal without leave from a county court Judge's refusal to review a taxation of costs where the amount claimed is less than £20.

This was a motion to strike out an appeal from a county court. The plaintiff was a solicitor and recovered judgment in the county court on a bill of costs for less than £20. The Judge ordered the bill to be taxed, and refused leave to appeal. The bill was taxed at an amount less than £20, and the defendant asked for a review of taxation. This was refused by the Judge, who again refused leave to appeal. The defendant, notwithstanding the Judge's refusal of leave, entered an appeal to the Divisional Court.

Mr. E. G. Woodward appeared for the plaintiff; the defendant appeared in person.

The Lord Chief Justice.—This is a motion to strike out an appeal, upon the ground that no appeal lies. The purpose of the appeal is to obtain a review of taxation of certain items in a bill of costs, the total of which was considerably below £20. The contention of Mr. Dawson was that taxation stood on a peculiar footing. Mr. Dawson has argued with no little ability, but I am satisfied that his contention cannot be sustained. Section 120 of the County Courts Act, 1888, is as follows : "If any party in any action or matter shall be dissatisfied with the determination or direction of the Judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision or order of the Judge may appeal from the same to the High Court in such manner and subject to such conditions as may be for the time being provided by the rules of the Supreme Court regulating the procedure on appeals from inferior courts to the High Court : Provided always that there shall be no appeal in any action of contract or tort, other than an action of ejectment or an action in which the title to any corporeal or incorporeal hereditament shall have come in question, where the debt or damage claimed does not exceed twenty pounds . . . unless the Judge shall think it reasonable and proper that such appeal should be allowed, and shall grant leave to appeal. . . ."

Here the action was an action of contract and the money claimed was a sum less than £20. There was at one time a doubt whether an appeal lay in an

* Reported by J. W. Hall, Esq., Barrister-at-Law.

interlocutory matter. Where the sum claimed exceeds £20, any such doubt has long been laid to rest by such cases as *Ward v. Sneiman* (41 *The Times* L.R., 598); *Wilson v. Statham* (7 *The Times* L.R., 450; [1891] 2 Q.B., 261); and *Gilson and Sons v. Kilner* (69 L.T., 310). But it was suggested by Mr. Dawson that in the particular kind of interlocutory matter consisting of taxation there is an appeal without leave no matter what the amount claimed. For that proposition there is no authority whatsoever. The authorities show that if the amount is sufficient or if leave is given there is an appeal notwithstanding that the matter is interlocutory: they do not show that there is an appeal in case of a review of taxation where the amount is insufficient and where leave is refused. The motion, therefore, succeeds and the appeal will be struck out.

MR. JUSTICE AVORY.—I agree, and I have nothing to add.

MR. JUSTICE SALTER.—I agree. The section refers to "any action or matter," and therefore applies to any interlocutory matter in an action of contract.

[Solicitor—Mr. J. Wilmer Hives.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1927. Oct. 21.

OSBORNE v. MARTIN.*

Education — School — Attendance — Withdrawal of child for one hour weekly—Music lesson—"Under efficient instruction in some other manner"—Education Act, 1870 (33 and 34 Vict., c. 75), s. 74—Education Act, 1921 (11 and 12 Geo. V., c. 51), s. 49—Surrey County Council By-laws, No. 2.

By by-law No. 2 of the by-laws made by the Education Committee of the Surrey County Council under s. 74 of the Education Act, 1870, as amended by the Education Acts, 1876 to 1902 (which is now replaced by sec. 49 of the Education Act, 1921), "The parent of every child of not less than five nor more than 14 years of age shall cause such child to attend school, unless there be a reasonable excuse for non-attendance. Any of the following reasons shall be a reasonable excuse, namely: (*a*) that the child is under efficient instruction in some other manner. . . ."

Held, that these words mean that the child is receiving the whole of its instruction in some other manner, and do not entitle a parent to withdraw a child for one hour a week for the purpose of attending private lessons in a subject not approved by the Board of Education for elementary schools.

This was a case stated by Surrey Justices.

1. The respondent was summoned to answer an information and complaint preferred by the appellant that on March 24, 1927, he, being the parent of a certain child called Hilda Martin, then residing with him at Merle Common, Oxted, in the Petty Sessional Division of Godstone, being not less than five nor more than 14 years of age, did unlawfully omit and neglect to cause the said child to attend school as required by the by-laws of the Surrey County Council made and confirmed in pursuance of the Education Acts, 1870 to 1921, there being no reasonable excuse for such non-attendance.

2. On April 4, 1927, the justices dismissed the information.

3. The following facts were proved or admitted:—

(*a*) The appellant was an officer of the School Attendance Sub-committee, for the Petty Sessional Division of Godstone, of the Surrey Education Committee. The respondent was the parent of the said Hilda Martin (hereinafter referred to as "the child"), who lived with him at The Forge, Merle Common, Oxted, Surrey, and was at the material date 12 years of age, having been born on Nov. 28, 1914.

(*b*) On September 22, 1903, the said Surrey Education Committee made by-laws under sec. 74 of the Education Act, 1870, as amended by the Education Acts, 1876 to 1902, for an area including (*inter alia*) the Petty Sessional Division of Godstone. The said by-laws were sanctioned by the Board of Education on December 8, 1903.

No. 2 of the said by-laws was as follows: "The parent of every child of not less than five nor more than 14 years of age shall cause such child to attend school unless there be a reasonable excuse for non-attendance. Any of the following reasons shall be a reasonable excuse—namely: (*a*) that the child is under efficient instruction in some other manner. . ."

No. 3 was: "The time during which every child shall attend school shall be the whole time for which the school selected shall be open for the instruction of children of similar age."

(*c*) The child was a scholar at the Merle Common Council School, Oxted, and was in the sixth standard.

(*d*) On March 24, 1927, the head teacher issued a certificate to the effect that the child attended school 170 times from October 11, 1926, to March 24, 1927, the school having been open for the instruction of children 185 times during that period, and that she was absent on Thursday, March 24, 1927.

(*e*) The morning session at the school began at 9 a.m. and ended at 12 noon, and on Thursday mornings the time-table was as follows: 9.0 to 9.40, Scripture; 9.40 to 10.25, arithmetic; 10.25 to 10.45, physical training; 10.45 to 10.55, recreation; 10.55 to 11.30, English; 11.30 to 12, class singing.

(*f*) On March 24, 1927, the child attended at 9 a.m., but was withdrawn by the respondent at 11 a.m.

(*g*) The register was called over at about 10 a.m., the child being marked as "present," but upon her withdrawal the mark was cancelled as required by Regulation 9 of the Education Code, 1926, made by the Board of Education. Regulation 21 of the said Code provided that the attendance of a child must comprise at least two hours' secular instruction.

(*h*) The child was withdrawn by the respondent on the said date for the purpose of receiving a pianoforte lesson from one Lashmar, a private teacher of music who resided at Lingfield, about five miles from Merle Common.

(*i*) The respondent habitually withdrew the child from school at 11 a.m. on Thursdays for the said purpose.

(*j*) The child showed a special aptitude for music, and if her progress was satisfactory it was the intention of the respondent to educate her for the musical profession.

(*k*) Merle Common was an outlying district, and the respondent had endeavoured but had not been

* Reported by J. W. HALL, Esq., Barrister-at-Law.

able to find a local qualified music teacher to give pianoforte lessons out of school hours.

(*l*) The said Lashmar visited the Merle Common district on Thursday in each week, and such visits afforded the only opportunity for the child to receive instruction in pianoforte playing.

(*m*) Both English and class singing were subjects approved by the Board of Education as subjects of elementary education, but pianoforte playing was not a subject so approved.

4. On behalf of the appellant it was contended :—

(*a*) That having regard to the Code referred to in paragraph 3 (*g*) above, the alteration in the marking of the register upon the withdrawal of the child was rightly and lawfully made.

(*b*) That the certificate of the head teacher referred to in paragraph 3 (*d*) was conclusive evidence that the child was absent from school in the morning on March 24, 1927.

(*c*) That instruction in pianoforte playing was not "efficient instruction in some other manner" within the meaning of by-law 2(*a*).

(*d*) That inasmuch as the child did not attend school during the whole of the time for which the school was open for the instruction of children of similar age, as required by by-law 3 of the said by-laws, the offence charged had been committed.

5. The respondent contended that, having regard to the facts set forth in paragraph 3 above, and especially in sub-paragraphs (*c*), (*d*), (*h*), (*i*), (*j*), (*k*), and (*l*) of the said paragraph, it was more advantageous for the child to miss one hour's instruction in school to take a lesson in pianoforte playing at home, and that during the period of her absence she was "under efficient instruction in some other manner" within the meaning of by-law 2 (*a*).

6. The justices were of opinion that each of the contentions on behalf of the appellant failed, and accordingly dismissed the information.

The question for the opinion of the Court was whether the justices' determination was right in point of law, and if not, what should be done in the premises.

Mr. S. G. Turner appeared for the appellant; the respondent was not represented. Mr. Robert Fortune appeared for the justices, but as he had no *locus standi* except as *amicus curiæ*, the Court did not call upon him to argue.

The Lord Chief Justice.—I think this is a very clear case. The words "under efficient instruction in some other manner" mean that the whole instruction of the child is being given in some other manner. It was never meant that a child attending the school might be withdrawn for this or that hour to attend a lesson thought by the parent to be more useful or possibly in the long run more remunerative. The time-table and discipline of a school could be reduced to chaos if that were permissible. In my opinion the justices misdirected themselves. They evidently decided as they did because they thought it a good thing that this child should have music lessons, but upon the facts of this case there was no evidence upon which they could decide that she was under efficient instruction in some other manner.

Mr. Justice Avory.—I agree, and will only add that I think "efficient instruction in some other manner" means efficient instruction in the subjects of the curriculum approved for elementary schools.

Mr. Justice Salter.—I agree. A parent is not obliged to avail himself of the free education provided by the State, if he prefers to provide privately for his child's education; but if he does avail himself of it, he must take it as a whole.

[Solicitors—Messrs. Wyatt and Co., for Mr. T. W. Weeding, Kingston-on-Thames; Messrs. Kinch and Richardson, for Messrs. Wheeler and Brill, Oxted.]

K.B. Div.
(Lord Hewart C.J., Avory and Salter, JJ.)
1927. Oct. 27.

GREYHOUND MOTORS, LIMITED v. LAMBERT.*

Metropolis—Stage carriage—"Plying for hire"—Motor omnibus—Seats available only to ticket-holders—Tickets bought at least ten minutes before arrival of omnibus at booking office—Passengers picked up at several booking offices—Antecedent contract—Metropolitan Public Carriages Act, 1869 (32 and 33 Vict., c. 115), s. 7—London Cab and Stage Carriage Act, 1907 (7 Edw. VII., c. 55).

A motor omnibus belonging to the appellants, which was not licensed to ply for hire within the Metropolitan Police district, picked up at three points within that district passengers who had taken tickets for seats for journeys to destinations outside the district. These tickets were obtained by the passengers at the several offices of the appellants at least ten minutes before the arrival of the omnibus there.

Held, that, as the passengers did not necessarily enter into their contracts of carriage before the vehicle started on its journey, but in some cases did so when it had been travelling for some time, the vehicle was plying for hire within the Metropolitan police district.

Sales v. Lake (38 *The Times* L.R., 336; [1922] 1 K.B., 553) distinguished.

This was a case stated by Mr. Kenneth Marshall, the magistrate at West London Police Court, which raised the question what constituted plying for hire in the Metropolitan Police district by a motor omnibus which picked up passengers inside that district for destinations outside it on the road to Bristol.

At a Court of summary jurisdiction sitting at West London Police Court an information was laid by the respondent, a sergeant of the Metropolitan Police, against the appellants, a firm of motor omnibus owners, alleging that on May 26, 1927, they were the owners of a stage carriage, to wit a motor omnibus, which was found plying for hire between Hammersmith-road and Cranford Bridge, within the Metropolitan Police district, such carriage not being licensed to ply for hire within the limits of the district, contrary to section 7 of the Metropolitan Public Carriages Act, 1869 (32 and 33 Vict., c. 115), the London Cab and Stage Carriage Act, 1907, and the Secretary of State's Order dated October 9, 1924 (1924, St. R. and O., No. 1149), as amended by the Order dated April 6, 1926; (1926, St. R. and O., No. 395).

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

On the hearing of the information on July 8, 1927, the following facts were proved or admitted :—

(*a*) The appellants were the owners of a large number of motor coaches which carried passengers between London and Bristol.

(*b*) The appellants maintained branch offices at 229, Hammersmith-road, at the Clarendon Restaurant, Hammersmith, and at Hounslow, all being within the Metropolitan Police district.

(*c*) On May 26, 1927, there was exhibited in the window of the office at 229, Hammersmith-road a poster in which notice was given that London passengers must have tickets ten minutes before the omnibus arrived at the booking office.

(*d*) At 8.30 a.m. on May 26, 1927, Police-Sergeant Lockyer obtained at the office at 229, Hammersmith-road a ticket entitling him to travel to Slough, a place outside the Metropolitan Police district, for which he paid 1s. 9d.

(*e*) At the time when Police-Sergeant Lockyer obtained the ticket there was no motor-coach present belonging to the appellants.

(*f*) At 8.54 a.m. on the same day a motor-coach belonging to the appellants drew up outside the office, was boarded by Police-Sergeant Lockyer and one other passenger, and drove off.

(*g*) The motor-coach was driven to the Clarendon Restaurant, where three other passengers boarded it. It started from the Clarendon Restaurant at 8.59 a.m., and was driven to Hounslow, stopping on the way at High-road, Chiswick, and High-street, Brentford, at neither of which places did any other passengers board it.

(*h*) During the journey from the Clarendon Restaurant to High-road, Chiswick, the conductor of the motor-coach took from Police-Sergeant Lockyer and the other passengers the tickets which had been obtained by them at the office, and gave them in exchange paper tickets.

(*i*) At 9.10 a.m. on the same day the respondent, Police Sergeant Lambert, and another police officer, Police-Sergeant Bryant, obtained at the appellants' Hounslow office tickets entitling them to travel from Hounslow to Maidenhead, a place outside the Metropolitan Police district, for which they paid 1s. 9d.

(*j*) At the time when the last-mentioned tickets were obtained the motor-coach had not arrived at Hounslow.

(*k*) At 9.30 a.m. on the same day the motor-coach, with Police-Sergeant Lockyer and the other four passengers on board, arrived at Hounslow, and was boarded by the respondent and Police-Sergeant Bryant and two other passengers, after which it proceeded on its journey to Slough.

(*l*) After leaving Hounslow the conductor took from the respondent and the three other passengers the tickets which had been obtained at the Hounslow office and gave them in exchange paper tickets.

(*m*) At Colnbrook, between Hounslow and Slough, the respondent informed the driver and the conductor that Police-Sergeant Lockyer, Police-Sergeant Bryant, and himself were police officers, and left the motor-coach, which thereupon proceeded on its journey.

(*n*) The motor-coach was not licensed to ply for hire within the Metropolitan Police district in accordance with the statutes referred to.

The appellants called no evidence, but it was stated on their behalf, and the magistrate accepted the statement, that all their offices were in telephonic communication, and if bookings were insufficient a journey would be cancelled.

On the part of the respondent it was contended that the above facts constituted a plying for hire by the motor-coach within the limits of the Metropolitan Police district.

On the part of the appellants it was contended that, as there had been no soliciting of or waiting for passengers, but an antecedent contract of carriage in each case, there had been no plying for hire within the limits of the district.

The attention of the magistrate was directed to the following decisions :—(1) *Foinett v. Clark* (41 J.P., 359) ; (2) *Armstrong v. Ogle* (42 *The Times* L.R., 553 ; [1926] 2 K.B., 438) ; (3) *Sales v. Lake* (38 *The Times* L.R., 336 ; [1922] 1 K.B., 553) ; (4) *Leonard v. Western Services, Limited* (43 *The Times* L.R., 131 ; [1927] 1 K.B., 702).

The magistrate was of opinion that there had been solicitation of passengers both before and after the motor-coach left the office, 229, Hammersmith-road, by means of posters, and that there were no real antecedent contracts of carriage in respect of the police officers who bought tickets and boarded the coach soon after on its arrival at the two stopping places mentioned *en route* for Bristol. He held that there had been a plying for hire within the Metropolitan Police district, and he accordingly convicted the appellants, imposed on them a fine of 5s., and ordered them to pay three guineas costs.

The appellants, being dissatisfied with this determination as being erroneous in point of law, applied to the magistrate to state a case setting forth the facts and the grounds of his determination for the opinion of the Court whether he had come to a correct decision.

Mr. Paley Scott appeared for the appellants ; Mr. H. D. Roome for the respondent.

The Lord Chief Justice said that on the poster exhibited at the appellants' office at 229, Hammersmith-road there was a list of places on the road from Bristol to Hammersmith and a list of places on the road from Hammersmith to Bristol giving the times at which a motor-omnibus belonging to the appellants was expected to arrive and to depart. Certain fares which related to somewhat longer journeys than any within the Metropolitan Police district were specifically stated, but there was added in conspicuous type the information that there were "intermediate fares to all stages between Bristol and London at pro-rata rates." His Lordship continued :—The real contention of the appellants both in this Court and in the Court below was that the present case is covered by *Sales v. Lake* (38 *The Times* L.R., 336 ; [1922] 1 K.B., 553), but a comparison between that case and the present shows what so often appears—namely, how exceedingly misleading a phrase may be if its meaning is not examined. The phrase here which seems to have become a catchword is "antecedent contract." Antecedent to what? In *Sales v. Lake* (*supra*) the passengers bought their tickets before the time of the departure of the vehicle. Indeed, it was not until after the number of passengers had been ascertained that the respondents in that case hired the vehicle. The magistrate there found expressly that there was no plying for hire because no member of the public could have obtained a seat in the vehicle at any of the places where the passengers were picked up unless he had bought a ticket elsewhere antecedently to the starting of the vehicle. In giving judgment Lord Trevethin, C.J., said (38 *The Times* L.R., at p. 337 ; [1922] 1 K.B., at p. 558) : "If there had been any empty seats for which the driver was prepared to take in casual passengers, I think he would have been plying for

hire, but the magistrate's finding negatives this suggestion."

In my opinion, that case was the very opposite of the present case. Here there are contemplated four different starting points within the Metropolitan Police district. The vehicle starts from 229, Hammersmith-road at 9 a.m. It leaves Brentford at 9.20, Hounslow at 9.30, and Colnbrook at 9.55. What is its true aspect in the eye of the law when it starts from 229, Hammersmith-road ? *Non constat* that at that moment it has any passengers at all. Obviously it is contemplated that it may start with vacant places all or some of which may be filled at Brentford, Hounslow, or Colnbrook by persons who not only have not reserved accommodation before 9 o'clock, but may not even have made up their minds to take the journey that day until, in the case of those joining the omnibus at Colnbrook, nearly 10 o'clock, when the vehicle has accomplished a part of its journey which occupies something like three-quarters of an hour.

Stress has been laid on the fact that here the passengers had to obtain a ticket from an office and not from anyone on the vehicle. That seems to me to be quite immaterial for the reasons explained in *Foinett v. Clark and Another* (41 J.P., 359).

Without dwelling further on the facts of the present case and the contrast beween them and those of *Sales v. Lake* (*supra*), I think that the magistrate had ample evidence to justify him in coming to the conclusion to which he did, and therefore this appeal must be dismissed.

MR. JUSTICE AVORY.—I am of the same opinion. The importance of this case from the public point of view is that if vehicles such as this are not licensed they may start on their journeys in quite an unfit condition and may be driven by incompetent persons who have merely obtained a licence to drive on payment of the sum of 5s. That being so, it is obvious that the Court ought not to differ from the magistrate unless the case is governed by *Sales v. Lake* (38 *The Times* L.R., 336 ; [1922] 1 K.B., 553).

As my Lord has pointed out, the essential difference between the present case and *Sales v. Lake* (*supra*) is to be found in the facts. The vehicle there started for Brighton from Charing Cross, and, although it picked up passengers *en route* at Grosvenor-gardens, Vauxhall Bridge-road, and other places, no passenger was accepted at any stopping place except those who had obtained tickets before the vehicle started from Charing Cross. In other words, the passengers who were picked up had made contracts to be carried for the journey before the vehicle started from Charing Cross. In fact they made these contracts before the vehicle was hired. The magistrate expressly held that there was no plying for hire at Grosvenor-gardens because no member of the public could have obtained a seat in the vehicle at that stopping-place unless he had previously bought a ticket elsewhere. The judgment of Lord Trevethin is based on the same ground. He said (38 *The Times* L.R., at p. 337 ; [1922] 1 K.B., at p. 558) : "The information in the present case charged that the driver was plying for hire while he was in Grosvenor-gardens. The learned magistrate has, however, found that when the carriage was in Grosvenor-gardens no member of the public could have obtained a seat in the vehicle for that journey who had not previously booked his ticket elsewhere. That is to say, the process of soliciting was then over and the driver was merely receiving passengers who had already booked their seats. On this ground alone, in my judgment, the magistrate was right in refusing to convict."

That being the distinction between the present case and *Sales v. Lake* (*supra*), I have no hesitation in saying that we cannot differ from the finding of the magistrate, and that therefore the appeal must be dismissed.

MR. JUSTICE SALTER.—I am of the same opinion. The vehicle in question in this case carried passengers between Bristol and London and London and Bristol, following an ascertained route and travelling by fixed stages, which were notified to the public by posters and by the tickets supplied to passengers. The starting-point in London was the appellants' office at 229, Hammersmith-road. The journey to Brentford occupied 20 minutes and that to Hounslow 30 minutes. If when the vehicle started from Hammersmith-road there were any vacant seats—and there might or might not be—any member of the public who had come to the stopping-places at Brentford or Hounslow could obtain a ticket to travel any of the stages towards Bristol provided that he got it ten minutes before the arrival of the vehicle to take him up.

On these facts the case seems to me plainly to fall within the two conditions which must exist to constitute plying for hire, and which were applied by Lord Trevethin, C.J., in *Sales v. Lake* (38 *The Times* L.R., at p. 337 ; [1922] 1 K.B., at p. 557), when he said : "There must be a soliciting or waiting to secure passengers by the driver or other person in control without any previous contract with them." The soliciting here would be partly by the posters and partly by the fact that this vehicle was seen and known to pass along the route every day at fixed times. Lord Trevethin goes on to say that the test is that "the owner or person in control who is engaged in or authorizes the soliciting or waiting must be in possession of a carriage for which he is soliciting or waiting to obtain passengers." Here anyone who pleased might travel by this vehicle. In my opinion the magistrate was right in holding that the vehicle was plying for hire in the Metropolitan Police district.

The distinction between the present case and *Sales v. Lake* (*supra*) has already been pointed out. In that case the driver of the vehicle was told to pick up at various points suitable to them the particular persons who had previously taken tickets, and he was not authorized to pick up any other persons, and he did not do so. For these reasons I agree that this appeal must be dismissed.

The appeal was accordingly dismissed with costs.

[Solicitors—Messrs. Calder Woods and Sandiford, for Mr. F. E. Metcalfe, Bristol ; Messrs. Wontner and Sons.]

Chan. Div. (Clauson, J.) } 1927. Nov. 7.

IN RE WINTER—EX PARTE WILLIAMS.*

Practice — Judgment summons — Divorce damages and costs — Judgment summonses against co-respondent in respect of both — Priority.

Where damages and costs are awarded against a co-respondent and the petitioner takes out two judgment summonses against him, one in respect of the costs and the other in respect of the

* Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.

damages, an order will go in respect of the payment of costs first.

The applicant, Mr. David Ebenezer Williams, applied on two judgment summonses to Mr. Justice Astbury, sitting in bankruptcy, for an order for the examination of the debtor, Mr. Ernest Charles Winter, as to his means to pay £1,000, the sum awarded against him as the co-respondent on Mr. Williams's petition for divorce, and the costs, which amounted to £468 5s. 4d. The question arose whether the applicant was entitled to obtain an order against the debtor for the costs in priority to any order against him for the damages.

The first judgment summons related to the costs, and the other to the damages, but they were heard together.

Mr. Acton Pile, who appeared for the applicant, asked that an order should be made against the debtor on the judgment summons as to costs before any order was made on the summons in respect of the damages.

Mr. Justice Clauson said that the two summonses had been before the Court at the last hearing of judgment summonses in bankruptcy. The matter then stood over and he had discussed it with Mr. Justice Astbury, with the result that they had decided that the future practice should be that the order should go in respect of the payment of costs first. The husband was liable to his own solicitor for the costs, and it would be hard, when he was so liable, that he should in the first place only be able to obtain an order against the debtor in respect of the damages.

An order would be made in respect of the costs for the payment by the debtor of £10 per month, the first payment to be made on December 1, 1927. Until the costs were satisfied under that order no order would be made on the judgment summons in respect of the damages.

[Solicitors—Messrs. Ll. Gwynne Jones and Son, for Mr. J. G. Bishop, Abergavenny.]

Court of Appeal.
(Lord Hanworth, M.R., Atkin and Lawrence, L.JJ.)
1927. Nov. 7.

EASTMAN'S, LIMITED v. SHAW.*

Revenue — Income-tax — Trading profits — Deduction — Multiple shops — Shops closed and opened as demanded by business as a whole—Difference between cost of new fittings in new shops and price realized for old fittings —Capital or income expenditure—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Schedule D, Case I.

A trading company with a number of branch shops controlled by a head office followed a policy of opening and closing their branches in accordance with the local demands and the probabilities of profit or loss.

Held, that the difference between the cost of new fixtures, fittings, and utensils for the new shops, and the receipts from the sales of equivalent second hand fixtures, &c., from the shops that were closed was a capital expenditure, and was not a revenue expenditure which could be debited to the trading account of the company in ascertaining the profits which were assessable to income-tax.

Decision of Rowlatt, J. (43 *The Times* L.R., 549), affirmed.

This was an appeal from a decision of Mr. Justice Rowlatt (43 *The Times* L.R., 549) on a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the Finsbury Division.

The case is fully set out in the report below, but the facts may be shortly summarized as follows:—

The company appealed against assessments made upon them under Schedule D of the Income Tax Act, 1918, for the years 1922, 1923, and 1924 in respect of their profits from their business as butchers and meat salesmen. They had a large business as retailers of imported chilled and frozen meat carried on at shops which they owned throughout the British Isles. It frequently became necessary or desirable both to open new shops and to close old ones. Shops might be temporarily opened in a district until the company could acquire an existing butchers' business in a superior situation, and when they did so the former shop was often closed. When a new shop was opened in place of a shop which had been given up the appellants found it less expensive and more convenient to sell the old fixtures and fittings and to purchase new ones for the new shop. In 1911 the company had 1,447 shops, but this number was gradually reduced until 1919 when the total was 749, since when the number of shops had tended to increase.

The appellants contended that the difference between the cost of providing new fittings and fixtures and the price realized by the sale of the old ones in shops they had given up, had properly been debited by them to income and expenditure account, and should be deducted from the profits before ascertaining the net income. The amount of this difference was in the year 1920, £440; in 1921, £4,374; and in 1922, £7,310. The Crown contended that these figures represented capital expenditure, and could not be allowed off income.

The General Commissioners having heard and considered the appeal were of opinion:—

(1) That it was part of the policy of the appellants to open and close shops whenever the state of trade made it desirable.

(2) That the question whether the expenditure incurred in opening shops was or was not of a capital nature was not affected by the fact that the appellants owned a large number of shops.

(3) That the expenses, less the sums received from the sale of fittings in the shops closed were expenses incurred at a time anterior to the carrying on of the trade, and were of a capital nature and were not an allowable deduction as an expense of running the business, and (4) that the assessments ought to be adjusted accordingly.

The company being dissatisfied with this decision requested the General Commissioners to state a case for the opinion of the Court.

On the case stated Mr. Justice Rowlatt upheld the decision of the General Commissioners, holding that if a trader had one shop and gave it up and moved into a new shop the expenditure on new fittings could not be deducted for income-tax purposes, and that it made no difference if he had 20 shops or more instead

* Reported by H. Langford Lewis, Esq., Barrister-at-Law.

of one. To multiply the expenditure could not convert it into a revenue expenditure.

The company appealed.

Mr. Raymond Needham appeared for the appellants; the Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills for the Crown.

The Court without calling on counsel for the Crown, dismissed the appeal.

The MASTER OF THE ROLLS said that the case involved a short point under the Income Tax Act, 1918. The question was whether the company was entitled to deduct certain expenses before ascertaining its net income, or whether those expenses should be attributed to capital. The company owned a very large number of butcher's shops in the country; in 1911 they had 1,447, in 1919 this had been reduced to 749, but the number was now increasing again. The Court was told that the policy of the company was to open and to close shops according to their potentialities for profit or loss. They might find that several shops in one area might be more profitable than a single shop in another area. They opened the shops for the permanent extension of their trade, and, if they chose to do so, they could sell the shop fittings in closed shops, and buy new shop fittings for newly opened shops. The General Commissioners had found that it was part of the policy of the company to open and close shops. That, as Lord Justice Atkin had remarked, was not peculiar to the company's trade, but was merely to apply ordinary business policy to their trade. The General Commissioners had not found that the business of the company was one of buying up, fitting, and then selling shops. The principles of law applicable were quite clear, and had been rightly applied by Mr. Justice Rowlatt. The expenses incurred by the company in refitting shops were in the nature of a capital outlay and a capital loss.

LORD JUSTICE ATKIN said that he entirely agreed with the decision of Mr. Justice Rowlatt for the reasons given by him and by the Master of the Rolls.

LORD JUSTICE LAWRENCE concurred.

[Solicitors—Mr. Charles H. Wright; the Solicitor of Inland Revenue.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1927.
Oct. 25.

REX v. SHEFFIELD JUSTICES—EX PARTE T. RAWSON AND CO., LIMITED, AND ANOTHER.*

Licensing—Intoxicating liquor—Redundancy—Same justices acting as licensing justices and as compensation authority—Offer to licensing justices of payment to compensation fund—Extraneous consideration—Effect on decision of compensation authority.

A question arose which of two adjacent licensed houses should be granted a renewal of its licence, and which should be suppressed. The owners of each house submitted to the licensing justices plans of proposed alterations, and the owners of one of the two houses offered to pay £1,250 to the compensation fund if the alterations were sanctioned. The same licensing justices sat as compensation authority to consider the question of redundancy, and decided to renew the licence of the house whose owners had offered the contribution, it appearing from the evidence that this house, when altered, could be made the better of the two. They then, as licensing justices, approved the alterations to this house.

Held, that in considering the question of the contribution offered to the compensation fund the licensing justices had taken extraneous matter into account, and that this must be held necessarily to have affected their minds as compensation authority, and their decision must be quashed.

Per AVORY, J.—It is contrary to the spirit of the Licensing Acts, though it may be within the letter of them, that the powers of the compensation authority should be delegated to the licensing committee so that the two bodies are identical. It was clearly intended that they should be separate and independent bodies.

This was a rule *nisi* for a *certiorari* directed to the justices of Sheffield acting as the compensation authority for the city under the Licensing (Consolidation) Act, 1910, to quash an order made by them at a meeting of the compensation authority on June 21, 1927, whereby they refused to renew the licence of the "Norfolk Arms," Granville-street, Sheffield.

The rule was granted at the instance of Thomas Rawson and Co., Limited, the owners, and Arthur Smith, the licensee, of the "Norfolk Arms," upon the grounds:—

"(1) That the compensation authority considered matters other than the reports made to them pursuant to the Licensing (Consolidation) Act, 1910, sec. 19 (1), namely, the offer of the owners of the 'Granville Inn' to pay £1,250 into the compensation fund. (2) That the compensation authority offered to sell the renewal for a money payment which would go to the compensation fund if the committee chose so to direct. (3) That the evidence before the committee differentiated the two houses in favour of the 'Norfolk Arms,' and nothing but the aforesaid money payment by the owners of the 'Granville Inn' could justify a preference for the latter house. (4) That to give such a preference for such a reason amounted to a sale of justice, inasmuch as it put it in the reach of a rich person to defeat the claims of a poorer rival, and was thus contrary to the fundamental provisions of the Constitution."

It appeared from the affidavit upon which the rule was obtained that notice of opposition to the renewal of the licences of the "Norfolk Arms" and the "Granville Inn"—which were both fully licensed houses ten yards apart in the same street—was served upon the respective licensees. At the general annual licensing meeting on February 8, 1927, the question of the renewal of both licences was considered by the licensing justices, and both houses were referred to the compensation authority for consideration at the principal meeting. The compensation authority for Sheffield delegated their powers to the licensing justices under section 6 (1) of the Licensing (Consolidation) Act, 1910. Sir William Clegg was chairman both of the licensing justices and of the compensation authority.

* Reported by J. W. HALL, Esq., Barrister-at-Law.

The principal meeting of the compensation authority was held on June 21, 1927, when evidence in respect of both houses was heard. The solicitor for the "Norfolk Arms" submitted plans of proposed alterations and addressed the Bench. The solicitor for the "Granville Inn" also submitted plans for alterations to that house, and was proceeding to address the Bench when he was stopped by the chairman and asked whether he had any proposal to make to the justices. He immediately replied that the owners of the "Granville Inn" were prepared to pay £1,250 into the compensation fund. There was no bargaining about the amount, nor was there any question of the surrender of any other licences as an alternative proposal. The offer was immediately accepted by the chairman, who thereupon announced that the licence of the "Granville Inn" would be renewed and that the licence of the "Norfolk Arms" would be referred for compensation.

Sir William Clegg made an affidavit on behalf of the justices in which he stated that at the transfer sessions on September 8, 1925, plans of the "Granville Inn," showing certain alterations, were laid before the justices, and an application was made for their consent to the alterations under section 71 of the Licensing (Consolidation) Act, 1910. Consideration of the matter was adjourned to enable the licensing committee to visit the inn.

The committee visited the inn on October 1, 1925, but viewed the outside only of the "Norfolk Arms." They came to the conclusion that the "Norfolk Arms" was the better house and, at the transfer sessions on October 27, 1925, refused to give consent to the proposed alterations, as the question of redundancy of one of the two licences was likely to arise in the near future. In November, 1925, the committee viewed the "Norfolk Arms" inside as well as out, and came to the conclusion that their previous opinion was wrong and that it was not practicable so to improve the "Norfolk Arms" that it would be as good as the "Granville Inn" when altered and improved. They considered, having regard to the enlarged drinking facilities provided by the proposed alterations of the "Granville Inn," that consent should not be given unless the owners offered to give an undertaking to surrender a licence or licences, or made some equivalent offer. The "Granville Inn" plans were again submitted, and on December 8, 1925, the consideration of them was adjourned to see what offer would be made by the owners. Subsequently the justices' clerk received a letter dated March 12, 1926, written on behalf of the owners of the "Granville Inn," which said :—

"My clients . . . will pay the sum of £1,250 on the day when the 'Norfolk Hotel' (*sic*) opposite to the 'Granville Inn' is closed . . . on condition that the plans now submitted to the licensing committee for the improvement and alteration to the 'Granville Inn' are approved."

That offer was at that time declined. At the transfer sessions on December 14, 1926, the licensing committee considered that one of the two licences was redundant. They gave instructions for notices of objection to be served, with a view to determine whether there was a redundancy, and, if so, which of the two houses was the better adapted for licensed premises, or would be so after making any approved alterations. There was evidence before the committee at the general annual licensing meeting on February 8, 1927, that the "Granville Inn" had room for extension, while the "Norfolk Arms" could be improved but not extended.

At the transfer sessions of the licensing committee and the principal meeting of the compensation authority on June 21, 1927, all applications and business had to be dealt with by the justices present either in their capacity as members of the licensing committee or as members of the compensation authority. Among the questions which they had to consider were :—(1) (As compensation authority) Whether, subject to the payment of compensation under the Licensing Acts, the renewal of the licences of the "Granville Inn" and the "Norfolk Arms" or of either, and, if so, which, of them should be refused ; (2) (as licensing committee) (*a*) whether the consent of the licensing committee should be given to the proposed alterations of the "Granville Inn" ; and (*b*) whether the consent of the licensing committee should be given to the proposed alterations of the "Norfolk Arms," the plans for which were first produced at that meeting.

By consent of the solicitors for both parties all those applications were heard together. It was clearly understood that, if a renewal were granted to either house, the house would be altered as might be approved by the justices. The same architect had prepared the plans for both houses. He was questioned by the advocate for each side, and stated that in his opinion the "Granville Inn" would be the better house when the alterations were made.

The justices were unanimously of opinion that only one of the two licences was required, and that no practicable alterations would make the "Norfolk Arms" as good as the "Granville Inn." It became apparent to every one in Court that the only question to be decided was whether the licensing committee should give their consent to the proposed alterations to the "Granville Inn." The offer subsequently made related solely to the proposed alterations. The justices decided, in accordance with their opinion on the evidence, that in the interests of the public the licence of the "Granville Inn" should be renewed and that the licence of the "Norfolk Arms" should not be renewed. Before announcing that decision as compensation authority it remained for them as licensing justices to decide as to granting their consent to the making of the alterations to the "Granville Inn." The alterations involved an enlargement of the licensed premises and an increase of the drinking facilities, and the justices were of opinion that the licensees ought either to surrender some other licensed premises or pay to the compensation fund some sum in lieu thereof, as a condition of receiving the consent sought. It was with this in mind that Sir William Clegg asked the solicitor for the "Granville Inn" whether he had any proposal to make. In no sense was he inviting the solicitor to make an offer to the compensation authority as a condition of the renewal of the licence, upon which they had already decided. Every one understood that the offer of payment was made in consideration of the increased business facilities sought. The licensees, said Sir William Clegg, could not have thought that the offer was made or accepted as the price for the renewal of the licence.

The compensation authority would have preferred an offer to surrender a licence or licences of the value of £1,250, or thereabouts, but were aware that owners had difficulty in finding a suitable licence to surrender. As money paid into the compensation fund went to the extinction of licences, they considered the offer a fair one and accepted it, and gave leave to reconstruct the "Granville Inn." They then, as compensation authority, announced their refusal to renew the licence of the "Norfolk Arms" as being redundant, and, as

the licensing committee, refused to consent to the proposed alterations to the "Norfolk Arms."

Mr. C. Paley Scott showed cause; Mr. Mitchell Banks, K.C., and Mr. Maurice Healy supported the rule.

The LORD CHIEF JUSTICE.—This is a rule *nisi* for a writ of *certiorari* to be directed to the Keepers of the Peace and Justices in and for the city and county borough of Sheffield acting as the compensation authority for that city and county borough to remove into this Court certain orders made by them, or some of them, at a meeting of the compensation authority held at or about June 21 of this year, whereby they refused to renew the licence of certain premises known as the "Norfolk Arms," Granville-street, Sheffield.

There are four grounds stated in the rule, and perhaps the substance of them is expressed in the first of them—namely, that the compensation authority considered matters other than the reports made to them pursuant to the Licensing (Consolidation) Act, 1910, section 19, subsection 1; that is to say, an offer by the owners of the "Granville Inn" to pay £1,250 into the compensation fund. It is not necessary, I think, to repeat all the facts of the case which have been laid so fully and so clearly before the Court both by the affidavits and by the arguments of learned counsel. It is enough to say that in the city of Sheffield the compensation authority, who are all the justices for the city and county borough of Sheffield, have delegated, as they are lawfully entitled to delegate, their powers as the compensation authority to a committee—a committee consisting of the licensing justices for Sheffield.

Now those being the tribunals which, although identical in point of *personnel*, were quite separate and independent in point of function, it is clear from the affidavit that a question arose, and arose a considerable time ago—not this year, nor even last year—whether of the two licensed houses, namely, the "Norfolk Arms" and the "Granville Inn," the first or the second should be regarded as redundant. The materials before the Court show that there were good grounds for believing that the two houses co-existing were not necessary. The question, however, remained which of the two should be taken and which left. Before that controversy was disposed of, and while it yet remained uncertain, questions arose as to the possibility of improving each of these houses by alteration, and it is not denied that in considering the question whether a particular house is redundant and what its merits are in relation to or in comparison with another house, the justices are entitled to consider not merely what it is *in esse* but what it is *in posse*; in other words, they are entitled to see what are its reasonable prospects of improvement by alteration. It happened curiously enough that the skilled witness who was prepared to speak as to the potentialities of each of these two houses in the matter of alteration was one and the same, and undoubtedly when the last stage but one in the matter was reached, having given his evidence, he did express the view that of the two houses the "Granville Inn" was the better both for what it was, and for what it might become.

That matter involved another question, namely, whether permission should be given for the carrying out of the proposed alterations. The question of the alterations was a question for the licensing justices as such; the question of redundancy was a question for the compensation authority. And the first complaint logically and chronologically here is, that in considering the question whether the alterations to the "Granville Inn" should be permitted, the licensing justices not only took into account, but imposed as a condition, the proposed payment of a sum of £1,250. There is no need to read again upon the point the extremely frank and clear affidavit of Sir William Clegg, the chairman of the compensation authority. In two passages, one of them occurring in paragraph 10 of the affidavit, and the other occurring in paragraph 18 of the affidavit, he makes it plain that, whether in express words or in silent reflection, the justices treated the payment of this sum of £1,250 as a condition of their assent to the proposed alterations of the "Granville Inn."

The first question in the case is really whether that proceeding was permitted by law, and let me say at once that as in the case of *Rex v. Shann* (26 *The Times* L.R., 435; [1910] 2 K.B., 418) so here; there is not the smallest doubt, and I accept unreservedly the view that Sir William Clegg and his brother justices honestly believed that they were dealing with all these matters according to the merits. The question remains, however, whether that which they did was lawful, and it seems to me to be clear both from the case of *Rex v. Shann* (*supra*) and from the case of *Rex v. Wandsworth Licensing Justices* (37 *The Times* L.R., 619; [1921] 3 K.B., 487), that licensing justices are not entitled to impose such a condition as a term of their permission for alterations to be made. The matter is made quite plain, for example, by a passage in the judgment of Lord Chief Justice Lawrence, as he then was, in *Rex v. Wandsworth Licensing Justices* (*supra*), at page 496, and in the judgment of my Brother Avory, at page 498 of the same volume.

I cannot resist the conclusion involved in the words of Sir William Clegg's affidavit that the payment of this sum of money was in truth and in fact a condition of the permission to make the alterations. But while it was for the licensing justices to consider whether the alterations might be made, it was for the compensation authority to decide whether the house, and which house, was redundant, and although the chronology of the matter is a little involved, it seems to be reasonably clear that the licensing justices sent forward both houses to be considered by the compensation authority, the question of the alterations still remaining in suspense, and thereupon the very same gentlemen, uniting in their own persons the functions of the licensing justices and the functions of the compensation authority, sat in the two capacities and entertained first one question, then the other, and then returned to the first question. There is not merely an alternation of their functions to and fro, there is a reiterated alternation to and fro, and according to the history of the matter, as they finally set it forth, they came to the conclusion as compensation authority that the "Granville Inn" was the inn to be preserved, and the "Norfolk Arms" was the inn that was redundant, but all the time they had in their minds as licensing justices the question whether the proposed alterations to the "Granville Inn" should be permitted, and that question involved the other question, whether they could with success impose the condition that the owners of the "Granville Inn" should pay a sum of £1,250.

Now if they had been sitting separately as licensing justices to consider by itself the question of the alterations, it is obvious on the authorities that they would have taken extraneous matter into consideration if they had been influenced by the offer of £1,250, and I am of the opinion that that extraneous con-

sideration had the effect of vitiating the subsequent decision which they made upon the different but allied question of redundancy when the scale was turned against the "Norfolk Arms" and in favour of the "Granville Inn" by reason of these very alterations still in prospect, but consented to upon the terms of the payment of the £1,250. In other words, in coming to their decision as compensation authority they were influenced by the extraneous consideration which operated upon their minds as licensing justices in imposing the condition with reference to the proposed alterations of the house. No doubt when the very same persons are acting at one moment as licensing justices, and at another moment as compensation authority, it is difficult for them to keep out of their minds as compensation authority considerations which may have entered into their minds as licensing justices. But one thing is very certain : if they choose to sit in both capacities in the same place on the same occasion, then if as licensing justices they permit extraneous matters to be taken into consideration, those extraneous matters must automatically affect their decision as compensation authority.

I have come to the conclusion, while I recognize to the full the public purpose which animated these justices and the honesty of their belief that they were deciding the question according to the merits, that this decision cannot stand. I think that the extraneous considerations which were permitted to operate upon their minds as licensing justices did not cease in their effect with the making of the order about the alterations, but continued so as to affect and so as to destroy the decision which those gentlemen also made in their capacity of compensation authority, because that decision was evidently influenced by those very alterations which had been sanctioned in this improper way. In those circumstances, it seems to me that this rule ought to be made absolute, and this order ought to be quashed.

Mr. Justice Avory.—I have come to the same conclusion. This rule does not specifically raise any question about the constitution of the compensation authority in this present case, but having been informed, as we have, of what the facts were, I think it right to say that although it may be that the committee who acted as the compensation authority in this case were strictly within the letter of the law as provided by section 6 of the Licensing (Consolidation) Act of 1910, I am satisfied that the appointment of such a committee, namely, of the same licensing justices who acted as the licensing justices for the borough, as the committee to act as the compensation authority, is clearly contrary to the spirit of the Act of Parliament, which, in my view, contemplates that the compensation authority shall at all events be a different body from the licensing justices. That view is certainly expressed in one of the judgments in the case of *Rex v. Shann* (26 *The Times* L.R., 435 ; [1910] 2 K.B., 418), in which Lord Justice Farwell, at page 434, said : "It is, in my opinion, clear that the licensing justices and the compensation committee are two distinct and independent bodies, whether the latter be quarter sessions, as provided by section 1, subsection 1, of the Licensing Act, 1904, or the majority of the whole body of justices as provided by section 8, subsection 2, of that Act as amended by the Licensing Act, 1906." It is idle in this case, in my view, to say that this compensation committee was a distinct and independent body from the licensing justices who were dealing with the very same matter ; in fact, they were the same persons, and, moreover, in fact in this case, they were actually sitting on June 21, which is the material date, in both capacities, both as the compensation authority and as the licensing justices, who were dealing with the application for alterations in licensed premises.

Apart from that point, which I think might have been made one of the grounds of this rule, the only question which remains is whether upon the affidavits which are before us, and particularly whether upon the affidavit made by the chairman, Sir William Clegg, we can avoid the conclusion that the compensation committee, or the compensation authority in this case, in refusing to renew the licence of the "Norfolk Arms" and in granting a renewal of the licence of the "Granville Inn," were influenced by some extraneous consideration which ought not to have influenced their judgment. Whether it be put as a condition which they were not authorized to impose, or whether it be put as an extraneous consideration which influenced their judgment is immaterial. I think upon the evidence which is before us we should be justified in saying that in fact, although not in terms, the compensation authority in this case were imposing a condition of the renewal of the licence of the "Granville Inn" the payment of a sum of £1,250 to the compensation authority ; and in effect they were saying that they would not renew the licence to the "Norfolk Arms" unless either the same or a better offer were made on behalf of the "Norfolk Arms." When once one is driven to that conclusion, namely, that they were influenced by that consideration, it is clear upon the authorities that that was a matter which they had no right to take into consideration at all.

The case of *Rex v. Shann* (*supra*), to which my Lord has already referred, I think deserves a little consideration as showing its application to the present case. In that case the Divisional Court had held that the compensation authority were entitled for the purpose of differentiating between the two houses to take into consideration the offers made by the respective owners, and the Divisional Court discharged the rules. That decision was reversed on appeal, and for the purpose of explaining a passage in the judgment of one of the learned Lords Justices, which I am going to read, it is right to look at the argument of Sir Edward Carson, which is at [1910] 2 K.B., page 421, where he was putting it before the Court of Appeal in this way ; he said : "Possibly, in a case where the owner of a licensed house, the renewal of the licence of which had been referred to the compensation authority, had another licensed house, there might be no objection to his arranging with the authority to give up the licence of the latter house if the authority would renew the licence of the former ; but, assuming that to be so, it is quite clear that, where two persons are applying for the renewal of the licences of their respective houses, it is *ultra vires* for the authority to make the question which licence shall be renewed, and which suppressed, the subject of an auction, as was in effect done in the present case." That view appears to me to have been supported and endorsed by the decision of the Lords Justices in that case. While it is true that Lord Justice Vaughan Williams differed in the sense that he did not see his way to differ from the conclusion of fact at which the Divisional Court had arrived, he said this at page 429 : "The contention, as I understand it, is this, that the only body which has to deal with the question of the alteration or rebuilding of these publichouses was the licensing justices, and that at no time and for no reason had the compensation authority a right to get information as to what

these people would be willing to offer either by way of surrender of licences or of contribution to the compensation fund. I think that probably that view is right, if it means that the compensation authority had no right to make willingness to conform to their conditions a condition necessary to avoid the refusal of the licence. I do not think the compensation authority had any right to do that; in fact, I doubt whether even the licensing justices had any such right, at all events after the matter had been referred by them to the compensation authority." Then at page 434 Lord Justice Farwell says: "I can find nothing in the Act that justifies the committee"—that is, the compensation committee—"in offering to sell the renewal, either for a money payment which would go to the rates as if made under section 4, subsection 4, or to the compensation fund, as the committee might choose to direct, or for the surrender of other licensed premises. The illegality of a money payment is, in my opinion, decided by *Reg. v. Bowman* (14 *The Times* L.R., 303; [1898] 1 Q.B., 663), and is the more marked in this case because the Act expressly authorizes money payments in the case of new licences and does not do so in the case of these renewals of old licences." Lord Justice Kennedy, as my Lord has already said, at page 439, took the same view that the proceedings in that case could not be upheld even though you accepted the view which was put forward in that case, as it is in the present case, by the chairman of the justices, that they believed they were deciding according to the merits. After saying that he was prepared to accept that view, Lord Justice Kennedy proceeds: "But at the same time I concur with Lord Alverstone, C.J., when, in delivering the judgment of the Divisional Court, he stated that, if the Court thought that it was improper for the compensation authority to ascertain what licences the respective owners were prepared to surrender in consideration of the renewal, the Court would agree with the contention of Sir Edward Carson on behalf of the present appellants that the reception and consideration of the offers of the licensees as to the surrender of the licences or contribution to the compensation fund, if their licences were renewed, would vitiate the subsequent proceedings and establish the contention that the renewing magistrates acted beyond their jurisdiction, even though they disregarded the offers in coming to the decision." He says he agrees with Lord Alverstone in that view of the law, and in the view of the Lord Justice it was fatal to the respondent's case. Then he proceeds to say why he did not agree with the Divisional Court, and he goes on: "The Lord Chief Justice went on to hold, however, that the compensation authority in deciding the question of renewal were entitled to consider what (if any) licences the respective owners would be prepared to surrender, or what contribution they would make to the compensation fund. From this view I respectfully dissent. I cannot find any justification for the action of these justices either in the provisions of the Act of 1904, or in general principles of justice, or in the authority of *Leeds Corporation v. Ryder* (23 *The Times* L.R., 721; [1907] A.C., 420), to which the Lord Chief Justice proceeded to refer to in his judgment."

Under those circumstances, it appears to me to be quite impossible in this case to say that the compensation authority was not influenced by the consideration that this money payment was going to be made to the compensation fund, and on that short ground I agree that this rule should be made absolute.

Mr. Justice Salter.—I agree, and have nothing to add.

On an application being made for costs against the justices, the Lord Chief Justice said: Is there not a fund, Mr. Paley Scott, in existence out of which justices in such a case if ordered to pay costs can pay them?

Mr. Paley Scott.—It has been decided that your Lordships may order costs to come out of the compensation fund. It seems almost poetic justice in this case that the offending fund should pay. Would your Lordships in the event of making that order also order that the respondents' costs might come out of the same fund. I do not think there is any other fund.

The Lord Chief Justice.—What sort of justice is that, Mr. Paley Scott?

Mr. Paley Scott.—I think it is equally poetic, my Lord. As I understand this case, it was the desire of the justices to swell the fund and not to deplete it.

Mr. Justice Avory.—Is it quite clear that we can make that order?

Mr. Paley Scott.—Your Lordship will find the matter referred to at page 570 of Paterson. There was a case of *Rex v. Sheffield Justices—Ex parte Morrison* (32 *The Times* L.R., 241; [1916] 1 K.B., 682).

Mr. Justice Avory.—I have some recollection of having taken part in that decision in some capacity.

The Lord Chief Justice.—This poem, Mr. Paley Scott, seems to have fallen into more than one part.

Mr. Paley Scott.—Yes, my Lord, there are few things that are original. The way in which the textbook writer deals with it is: "Where a rule for a *mandamus* is applied for against a compensation authority, and that authority appears to oppose the rule, the costs of the compensation authority, and, if the rule is made absolute, also those of the applicant, may be directed to be paid out of the compensation fund."

Mr. Justice Avory.—Where is there any decision in this case of *Rex v. Sheffield Justices* (*supra*) about the costs?

Mr. Paley Scott.—I am very sorry, my Lord, but I am afraid I have not got the case here. I am referring now to page 570 of Paterson, and if I may say so, my Lord, it was also within the recollection of my client.

Mr. Justice Avory.—There is nothing about costs in that case. It was a question whether there had been an agreement as to the amount of compensation.

Mr. Paley Scott.—It is dealt with by section 21 under which in Paterson the note occurs which I have just read to your Lordship. Subsection 5 of that section says: "Any expenses incurred by the compensation authority in the payment of compensation under this Act, or otherwise in the exercise of their powers or the performance of their duties as compensation authority, and such expenses of the licensing justices" and so forth "shall be paid out of the compensation fund, and the compensation authority, in the exercise of their powers, shall have regard to the funds available for the purpose." It was under that section that the order was apparently made in the case to which I have referred, your Lordship, that costs should come out of that fund.

Mr. Justice Avory.—The report of the case of the *Sheffield Justices* (*supra*) says nothing about costs, but I am quite sure that this question has been before the Court, and it has been considered under subsection 5 of section 21.

Mr. Paley Scott.—Yes, my Lord. I was told of it by my client, who had personal recollection of the

decision in that case, and the learned editor in his work seems to have the same information.

The LORD CHIEF JUSTICE.—Very well. The order of the Court is that the rule *nisi* be made absolute, and the costs of both sides will be borne by the compensation fund.

Mr. PALEY SCOTT.—If your Lordship pleases.

[Solicitors—Messrs. Church, Rendell Bird and Co., for Mr. F. B. Dingle, Sheffield; Messrs. Godden, Holme and Ward, for Messrs. Chambers and Sons, Sheffield.]

K.B. Div. (Wright, J.) } 1927. Nov. 4.

FARR, SMITH, AND CO., LIMITED v. MESSERS, LIMITED.*

Contract — Sale of goods — "Note or memorandum in writing" — Action originally founded on previous contract—Plea in defence in that action—"Earnest"—Undertaking to pay third party's debts—"Part payment"—Sale of Goods Act, 1893 (56 and 57 Vict., c. 71), s. 4 (1).

Partners in a firm brought an action for damages for breach of a written contract for the sale of goods. In the defence, which was signed by counsel, the defendants pleaded that the firm had been converted into a limited company and that it had been orally agreed between that company and the defendants that, in consideration of the company's undertaking to pay certain debts owing to the defendants by the firm and to perform the obligations of the firm under the written contract, the defendants would supply to the company the goods sold under the written contract. Subsequently the action was amended, the company being substituted as plaintiffs and the cause of action being expressed to be for the breach of the oral agreement.

Held, that the plea in the original defence in which the oral agreement was set out was a "note or memorandum in writing . . . signed by the party to be charged or his agent in that behalf" of that oral contract within s. 4 (1) of the Sale of Goods Act, 1893.

Held, further, that the undertaking to pay the firm's debts did not constitute the giving of "something in earnest to bind the contract" within s. 4 (1), being rather part of the consideration for the contract, but that the payment of those moneys was given "in part payment" within the subsection.

This was an action in which the plaintiffs, Messrs. Farr, Smith, and Co., Limited, of Woolwich, S.E., claimed from the defendants, Messrs. Messers, Limited, of Bishopsgate, E.C., damages for breach of contract.

The history of the case, put shortly, was as follows. The facts and arguments appear fully in the judgment.

On January 9, 1924, a written contract was entered into between the defendants and a firm named Farr, Smith, and Co. for the sale and delivery by the defendants to the firm of a quantity of firewood. Subsequently, the present plaintiffs, a limited company, were formed to take over the business of Farr, Smith, and Co. On July 9, 1924, it was orally agreed between two of the directors of the plaintiff company and one of the defendants' directors that, in consideration of an undertaking by the plaintiff company to pay certain debts owing to the defendants by the firm of Farr, Smith, and Co., and to perform the firm's obligations under the contract of January 9, 1924, the defendants would supply to Farr, Smith, and Co., Limited, the wood sold under the contract of January 9, 1924. The defendants failed to deliver the goods.

On February 21, 1925, an action was begun in which Frederick Augustus Farr and William Henry Smith, the partners in Farr, Smith, and Co., claimed from the defendants damages for breach of the agreement of January 9, 1924. On April 20, 1925, the statement of claim in that action was delivered. On May 12, 1925, the defence was delivered. In paragraph 3 of the defence the agreement of July 9, 1924, was pleaded.

By an order dated November 6, 1925, the present plaintiffs were substituted as plaintiffs for Mr. Farr and Mr. Smith. On November 19, 1925, the amended statement of claim was delivered. In it the plaintiffs claimed damages for a breach of the oral contract of July 9, 1924. By their amended defence the defendants denied the agreement and further pleaded that section 4 of the Sale of Goods Act, 1893, had not been complied with.

Mr. Schiller, K.C., and Mr. T. Simpson Pedler appeared for the plaintiffs; Mr. Pitman, K.C., and Mr. Harold Stranger for the defendants.

MR. JUSTICE WRIGHT delivered the following judgment:—This is a claim for damages for breach of contract for the sale of certain wood. On January 9, 1924, the defendants, who are timber merchants, sold to a firm of Farr, Smith, and Co., boxmakers, 150 to 200 cubic fathoms first quality firewood at prices which ranged from £9 10s. per cubic fathom to £8 10s. per cubic fathom. The shipment was to be from Kramfors and the goods were to be ready for shipment in September, and payment was to be made by approved acceptance four months from the date of the discharge of each parcel. The firm in question had purchased and received delivery of an earlier parcel of wood goods and in the early part of 1924 they were in some financial difficulty. From time to time they made payments to the defendants on account and they laid their position before the defendants very candidly. The firm desired to obtain further capital and for that purpose a limited company, the present plaintiffs, was formed. Shortly afterwards, on or about July 9, 1924, Mr. Farr, a partner in the old firm and also a director of the new company, accompanied by another director, Mr. Skinnerton, interviewed a director of the defendants. Mr. Skinnerton, in evidence, which I accept, said that the indebtedness of the firm was discussed and eventually it was arranged that the company should pay in cash and in bills the moneys due to the defendants from the firm, and at the same time it was agreed that the company should have the benefit of the contract of January 9, 1924. The arrangement was that the defendants should send to the new company drafts at one, two, and three months, and that they should also receive a cheque for £200. The defendants received the cheque for £200 and they also received acceptances from the plaintiff company for £227 5s., £225 19s., and £224 13s.

I find as a fact that there was such an agreement

* Reported by G. F. L. BRIDGMAN, Esq., Barrister-at-Law.

and that the effect of that agreement was that the defendants undertook to perform the contract of January 9, 1924, with the plaintiffs instead of the firm and in consideration of that undertaking they were promised, and they in fact received, the cheque and the three acceptances. The defendants admitted this in paragraph 3 of the original defence, in which it was stated :—"On or about July 9, 1924, the plaintiff, Farr, partner in Farr, Smith, and Co., called upon the defendants and said that he and his firm were unable to meet the sums then due to the defendants by the plaintiffs and that, to provide money, they had formed a limited company, Farr, Smith, and Co., Limited, and he then orally requested that the defendants, instead of supplying the plaintiffs with the goods under the agreement of January 9, 1924, would enter into the following agreement : (1) That the defendants would accept £200 to be paid in cash on the following Monday and the balance by drafts on the said Farr, Smith, and Co., Limited, as to £224 13s. in one month, as to £225 19s. in two months, and as to £227 5s. in three months ; and (2) that the defendants would supply to the new company which had been formed, called Farr, Smith, and Co., Limited, instead of to the plaintiffs, the goods sold under the contract of January 9, 1924, and accept that company as buyers of the said goods ; and the defendants, through their Mr. Goff, agreed to this arrangement."

My attention has been drawn by Mr. Pitman to paragraph 5 of the original defence which is as follows:—"Further or alternatively it was an implied term of the said agreement of July 9, 1924, that Farr, Smith, and Co., Limited, would enter into an agreement and/or sign a contract forthwith in the terms of the contract of January 9, 1924, except that the company's name would be inserted instead of Farr, Smith, and Co., and that the plaintiffs would arrange that such contract would be entered into by Farr, Smith, and Co., Limited, but, in breach of the said implied terms, Farr, Smith, and Co., Limited, failed to enter into the contract." I see no ground whatever for implying any such term. No evidence has been given of any agreement to that effect, and having regard to the first three words of paragraph 5, "Further or alternatively," I consider paragraph 5 to be an alternative, leaving paragraph 3 standing in the form in which it appears.

It is said by Mr. Stranger that in pleading paragraph 3 he did not intend to allege an agreement between Farr, Smith, and Co., Limited, and the defendants, and that he has not so alleged. I think that he has so alleged that agreement, whether he intended to do so or not. The position at that stage of the action was that the partners in Farr, Smith, and Co. were claiming the performance of the contract of January 9, 1924, and the whole purpose was to allege in defence of that claim that there had been a novation of the contract. That is a reasonable and proper interpretation of paragraph 3. That defence was delivered on May 12, 1925, and thereupon the action was reconstituted and the pleadings were amended. The plaintiffs, Farr and Smith, as individuals, were struck out and for them were substituted the present plaintiff company, Farr, Smith, and Co., Limited. The contract which then became the cause of action was alleged to be an oral contract entered into on July 9, 1924, between the defendants and Farr, Smith, and Co., Limited, and so the action has proceeded up to the present time.

There is no doubt at all that the defendants did not deliver to the plaintiff company the goods under the contract. Certain requests for delivery were made from time to time and it was not until December 15, 1924, that the defendants finally said that they had no contract with the plaintiffs for the delivery of the wood. They offered to deliver some 70 fathoms as under a new contract on certain terms, but the defendants refused that as they were entitled to do, and they never got any further satisfaction. I therefore find a breach of contract and, subject to what I feel to be the real defence, the plaintiffs are entitled to damages.

The defendants, however, have thought fit to rely upon the defence of section 4 (1) of the Sale of Goods Act, 1893. That subsection provides : "A contract for the sale of any goods of the value of £10 or upwards shall not be enforceable by action unless the buyer shall . . . give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf."

Mr. Schiller contends that that section has been complied with and he takes his stand on each one of its three limbs. He says that there is here a note or memorandum in writing of the contract sued on ; that there is earnest ; and that there is part payment.

Is there any note or memorandum of the contract ? Mr. Schiller submitted that I could find such a note or memorandum in the correspondence. I do not think that I can do so. In the correspondence there is a recognition of the bargain between the parties, but no document which sufficiently identifies the contract or specifies its terms so as to constitute a note or memorandum within the section. He then says that there is a note or memorandum in paragraph 3 of the original defence. I think that that paragraph does contain a correct and complete note or memorandum of the agreement entered into orally on July 9, 1924.

But a further point has to be considered. It has been held that the note or memorandum to be relied on must be in existence at the time when the action is brought and it is not enough that it should be in existence at the time when it is sought to prove the case by adducing a note or memorandum in writing. The leading case on that point is *Lucas v. Dixon* (22 Q.B.D., 357), the decision of a strong Court which has been accepted since. Lord Justice Fry said : "The statute requires the memorandum as evidence, but requires that evidence to be in existence at the commencement of the action which is brought to enforce the contract. If, then, it only comes into existence after the commencement of such an action, and the plaintiff desires to avail himself of it, he can only do so by discontinuing the action and commencing another." The Lord Justice, in his work on Specific Performance (6th edition), page 240, section 497, refers to "the well-settled rule which requires that the writing relied on as taking a case out of the statute should be in existence before action brought ; a requirement which would be unreasonable and contrary to the usual practice, if it related only to procedure and did not go to the solemnities of the contract." The rule is well fixed. In this case the plaintiffs thought fit, instead of discontinuing the action which was originally brought in the names of the partners of the firm, to take the course which is now not objected to under modern procedure. They struck out the names of the original plaintiffs and substituted as plaintiffs the present plaintiffs, and they also altered the cause of action, because, whereas the original action was a claim on a contract of

January 9, 1924, between the partners of Farr, Smith, and Co. and the defendants, the action as at present conceived is brought to enforce a different contract—namely, an oral contract of July 9, 1924, between the plaintiff company and the defendants.

In these circumstances, I have to determine in what sense the rule laid down in *Lucas v. Dixon* (*supra*) is to be applied to the present case. I think that I am justified in holding that the rule in *Lucas v. Dixon* (*supra*) is satisfied. I think that the memorandum relied on—namely, paragraph 3 of the original defence—ought to be held to have been "in existence at the commencement of the action which is brought to enforce the contract," to quote the words of Lord Justice Fry. I come to this conclusion because, until the proceedings were reconstituted, there was no action to enforce the contract now in issue. I think that it ought to be held, so far as the rule which I am considering is concerned, that, where there is an entirely new departure in the way of the parties and of the cause of action, even though, by reason of the modern procedure, use can be made of the existing writ, that is still to be treated as the beginning of a new action. On that basis I am prepared to hold that the memorandum in this case is sufficient. I ought to refer to a decision of Mr. Justice Russell in *Grindell v. Bass* (36 *The Times* L.R., 867; [1920] 2 Ch., 487) where the memorandum came into existence in the course of the action but before the party who sought to rely on it had become a party to the action. The action was for specific performance. There was a defence signed by counsel alleging that the defendant had already contracted to sell the property to a third party, who was thereupon added as a defendant and who counterclaimed for a declaration based on the contract alleged in the defence. It was held by Mr. Justice Russell that the third party was entitled to rely on the paragraph in the defence as being a note or memorandum. I think that, although that is not precisely an authority for the conclusion to which I have arrived in the present case, it does give some support to the view which I have expressed of the true meaning to be attached to the words "commencement of the action which is brought to enforce the contract" in the rule. I ought, in referring to *Grindell v. Bass* (*supra*) also to add that I rely on it as being in support of the conclusion at which I have arrived that a note or memorandum signed by counsel in a case is a note or memorandum "signed by the party to be charged or his agent in that behalf" within section 4, subsection 1, of the Sale of Goods Act, 1893.

I think, however, that it is desirable for me to deal with the two other points on which reliance has been placed. One of those points is whether any earnest was given here. The other is whether there was part-payment.

As to the first of these points, it is somewhat difficult to give a precise definition of "earnest." Certain essential characteristics, however, seem to me to be clear. While a deposit may be an earnest, in all the old cases earnest was some tangible thing. And that thing must be given at the moment when the contract is concluded because it is something to bind the contract and must, therefore, come into existence at the making of the contract. It must also be given by one contracting party to the other as a token of good faith and as a warranty that he will fulfil his contract and subject to the condition that if, owing to the giver's default, the contract is not fulfilled, it will be forfeited. If, on the other hand, the contract is duly performed the earnest may well serve the further purpose and operate by way of part payment.

In *Howe v. Smith* (27 Ch.D., 89, at p. 101), Lord Justice Fry, when dealing with a deposit paid on a contract for the sale of land, said: "Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract." In *Sumner and Leivesley v. John Brown and Co.* (25 *The Times* L.R. 745), Mr. Justice Hamilton, as he then was, said that earnest meant "something given for the purpose of binding a contract, something to be used to put pressure on the defaulter if he failed to carry out his part. If the contract went through, the thing given in earnest was returned to the giver, or, if money, was deducted from the price. If the contract went off through the giver's fault the thing given in earnest was forfeited." In Benjamin on Sales (6th Edition), page 255, a definition to the same effect is given. The author says: "Earnest may be money, or some gift or token (among the Romans usually a ring), given by the buyer to the seller, and accepted by the latter to mark the final conclusive assent of both sides to the bargain; and this was formerly a prevalent custom in England. And an earnest did not lose its character because the same thing might also avail as a part payment." In *Blenkinsop v. Clayton* (7 Taunt., 597), it was held that there must be an actual transfer of the thing which passes. I ought to add that in *Sumner and Leivesley v. John Brown and Co.* (*supra*), Mr. Justice Hamilton refused to treat the delivery of certain bags to be filled with potatoes which had been bought under the contract as in the nature of earnest. He held that the bags were sent to facilitate the performance of the contract, and not to bind it.

I do not think that, in the present case, there was anything which could be held to be an earnest within the definitions to which I have referred. Nothing, as I find the facts, was given, at the time when the contract was made, to bind the parties. There was a promise to give a cheque and there was a promise to accept and to deliver certain drafts. But those matters, I think, were part of the consideration for the contract. They were not referred to, at the time of the conclusion of the contract, with the intention of binding it. A few days after the contract had been entered into the cheque was paid and the drafts were given, but, in my opinion, that was done, after the contract had been made, in partial performance of it.

With regard to the last point I hold that the consideration passing from the plaintiffs to the defendants was twofold. It was not merely the undertaking to fulfil the conditions as to payment contained in the original contract of January 9, 1924. It also included an undertaking to pay the amounts covered by the cheque and the drafts. I hold that the giving of the cheque and the drafts was a part payment under the contract within the meaning of section 4, subsection 1, of the Sale of Goods Act, 1893.

On these grounds the technical defences to this claim fail, and the only question which I have now to consider is that of damages.

His Lordship proceeded to assess the damages at £300. Judgment was entered accordingly for the plaintiffs, with costs.

[Solicitors—Messrs. Woodham Smith and Borradaile ; Messrs. Trinder, Kekewich, and Co.]

Court of Criminal Appeal.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1927. Nov. 7.

REX v. O'DONOGHUE.*

Criminal Law — Infanticide — "Newly-born child"—Child a month old—Infanticide Act, 1922 (12 and 13 Geo. V., c. 18), s. 1 (2).

The appellant was charged with the murder of her child who had been born on August 19, 1927, and had been strangled by her on September 21, 1927. The Judge at the trial held that there was no evidence to go to the jury that the child was "newly-born" within s. 1 (2) of the Infanticide Act, 1922.

Held, that that ruling was correct.

Observations on the form of statements made by accused persons while under arrest.

The COURT dismissed this appeal, which raised the question whether a child aged one month was a "newly-born child" within section 1 (2) of the Infanticide Act, 1922.

That subsection provides :—

"Where upon the trial of a woman for the murder of her newly-born child, the jury are of opinion that she by any wilful act or omission caused its death, but that at the time of the act or omission she had not fully recovered from the effect of giving birth to such child, and that by reason thereof the balance of her mind was then disturbed, the jury may, notwithstanding that the circumstances were such that but for the provisions of this Act they might have returned a verdict of murder, return in lieu thereof a verdict of infanticide."

The appellant, Mary O'Donoghue, a waitress, was convicted at the Central Criminal Court of the murder of her child, John O'Donoghue, by strangling him. She was sentenced to death, but the sentence was afterwards commuted to one of penal servitude for life.

The child was born on August 19, 1927. On September 21, in the words of a confession made to the police by O'Donoghue, she "put a napkin round the child's neck and twisted it because I had nobody to mind him and no money." At the trial Mr. Justice Talbot held that the child could not be regarded as "newly-born" within the meaning of the Act, and that it was not open to the jury to convict O'Donoghue of infanticide.

Mr. Mitchell Banks, K.C., and Mr. Seuffert appeared for the appellant ; Sir Travers Humphreys for the Crown.

Mr. BANKS said that it should have been left to the jury to say whether or not the child was newly-born within the meaning of the Act. If, however, that question were for the Judge, he should have held that the child was newly-born, and then it would have been for the jury to say whether O'Donoghue had fully recovered from the effect of her confinement, or whether, by reason thereof, the balance of her mind was disturbed. The medical evidence showed that mental disturbance normally continued for six weeks after a confinement. The text-books showed that puerperal insanity and melancholia commonly supervened, not immediately after the birth, but at any time up to six weeks or two months after it.

MR. JUSTICE AVORY.—When do you say that a child ceases to be newly-born ?

Mr. BANKS replied that obviously there must be limits. He based his argument on the fact that there was no hint in the statute of what the words "newly-born" meant. In *Rex v. McConnell,* which was tried before Mr. Justice Shearman at Reading Assizes on October 17, 1923, the Judge took the view that the question whether a child aged six weeks was "newly-born" was for the jury. He accordingly left it to them, and the jury found the prisoner guilty of infanticide.

MR. JUSTICE AVORY.—I thought that it was generally known that this statute was meant to meet the case of a woman who took the life of her child either while it was being born or immediately after its birth.

Mr. BANKS said that that might have been the origin of the statute, but the words of section 1 were of wider effect. The words were "fully recovered from the effect of giving birth," and a woman came within the words of the section so long as she was subject to any mental or nervous effect of the birth.

Counsel for the Crown was not called on to argue.

The LORD CHIEF JUSTICE delivered the judgment of the Court as follows :—The ground of this appeal is that the Judge at the trial was wrong in law in holding that the case could not come within the terms of section 1 (2) of the Infanticide Act, 1922. He held that there was no evidence to go to the jury on which they might be asked to find that the child in this case was a "newly-born child." He did not purport to define the term "newly-born child." He merely ruled that a child who had lived from August 19 until September 21 could not be found to be a newly-born child within the meaning of the section.

The argument which has been urged in criticism of that ruling is that the Infanticide Act, 1922, contemplates an act committed by the mother at a time when she has not fully recovered from the effects of childbirth and in consequence is in a state of mental disturbance ; and that the real question to be considered is not how many days or weeks have elapsed since the birth of the child, but whether the child that has been killed is the child from the effect of whose birth the mother who is accused of its murder has not fully recovered at the time of the child's death.

In our opinion, to read the subsection in that way is to misread it and to eliminate from it the epithet "newly-born." If the statute meant what it is urged on behalf of the appellant that it does mean, the natural way to express that meaning would have been to say : "Where a woman by any wilful act or omission causes the death of her child, but at the time of the act or omission she has not fully recovered from the effect of giving birth to such child and by reason thereof the balance of her mind is then disturbed," the jury may return a verdict of infanticide.

The Act, however, does not say that. Wherever the child is referred to—whether in subsection 1, 2, or 3 of section 1—the expression "newly-born child" is used. In other words, that the conditions prescribed by this section may be fulfilled, there must be at least three co-existing circumstances. The first is that the child in question must be the child

* Reported by G. F. L. BRIDGMAN, Esq., Barrister-at-Law.

of the mother who is charged ; the second is that it must be her newly-born child ; the third is that at the time of her act or omission by which the child died the mother must not have fully recovered from the effect of giving birth to such child and by reason thereof the balance of her mind must then be disturbed. It is crucial that while the first and third conditions are fulfilled the second should also be fulfilled.

We do not propose to undertake the task which does not arise of defining the expression "newly-born child." It is enough for the purpose of the present appeal to say that Mr. Justice Talbot made no error in law in holding, with reference to a child of more than a calendar month in age, that there was no evidence on which he could permit the jury to find that the child was a "newly-born child" within the meaning of the subsection. This appeal, therefore, fails.

The appellant made a statement to the police in which she showed that she was well aware of all the past and existing circumstances of the case. That statement begins by saying : "I have been informed by the police and have been cautioned that I need not say anything about it [*i.e.*, the death of her child], but in spite of that I wish to make a voluntary statement concerning it." At the end of the statement, before her signature, she adds : "This statement has been read over to me and is true." In view of the fact that accused persons frequently deny that they have been cautioned when they have been cautioned, or deny that the statement has been read over to them when it has been so read, we think that no objection can be taken to the practice which was followed in the present case.

The appeal was accordingly dismissed.

[Solicitors—Messrs. Macdonnell and Co. ; the Director of Public Prosecutions.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) } 1927. Nov. 4.

S. v. S. AND P.*

Divorce—Costs—Husband's petition for dissolution of marriage—Wife's admission of birth of child—No allegation by her that petitioner was the father—Denial of adultery with co-respondent—Security for costs.

On a husband's petitioning for divorce on the ground of his wife's alleged adultery with a named co-respondent, the paternity of a child being in dispute, the wife by her answer admitted the birth of the child, and she did not allege that the petitioner was the father, but she denied adultery with the co-respondent. It was urged on behalf of the petitioner that the pleadings showed that the wife had not a good ground for her defence so as to justify an order against her husband to secure her costs. In accordance with an offer made by the petitioner an order was made for security to be given without payment into Court.

On January 15, 1926, the husband filed a petition for the dissolution of his marriage on the ground of his wife's alleged adultery with a named co-respondent on divers occasions since January, 1923. The petition was amended on December 9, 1926, and further charges were added, and in his particulars the petitioner said that in respect of one charge he would rely upon the fact of the birth of a child to his wife in July, 1926. The respondent by her answer denied the charges of adultery, admitted having given birth to a child in July, 1926, but denied that the co-respondent was the father. The co-respondent by his answer denied the charges. The Registrar on October 19, 1927, made an order that the husband should pay the wife £21 17s. taxed costs up to setting down, and should lodge in Court £30 by way of security for costs of the hearing.

Mr. F. L. C. Hodson, for the husband, said that this was an appeal from the Registrar's order, and it raised a question of principle. It was clear from the pleadings and documents filed in the cause that the respondent was really being made a witness for the co-respondent, who was represented by the solicitors who were acting for her. By inference she had admitted adultery, though not with the co-respondent. Therefore by virtue of the Supreme Court of Judicature (Consolidation) Act, 1925, sections 177 and 178, the petitioner was entitled to relief as against the respondent by way of a decree of divorce.

Lord Merrivale.—Orders for costs in this Division may be very oppressive. Is the petitioner willing to give security for costs ?

Mr. Hodson.—Yes, but not to make a payment into Court.

Mr. H. B. D. Grazebrook, for the respondent, submitted that the answer disclosed a good ground of defence such as justified an order for the usual security for the protection of the respondent's solicitors.

Lord Merrivale.—The authority of the Court to order an aggrieved husband, or a husband alleging himself to be aggrieved, to secure the costs of a wife who is alleged to be guilty, although it is a most valuable power of the Court in the interests of justice, is exceedingly capable of being oppressively used. I do not say that it is being oppressively used in this case, but when I became aware of the circumstances of the case, having in mind what I have said with regard to the possible effects of the jurisdiction, I thought it was desirable that this case should be argued in open Court.

The petitioner alleges adultery of his wife and says that she has given birth to a child whose paternity he denies. That is as far as he can go, in view of the decision some time ago in *Russell v. Russell* (40 *The Times* L.R., 713 ; [1924] A.C., 687). It appears now that the wife does not suggest that he is the father. She says that at the hearing of the case she would be ready to inform the Judge who the father is, but she desires, it is said, to defend herself against the charge of adultery with the co-respondent. That may well be so. I do not know, and it is not my business to inquire. The case is a peculiar case. It is not within the class of simple cases out of which the jurisdiction in the Ecclesiastical Courts grew up, and in respect of which the jurisdiction of this Division was intended to be exercised. It is a class of case which arises out of more complex conditions than those to which the jurisdiction of old times and the modern jurisdiction were designed to apply. It has been properly said for the wife, "She is charged with adultery ; she denies adultery with the alleged paramour ; she wishes to defend herself." So be it, but the case is a curious case, and

* Reported by William Latey, Esq., Barrister-at-Law.

there is something of the nature of a prescriptive right, upon cause shown, to secure to the wife the means of defence.

I propose to do so in this case, knowing as little as I do now about the merits of it, but accepting the offer which was made on behalf of the petitioning husband to give sufficient security for any costs which he may ultimately be ordered to pay. I do not propose to order a payment into Court. A sum in Court is apt to find its way out of Court in some way or other. I propose to order security. The Registrar will fix the proper security and it will be security for such costs as the Judge may order at the trial.

[Solicitors—Messrs. Corbin, Greener and Cook, for Messrs. Arthur Neal and Co., Sheffield; Messrs. Jaques and Co., for Mr. E. S. Spencer, East Retford.]

House of Lords.
(Viscount Cave, L.C., Viscount Dunedin, Lord Atkinson, Lord Shaw of Dunfermline, and Lord Carson.)
1927. Nov. 7.

TARN v. SCANLAN. NEILSEN, ANDERSEN, AND CO. v. COLLINS. WILLIAM H. MULLER AND CO. (LONDON), LIMITED v. LETHEM. WILLIAM H. MULLER AND CO. (LONDON), LIMITED v. INLAND REVENUE COMMISSIONERS.*

Revenue — Income-tax — Excess profits duty—Non-resident—Trade exercised within United Kingdom — Assessability of British agents — Receipts of profits or gains—Income Tax Act, 1842 (5 and 6 Vict., c. 35), s. 41—Finance (No. 2) Act, 1915 (5 and 6 Geo. V., c. 89), s. 31.

The House affirmed three decisions of the Special Commissioners of Income Tax that the several appellants, who acted in this country as agents of foreign shipping companies, were assessable to income-tax on the principal company's profits, and a fourth decision that the appellants in the fourth case were in similar circumstances assessable to excess profits duty.

Decisions of the Court of Appeal (42 *The Times* L.R., 704, and [1927] 1 K.B., 780) affirmed.

These appeals (except the last) related to the liability of foreign companies to income-tax in the name of agents resident in the United Kingdom, and the last raised a similar question as regarded excess profits duty. All the appeals were dealt with together by the Lord Chancellor, who sufficiently stated the facts on each appeal. All the appeals were dismissed.

In *Tarn v. Scanlan* and *Neilsen, Andersen and Co. v. Collins* (42 *The Times* L.R., 704) Sir John Simon, K.C., Mr. Latter, K.C., and Mr. Cyril King appeared for the appellants; and the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills for the Crown.

In *Wm. H. Muller and Co. (London), Limited v. Lethem* and *Same v. Inland Revenue Commissioners* ([1927] 1 K.B., 780) Mr. Latter, K.C., and Mr. Beecroft appeared for the appellants; the Attorney-General (Sir Douglas Hogg, K.C.), the Solicitor-General (Sir Thomas Inskip, K.C.), and Mr. R. P. Hills for the Crown.

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

The Lord Chancellor read the following judgment:—These four appeals raise questions as to the liability of foreign companies to be assessed to income-tax or excess profits duty in the names of certain persons as their agents, and it is convenient to deal with them together.

TARN v. SCANLAN.

In *Tarn v. Scanlan* the facts, as found by the Commissioners for the Special Purposes of the Income Tax Acts, are that a Danish shipping company, referred to in the case as Det Forenede, and an English company, referred to as Wilsons, established by agreement between themselves a regular line of steamers between Copenhagen and Hull; that it was a term of the agreement that Wilsons should be the exclusive agents for Det Forenede at Hull during the continuance of the agreement; and that Wilsons, besides acting as forwarding agents for English consignors of goods to be forwarded from Hull to Copenhagen, controlled the freight at this end, quoted rates of freight to the consignors, arranged room on the steamers (either their own or Det Forenede's), and employed stevedores to put the goods on board. No written contract was usually entered into before the signature of the bill of lading, but the bill of lading was signed "for the master" by one of Wilsons' clerks. Wilsons collected the freight for outward-bound goods and any other moneys due from the consignors, and remitted what was due to Det Forenede.

On these facts the questions arising were—(1) whether during the years in question (the tax years 1913 to 1916) Det Forenede exercised a trade within the United Kingdom so as to be chargeable under Schedule D of the Income Tax Acts with tax on the profits and gains of such trade; and (2) whether they were so chargeable in the name of Wilsons, who are represented by the appellant Tarn. Mr. Justice Rowlatt and the Court of Appeal have answered both questions in the affirmative, and Tarn appeals to this House. There is no question as to the amounts of the assessments.

As to the first question, I feel no doubt that Det Forenede did carry on a trade here to the extent to which goods were taken on board their ships at Hull for carriage elsewhere. It might be enough to say that the Special Commissioners have so found, and that there was ample material on which they could base that finding. But it may be added that, in my opinion, according to the tests laid down in *Erichsen v. Last* (8 Q.B.D., 414), and in later cases, including several decisions in this House, they could hardly have arrived at any other conclusion.

The second question depends, as to the first three tax-years involved (namely, the years 1912-1913, 1913-1914, and 1914-1915), on the effect to be given to section 41 of the Income Tax Act, 1842, and as to the fourth tax-year (namely, 1915-1916) on the construction of that section as modified by section 31 of the Finance (No. 2) Act, 1915.

Section 41 of the Act of 1842 provides that any person not resident in Great Britain, whether a British subject or not, shall be chargeable with tax in the name of

"any factor agent or receiver having the receipt of any profits or gains arising as herein mentioned and belonging to such person in the like manner and to the like amount as would be charged if such person were

resident in Great Britain and in the actual receipt thereof" :
and the agent so described is made answerable for the tax and is authorized (by section 44 of the Act) to retain the amount out of moneys coming to his hands.

Upon these sections it is argued on behalf of the appellant that the agent so to be made liable must be an agent actually carrying on the business in respect of which the charge arises and entering into the contracts incident to such business, and that Wilsons, although they performed certain services in connexion with the business of Det Forenede at Hull, did not actually carry on that business and enter into the contracts. For myself I should be prepared to follow the opinion expressed by Lord Herschell in *Grainger v. Gough* (12 *The Times* L.R., 364 ; [1896] A.C., 325, at p. 337) and concurred in by Lord Macnaghten in the same case, and to hold that persons who were agents for some purpose connected with a trader's business and who received the gross proceeds (in which the net proceeds are included) were agents in whose name the trader could be assessed under section 41. But the question hardly arises in the present case ; for, on the facts found by the Special Commissioners, Wilsons were the exclusive agents for Det Forenede at Hull, quoted freights, accepted consignments of goods, and put them on board the steamers of Det Forenede, and I think it clear that they actually carried on the business and entered into the contracts for the carriage of the goods, even though the bills of lading were signed by their clerk for the master of the vessel. In my opinion, Det Forenede were chargeable with tax in their name.

As regards the tax year 1915-1916, section 41 of the Act of 1842 is extended by section 31 of the Finance (No. 2) Act, 1915, so as to make a non-resident person chargeable to income-tax in the name of his agent, although the agent may not have the receipt of the profits and gains of the non-resident ; and the section provides (by subsection (2)) that a non-resident person shall be chargeable in respect of any profits or gains arising, whether directly or indirectly, through, or from, any agency, and shall be so chargeable in the name of the agent ; and (by subsection (6)) that nothing in section 41 of the Act of 1842, as amended, shall render a non-resident person chargeable in the name of a broker or general commission agent, or in the name of an agent not being an authorized person carrying on the non-resident's regular agency in respect of profits or gains arising from sales or transactions carried out through such a broker or agent. This section is not a chargeable section, but it modifies the machinery by which a non-resident person carrying on a business here may be reached by enabling the Revenue authorities to assess and charge him in the name of an authorized person carrying on his regular agency, even though such agent may not have the receipt of the profits or gains of the non-resident. To this section, therefore, Lord Herschell's opinion above referred to does not apply, and the only question to be determined is whether Wilsons were authorized persons carrying on the regular agency of Det Forenede. The Special Commissioners held that they were, and upon the facts which they found I see no reason for questioning their decision. On this point, as on the other, I agree entirely with the opinion of Mr. Justice Rowlatt and the Court of Appeal, and I think that the appeal fails.

Both Mr. Justice Rowlatt and Lord Justice Scrutton commented severely on the delay which had occurred between the date in the year 1919, when the case first came before the Commissioners for Special Purposes, and the date in 1926 when it was brought before Mr. Justice Rowlatt for decision ; and no doubt the dates are startling. Neither Mr. Justice Rowlatt nor Lord Justice Scrutton pronounced any opinion as to who was to blame for the delay ; but they said, and said truly, that there must be something wrong in a system under which it took so long to settle the amount of a tax payable to the State. On these comments being brought to my notice I made some inquiries, with results which justify the hope that the procedure will henceforth be expedited. Mr. Justice Rowlatt, with the sanction of the Lord Chief Justice, has directed that "points of argument," which it has for some time been the practice to exchange in these cases and which in some instances have caused delay, need no longer be delivered ; and also that a case may be set down, not by the appellant only, but by either party. With the assistance of these directions, and with greater insistence by the Special Commissioners on the need for expedition, it may be that delay such as that which aroused comment in this case will henceforth be avoided.

NEILSEN, ANDERSEN, AND CO. v. COLLINS.

In *Neilsen, Andersen, and Co. v. Collins* the facts found by the Special Commissioners are very similar to those found in *Tarn v. Scanlan*. Det Forenede have a line of steamers running between Copenhagen and Newcastle, and the appellants, Neilsen, Andersen, and Co., are their agents at Newcastle, accept goods for carriage from that port to Copenhagen, put them on board the ships of Det Forenede, collect the outward freights, and remit them to the company. In this case, as in the other, no written contract is entered into before the bill of lading, but a clerk in the employ of the appellants, who is lent to the master of the ship for that purpose, prepares the manifest and signs the bill of lading for the master. The years for which the assessments in this case were made were the years ending April 5, 1914, 1915, and 1916.

In my opinion, the considerations which apply to the appeal in *Tarn v. Scanlan* apply equally to this appeal, and this appeal also must fail.

In the course of the argument attention was drawn to the circumstance that in respect of each of the years in question the Special Commissioners had made an allowance for wear and tear equal to the assessment in respect of profits, with the result that no tax was payable by the appellants, and there appeared to be no material basis for an appeal. The explanation of counsel for the appellants was that, if no appeal had been lodged, they would have been bound as regards future assessments by the findings of the Special Commissioners in the present case. I am not satisfied that this would be so ; but, as the appeal fails, it is unnecessary to pursue the point.

WILLIAM H. MULLER AND CO. (LONDON), LIMITED v. LETHEM.

The facts of this case differ in one respect from those found in the two cases above referred to.

Two Dutch steamship companies, which are referred to in the case as the Nederland Steamboat Company and the General Shipping Company, were the owners of four steamships known as the Batavier Line and trading regularly between Rotterdam and London. The firm of W. H. Muller and Co., of Rotterdam (referred to as "the Dutch firm"), were the directors of the Nederland Steamboat Company and had the management and control of that company under the supervision of a board, and they were also the

shipping agents of the company. The Dutch firm were also the directors of the General Shipping Company, with like powers; and by a deed dated June 29, 1899, they were appointed exclusive shipping agents for that company and were authorized to appoint sub-agents when they might deem it necessary, subject to the approval of the company. In the year 1904 the Dutch firm appointed the appellants, W. H. Muller and Co. (London), Limited (referred to as "the London firm"), to be "agents in London for the Batavier Line"; and since that time the London company have (as the Special Commissioners found) done everything that was required to be done in connexion with the ships of the Batavier Line in London—booking passages, accepting goods and putting them on board, and collecting the freights on goods shipped c.i.f. In this case, too, the bills of lading were signed for the master by one of the clerks of the London company. The assessments appealed against are for the years ending April 5, 1916 and 1917.

Upon these facts there can be no doubt that the two Dutch shipping companies carried on business in London; and the only question is whether the London firm were, within the meaning of section 31 (6) of the Finance (No. 2) Act, 1915, authorized persons carrying on the non-residents' regular agency. The contention put forward on behalf of the appellants was that the Dutch company in appointing the appellants agents in London for the Batavier Line made them the agents not of the Dutch shipping companies but of the Dutch firm itself, to which alone they were accountable; and that the London firm, in conducting the business of the line in London, have acted not for the shipping companies but for the Dutch firm as their principals, and have never been agents of the shipping companies. I cannot accept this contention.

The Dutch firm, by their letter of July 4, 1904, appointed the London company "agents in London for the Batavier Line," signing the letter "W. H. Muller and Co., Batavier Line"; and in the subsequent agreement dated March 6, 1916, the Dutch firm treated themselves as owners of the line, and appointed the London firm

"sole agents for the owners in London in respect of the Batavier Line for the transaction of the shipping business of the said line carried on at Custom House and Wool Quays, Lower Thames-street, in the said city, and in particular for the fixing of rates of freight, the embarkation and disembarkation of passengers, and the carriage of passengers and cargo and other business usually carried on by a line of steamships."

I am disposed to think that in signing both these documents the Dutch firm were acting as directors of the shipping companies, and in that capacity appointed the London firm as direct agents of those companies; but even if that be not so, and if the appointments must be held to have been made by the Dutch firm as shipping agents for the Dutch companies and not as directors—still it appears to me that they constituted the London firm direct agents of the two companies. In this connexion reference may be made to the well-known judgment of Lord Justice Thesiger, in *De Bussche v. Alt* (8 Ch.D., 286, at p. 310), where he pointed out that in certain cases, where the exigencies of business require it, an agent must be deemed to have authority to constitute a direct privity of contract between a substitute appointed by him and his principals. In my opinion, the present case falls within that category, and the appellants were appointed and became the authorized and regular agents of the two Dutch companies in London.

WILLIAM H. MULLER AND CO. (LONDON), LIMITED v. COMMISSIONERS OF INLAND REVENUE.

The appeal in *William Muller and Co. (London), Limited v. Commissioners of Inland Revenue* related to the liability of the appellants for excess profits duty in respect of the profits of the business carried on by the two Dutch companies in London. It was admitted that the result of this appeal must follow the result of the appeal in William H. Muller and Co. (London), Limited v. Lethem.

For the above reasons I am of opinion that these appeals fail, and should be severally dismissed, with costs.

The LORD CHANCELLOR stated that LORD SHAW OF DUNFERMLINE concurred in his judgment.

TARN v. SCANLAN. NEILSEN, ANDERSEN, AND CO. v. COLLINS.

VISCOUNT DUNEDIN.—My Lords, I concur. These two cases, which for practical purposes I consider indistinguishable, are, in my opinion, so far as the first question is concerned—*i.e.*, whether there is a business carried on in the United Kingdom—clearly determined by authority. The case of *Erichsen v. Last* (8 Q.B.D., 414) is not *per se* binding on this House, but it is practically so. For not only was it approved by Lord Herschell in *Grainger's* case (12 *The Times* L.R., 364; [1896] A.C., 325), but in the subsequent and recent case of *Maclaine and Co. v. Eccott* (42 *The Times* L.R., 416; [1926] A.C., 424), both the Lord Chancellor (in whose judgment Lord Atkinson and Lord Sumner concurred) and Lord Shaw explicitly adopted *Erichsen v. Last* (*supra*) as good law. In applying the law of that case to the facts of this, I agree entirely with the Master of the Rolls, who says: "It appears to me that there was a business, the business of securing freights for their ships, which was carried on in this country."

Then the question whether the tax was rightly levied on the appellants as agents under section 41 of the Act of 1842 is a pure question of fact. The point urged by the learned counsel was that the contract of carriage was really effected by the bills of lading which were made out by the master and not by the appellants. I quote again from the Master of the Rolls, who, I think, correctly states the result of the evidence: "The appellants in both these cases were acting as agents for the foreign company for the purpose of entering into contracts and securing business for the foreign company, the business of filling their vessels with goods and then securing freight to be paid to the shipping company." That is the substance of the transaction, and I do not think it matters if the bills of lading were actually signed by the master, though as a matter of fact they were signed for the master by a clerk lent by the appellants. For the real contract out of which the profits arise is the contract made by the appellants with the person who sends the goods, and that is made on behalf of the shipping company and not by the appellants as principals. The result is that in so far as they received freights out of which profits are earned, they are accountable during the earlier years; and then so far as the year after the Act of 1915 is concerned they do not escape, because they are the regular agents and therefore fall within the rider on the exception provided by section 31 (6) of that Act.

With regard to the other two appeals, I agree with the judgment of the Lord Chancellor.

WILLIAM H. MULLER AND CO. (LONDON), LIMITED v. LETHEM. WILLIAM H. MULLER AND CO. (LONDON), LIMITED v. COMMISSIONERS OF INLAND REVENUE.

LORD ATKINSON, read by LORD CARSON.—My Lords: The facts have been fully stated already. Three companies are involved in this litigation. The first, an English company, incorporated under the Companies Acts, 1862 to 1900, under the name of Wm. H. Muller and Co. (London), Limited, of 32, Bury-street, London, E.C. The business of this company is found to be:—

"(A) To carry on the business of merchants, shipowners, shipbrokers, insurance brokers, underwriters, managers of shipping property, freight contractors, carriers by land or sea, forwarding agents, commission agents, colonial and produce brokers, corn factors, ore and metal brokers and dealers and any other business which usually is or conveniently can be carried on in conjunction with any of these businesses.

"(B) To do all or any of the matters aforesaid, alone or in conjunction with, or as agents for, foreign firms, companies or persons, and generally for other companies and persons, and to establish, regulate and discontinue agencies for the purposes of the company."

The second is a Dutch company established in Rotterdam in the year 1896, and, for convenience sake, named the Nederland Steamboat Company. Its business is found to be to run a freight and passenger service between Rotterdam and London with the right to run insurance risk on its own vessels and on goods shipped on those vessels. Article 10 of its statutes provided for management of the company by a director under the control of its board, which consisted of not less than three or more than nine members. This director is given the management and control of the company, which he represents "in law and outside the law."

The third company is W. H. Muller and Co.'s Algemeene Scheepvaart-Maatschappij, for convenience styled the General Shipping Company. It is a Dutch company established and incorporated at Rotterdam in the year 1899 for the following purposes, namely, to carry on:—

"(A) A shipowning business; and

"(B) The ownership of shares in companies carrying on shipowners' business.

"(C) The purchasing, building, launching, equipping, managing, chartering, re-chartering, engaging and selling of sea and river craft;

"(D) Transport of passengers, goods and cattle, the establishment of new, the purchase of existing, and the management of places for the building, docking and repairing of, vessels and machinery for the loading and discharging of vessels or for the storage of goods;

"(E) The insurance of all sorts of risks."

By Article 9 of the articles of this company it is provided that the company is to be managed by a director under the control of the company's board, and this director is to represent the company in law and outside the law.

The most intimate relations appear to bind together these three companies. For instance, a preponderating interest in the share capital of the London company was vested in a Mr. Kroller, a Dutchman who was a partner in a registered partnership named W. H. Muller and Co., Rotterdam, having its head office at The Hague, and referred to as the Dutch firm. All the ordinary shares in this Dutch firm were held by this same Mr. Kroller, together with his wife and his brother. But the 6 per cent. preference shares in this firm were held by outsiders.

By the 9th and 10th Articles of this company it is provided that the company is to be managed by a director, under the control of the board, and this director, it is provided, was to represent the company in law and outside the law. By its 41st Article it is provided that the Dutch firm was nominated as the first director of the General Shipping Company, and that the four Dutch gentlemen mentioned were to be nominated as its board. By a deed dated the 29th June, 1899, styled a constitution deed, it is recorded that the Dutch firm had contributed considerable assets, mentioned in detail in the deed, to the General Shipping Company on the following, amongst other, conditions:—

"(1) That the Dutch firm should act as exclusive shipping agents and exclusive cargo superintendents of the company both in Rotterdam and in those places where the Dutch firm was or might thereafter be established or represented by agents.

"(2) That the Dutch firm should, subject to the approval of the company, appoint sub-agents wherever the firm might deem this necessary.

"(3) That the Dutch firm should have the right to charge for its services referred to in Article 1 as shipping agents a commission of 4 per cent. on the gross amounts of freights and passages for cargo and passengers dealt with by them—none excepted—and might, moreover, in cases where the firm acted at the same time as cargo superintendents on behalf of the company, charge for its services as such a further commission of 1 per cent. besides the usual discharging and unloading charges in accordance with the tariff then in force of the Rotterdam Cargo Superintendents whether they are paid separately by the consignees and the shippers or included, or to be included, in the freights. By minute of general meeting dated 29th June, 1899, the salary of the manager was fixed at 3,000 florins per annum.

"The commission payable under this deed was in addition to the commission payable to the Dutch firm as directors."

The Nederland Steamboat Company—*i.e.*, Company No. 2—owned two vessels, named "Batavier 2" and "Batavier 3," and the General Shipping Company owned two vessels, "Batavier 4" and "Batavier 5." During the years to which the assessment of income-tax relates these four vessels, and those vessels alone, constituted the Batavier Line. The evidence and the authorities have been fully dealt with both before Mr. Justice Rowlatt and in the Court of Appeal. It is unnecessary for me to analyse the evidence again or deal with the authorities again. It is sufficient, I think, for me to express the opinion which I entertain: that it is absolutely hopeless to contend that these two companies Nos. 2 and 3 did not by means of their four vessels carry on in England a trade or business of the nature found in the case. As neither of these companies was resident in England they must necessarily have carried on this business through a body or a person or persons resident in England acting on their behalf in the conduct of their business as their agent or agents.

These two companies, being fully alive to the necessity in this respect which their enterprise imposed upon them, wrote to the English company—*i.e.*, Company No. 1—a letter the details of which make it doubly significant:—

"Rotterdam,
"4th July, 1904.
"Messrs. Wm. H. Muller and Co. (London), Limited.
"Bury-street, London, E.C.

"Dear Sirs,—In respect of your having taken over the business hitherto carried on by the Neder-

land Steamboat Company, at Custom House and Wool Quays, we herewith confirm that we appoint you agents in London for our Batavier Line, and as such you will have to follow our instructions in all matters concerning this line, and especially as to the fixing of any rates of freight, &c., nor will you fix any rates for wharfage, cartage, rent, &c., for the carriage of our goods without our approval. Your remuneration for the agency will be as follows :—

Advertisement 10s.
Reporting inward and clearing outward £1 1s. 0d.
Customs Manifest 10s. 6d.
B/L Postage 2s. 6d.
Telegram and Letters 12s.
Stevedore's Charges 1d. per ton outwards.
Quay Charges £10 per steamer.
Embarking and disembarking over wharf passengers.
Bicycles if passenger's luggage 6d. each.

Moreover, we shall have to refund to you the following paid out charges :—

Tonnage Dues.
River Pilotage.
Mooring and Unmooring.
Shifting.
Waterman's Attendance.
Customs Overtime.
Landing Customs Officers at Gravesend.
Pilot Calling.
Noting Protest.
Water Supplied.

"Please let us have an acknowledgment of the present.

"Yours truly,
"W. H. MULLER and CO.
"(Batavier Lijn)."

On the 6th July, 1904, the London company acknowledged the receipt of this letter, as requested, and on the 7th July, next day, the Dutch firm wrote to W. H. Muller and Co. (London), Limited, a letter which runs as follows :—

"In reply to your favour of yesterday we beg to inform you that we can only allow you as agents 4d. per passenger in and outward when passing over the wharf. That is what we understand from Mr. Kroller that he allows under this heading to the wharf.

"We agree with 2½ per cent. commission on freight and passengers inwards and 5 per cent. commission on freight and passengers outwards.

HALF LIGHTERAGE ON HORSES OUTWARDS FROM LONDON.

"The undersigned talked this matter over with Mr. Chambers and it was fully agreed that the lighterage of horses shall be taken as included in the wharfage, this lighterage being an extension of the wharf. This is necessary by the conference under which we are compelled to charge per horse 20s. sea freight and 3s. 6d. wharfage, and if we do anything not included herein we have to charge this separately to the customers. In this case the charge for lighterage would be prohibitive for the knacker trade.

Yours faithfully,
"WM. H. MULLER and CO. (Batavier Lijn),
"(Signed) N. Van de Roemer."

It is plain upon the face of this letter that the Dutch firm treated the London company as the agents of the Batavier Line to manage its London business. There is nothing about a sub-agency.

It is found at p. 7 of the case stated that:—

"10.—The London company are the lessees of the Custom House and Wool Quays Wharf in London, to and from which the four above-mentioned vessels of the Nederland Steamboat Company and the General Shipping Company regularly sail. The name 'Batavier Line' is exhibited outside the office of the London company, their telegraphic address is 'Batavier, Bilgate, London,' and the London Postal Directory contains an entry 'Batavier Line, W. H. Muller and Co., Limited, Office, London Wharf, Wool Quay.' Advertisements of the service carried on by the Batavier Line are inserted in the Press and paid for by the London company, the charges being refunded by the Dutch firm."

On the next page (p. 8) the methods followed in the conduct of their business connected with the vessels constituting the Batavier Line are described in great detail, and at p. 9 it is found that the London company did everything that was required to be done in connexion with the ships in London, obtaining instruction when necessary from the Dutch firm. The London company had no direct communication with either the Nederland Steamboat Company or the General Shipping Company except through the Dutch firm.

It is easy to dub an agent with the name of a sub-agent, but the real position, power, and authority of the man thus dealt with must be determined by his action : What authority he, with the approval of his principal, exercised ; what he did ; what were the nature and reach of his work. The London company was appointed by the Batavier Line to be its, and to act as its, agent to transact in England the business of the line that required to be there transacted. The idea that the Dutch firm, which did not reside in England, should be held to be the agent to transact in England the English business of its non-resident principal, the Batavier Line, is a rather absurd idea, as it would appear to me, and is altogether inconsistent with the terms of the letter appointing the London company as agents, and the evidence in the case. I think, therefore, that the London company is liable to be assessed for the income-tax sought to be recovered as the agent of the Batavier Line who transacted their business in England, and that the appeal fails, and should be dismissed.

As regards the two other appeals I concur.

LORD CARSON.—My Lords : I agree with the judgment delivered by the Lord Chancellor, and I only desire to say that in the case of Muller I felt some difficulty during the argument as to whether the appellants were the "agents" of the General Shipping Company within section 41 of the Income Tax Act, 1842, or section 31 of the Finance (No. 2) Act, 1915. It is very necessary where personal liability to taxation is imposed upon an agent in respect of business carried on for his principal not to extend such liability beyond the exact terms of the Act of Parliament, and I was impressed by the argument that there was no privity of contract between the appellants and the General Shipping Company. Upon consideration, however, I am of opinion that the question whether the tax was rightly levied upon the appellants as "agents" under section 41 is one of fact. In the present case, under the deed of June 29, 1899, authority is reserved to the Dutch firm "subject to the approval of the company" (*i.e.*, the General Shipping Company) "to appoint sub-agents whenever they might deem this necessary," and I think the Special Commissioners were justified in finding that the appointment of the appellants carried with it the knowledge and approval of the company. There is, therefore, evidence to support the finding of the Special Commissioners that the General Shipping

Company carried on a trade in the United Kingdom through the appellants as their agents or managers.

[Solicitors—In Tarn v. Scanlan and Neilsen, Andersen, and Co. v. Collins: Messrs. Nicholson, Graham, and Jones; the Solicitor of Inland Revenue. In William H. Muller and Co. (London), Limited v. Lethem, and Same v. Inland Revenue Commissioners: Mr. C. J. Sharpe ; the Solicitor of Inland Revenue.]

Court of Appeal.
(Lord Hanworth, M.R., Atkin and Lawrence, L.JJ.)
1927. Nov. 11.

IN RE HARRINGTON MOTOR COMPANY, LIMITED.*

Companies — Winding-up—Insurance of company against claims—Judgment against company — Subsequent liquidation—Payment by insurers to liquidator—Whether amount payable to judgment creditor — Availability for general creditors.

The applicant obtained judgment against a limited company for damages for personal injuries and costs. Afterwards the company went into liquidation, and the insurance company with which the company in liquidation was insured paid the amount of the damages and costs to the liquidator.

Held, that the applicant was not entitled to have the amount in question paid to him by the liquidator, but it formed part of the assets for distribution among the general creditors, including the applicant.

Decision of Eve, J. (43 *The Times* L.R., 684), affirmed.

This was an appeal by Mr. Walter Chaplin, of Galleywood, Chelmsford, from a decision of Mr. Justice Eve (43 *The Times* L.R., 684), on a summons taken out in the liquidation of the Harrington Motor Company, Limited. Mr. Chaplin had recovered £324 damages for personal injuries against the company in an action in the King's Bench Division. He asked for a declaration that that sum, together with the costs—£273—did not form part of the assets of the company available for distribution among its general creditors. The damages which the applicant had recovered had been paid over by the insurance company in which the motor company was insured to the liquidator of the motor company, and the applicant claimed that the whole of that money should be paid to him personally.

Mr. Justice Eve dismissed the application. Mr. Chaplin appealed.

Mr. W. N. Stable appeared for the appellant ; Mr. H. C. Bischoff for the respondent, the liquidator.

Mr. Stable contended that the appellant had an equity entitling him to be paid the money which was paid to the motor company for him. That was established by the principle laid down in *Ex parte James* (L.R., 9 Ch., 609). On that principle the liquidator would not be allowed to take money which was in fact the property of the appellant. Counsel relied upon *In re Richardson* ([1911] 2 K.B., 705) as showing that a sum of money in the hands of a trustee in bankruptcy or of a liquidator was not necessarily part of the assets if there were any creditor with an equitable claim against it. The cases of *British Union and National Insurance Company, Limited v. Rawson* (32 *The Times* L.R., 665 ; [1916] 2 Ch., 476) ; *In re Law Guarantee Trust and Accident Society, Limited* (30 *The Times* L.R., 616 ; [1914] 2 Ch., 617) ; *In re Thellusson—Ex parte Abdy* (35 *The Times* L.R., 732 ; [1919] 2 K.B., 735) ; and other cases were cited.

Mr. Bischoff was not called upon to argue.

The Master of the Rolls, in giving judgment, said that it was quite clear that most people would think, as a matter of common sense, that Mr. Chaplin should have a right to recover the money paid by the insurance company in respect of the defendants' liability. Yet in spite of the resourceful, able, and helpful argument of Mr. Stable, the Court must dismiss the appeal. When one considered the law as it stood, and when one looked at the question whether Mr. Chaplin had a right to say to the liquidator, "This is my money," it was impossible not to see that that view was untenable.

In the ordinary way, a bankruptcy or winding-up order barred any action by a creditor, and his only remedy was by proving in the bankruptcy or winding-up. Here it was contended that this debt was not the proper subject of a proof in the winding-up, but the question would then arise whether Mr. Chaplin had any right over against the insurance company. In *In re Law Guarantee Trust and Accident Society, Limited,* Mr. Justice Scrutton (as he then was) said (30 *The Times* L.R., 616 ; [1914] 2 Ch., at p. 647) :—

"There is, however, no direct privity between the debenture-holder or principal debtor, Sands, Wilson, and Co., on the one hand, and the insurance company on the other. The debenture-holder cannot sue the insurance company direct. . . . I am not aware of any way in which an original assured can get at a re-insurer ; his rights are only against the original insurer, the re-insured."

So, in the present case, Mr. Chaplin had a right to prove in the winding-up, but the insurance money belonged to the liquidator. It was not really correct to say that that money was due as a result of the action by Mr. Chaplin, and was therefore his money. It might be said, in a sense, to exist because he had suffered an accident, but the real reason why it came into being was because during a period of time a contract had existed between the defendants and the insurance company. And the defendants had paid their own money to the insurance company so that, in certain eventualities, money should be paid to them. It did not seem possible to establish any privity of contract between the creditor, Mr. Chaplin, and the insurance company. On the contrary, there seemed to be a complete break in the chain sought to be established between them in order to enable Mr. Chaplin to claim that the payment made by the company was really a payment to him.

In section 7 of the Workmen's Compensation Act, 1925, there was a provision that where an employer had entered into a contract with insurers, and he subsequently went bankrupt, an injured workman, entitled to compensation, could stand in the shoes of the employer and recover his money direct from the insurance company. That showed that the difficulty attending Mr. Chaplin's claim had, as regarded the case of an injured workman, been considered by the Legislature, and a special provision had been inserted

* Reported by H. Langford Lewis and G. T. Whitfield-Hayes, Esqs., Barristers-at-Law.

in the Act to deal with it. The appeal must be dismissed.

Lord Justice Atkin said that he thought that the appellant had a real grievance ; but the general rule of law was too strong to allow the Court to make any exception, however the Court might sympathise with the appellant. The position in law was quite clear, and it was that the appellant had no right or claim against the insurance company, or against money paid by the insurance company. The assured had a direct right of recourse against the insurance company, but a third party had no such right, because there was no privity between him and the insurance company, and it was difficult to see how a special right could be said to exist against the insurance company, or any right to claim money paid over by the insurance company, merely because the assured happened to be in financial difficulties. In *In re Law Guarantee Trust and Accident Society, Limited* (30 *The Times* L.R., 616 ; [1914] 2 Ch., 617, at p. 633), Lord Justice Buckley said : "The equitable doctrine is that the party to be indemnified can call upon the party bound to indemnify him specifically to perform his obligation, and to pay him the full amount which the creditor is entitled to receive, and that whether having received it he applies it in payment of that creditor or not is a matter with which the party giving the indemnity is not concerned. In such a case the party indemnified is entitled to receive 20s. in the £, and, having got it, to deal with it as he thinks proper." Later, referring to *Carr v. Roberts* (5 B. and Ad., 78), he added : "Both Mr. Justice Littledale and Mr. Justice Patteson at the conclusion of their judgments point out that it is the duty of the defendant to pay the whole amount, and it makes no difference whether it is applied in discharge of the debt, or whether the plaintiff, having recovered it, does not make a proper use of it. . . ." In the same case, Lord Justice Kennedy said (*supra,* at p. 639) : "How the person who receives payment of a sum of money under a contract of insurance or re-insurance, or, I will add, of indemnity, deals with that sum is, in general and apart from special considerations, no concern of the party who, in fulfilment of his contract, has made the payment to him. Upon what grounds of equity or legal logic can it be argued that, because the law, on grounds of public policy, compels the creditor, the liability to whom is the event upon which the right of a bankrupt or of an insolvent company to payment of the sum covered by the contract arises, to be content with such share of the assets of the bankrupt or the company in liquidation as a *pari passu* distribution between creditors will give, these assets are not to include the payment due under the contract ? " It seemed, therefore, that the third party was compelled by law to be content with that share of the assets to which, according to the amount of his debt, he was legally entitled.

Mr. Stable had argued that the appellant should, at any rate, have a preference in regard to the amount paid in respect of costs, because, he suggested, that was an asset "created" by the appellant in bringing the action. That seemed to him (the Lord Justice) a fallacy. Costs were an incident of litigation, but it could not be said that the sum paid over was "created" by the incurring of certain costs.

The appeal must be dismissed, the law being perhaps on the whole in an unsatisfactory state on the matter.

Lord Justice Lawrence said that, like the other members of the Court, he sympathised with the appellant, but it was impossible to allow the appeal. What the appellant was doing was to claim the benefit of a contract of insurance which had been made between his debtors and an insurance company, but with which the appellant really had nothing to do. It was not suggested that that contract was in any way assigned to him, and it was difficult to see how he could claim that the insolvency of the debtors gave him any special rights or interest in that special fund, to which by contract the debtors were entitled. The appellant had based his case almost entirely on *In re Richardson* ([1911] 2 K.B., 705). He (the Lord Justice) found it rather hard to follow the principles laid down in *In re Richardson* (*supra*), but he thought that they did not seriously question the general principle that a man could not claim an interest in a contract to which he was not a party.

[Solicitors—Messrs. W. Hilliard and Ward ; Messrs. Simmons and Simmons.]

Court of Appeal.
(Lord Hanworth, M.R., Atkin and Lawrence, L.JJ.)

1927.
Nov. 10.

INLAND REVENUE COMMISSIONERS v. YORKSHIRE AGRICULTURAL SOCIETY.*

Revenue — Income-tax—Charity—Exemption—Agricultural society—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 37 (1) (*b*).

The appellants, an agricultural society, founded mainly for the purpose of promoting and holding an annual agricultural show, had also among their objects the improvement of live stock and poultry and of machinery and appliances used in agriculture, and agricultural education and scientific research, and they claimed exemption from income-tax upon the dividends from their investments on the ground that they were a society established for charitable purposes only. The Special Commissioners found that the society was established for charitable purposes only, and they held that the claim should be allowed.

Held, that there was evidence on which the Special Commissioners could so find, and their decision must be affirmed.

This was an appeal from a decision of Mr. Justice Rowlatt, who, in reversing a decision of the Special Commissioners, held that the Yorkshire Agricultural Society was not entitled to claim as being a charity exemption from income-tax on the income and dividends of its invested funds for the year ending April 5, 1923.

The society was founded at York in 1837 mainly for the purpose of promoting and holding an annual agricultural show. At present the principal objects of the society, besides the holding of the show, were the improvement of live stock and poultry, of machinery and appliances used in agriculture, and agricultural education and scientific research.

The minimum annual subscription was £1, and there were at present over 3,000 members. A member, as such, was entitled to free admission to the annual show, to reserved tickets at reduced rates, to reduced

* Reported by H. Langford Lewis, Esq., Barrister-at-Law.

fees on exhibits sent in by him, and to certain other minor privileges, both in connexion with the annual show and otherwise. There was no provision for the disposal of the funds of the society in the improbable event of its being wound up. The income of the society was derived from entry fees and gate receipts, local subscriptions for prizes, interest on investments, and subscriptions of members. Any excess of income over expenditure, which excess in 1923 amounted to £2,131, was invested, and, in the event of the show resulting in a loss, the loss was met by a sale of investments.

The society contended that it was established for charitable purposes only, and claimed exemption from income-tax in respect of the income from its investments for the year ending April 5, 1923.

The Commissioners of Inland Revenue contended, (1) that the advancement of agriculture was not a charitable purpose only; (2) that the society was established for the benefit of its members and not for the benefit of agriculture generally; (3) that in any event one of its objects, added in 1923—namely, watching and advising on legislation affecting the agricultural industry—was not a charitable object; (4) that the society's funds were not established by a trust of a permanent character; and (5) that the society was not established for charitable purposes only, and that the claim for exemption from income-tax ought to be refused.

The Special Commissioners found, with some doubt in view of the wide nature of the stated objects of the society, that the society was established for charitable purposes only, and held that its claim for exemption should be allowed.

The Crown having appealed, Mr. Justice Rowlatt reversed that decision, mainly on the ground that the objects of the society were partly objects for the benefit of the members only.

The society appealed.

Mr. Gavin Simmonds, K.C., and Mr. Raymond Needham appeared for the appellants; the Solicitor-General (Sir Thomas Inskip, K.C.), Mr. J. H. Stamp, and Mr. R. P. Hills for the Crown.

The Master of the Rolls, in giving judgment, said that the claim to exemption arose under section 37 (1) (*b*) of the Income Tax Act, 1918, granting exemption from tax under Schedule D "in respect of any yearly interest or other annual payment forming part of the income of any body of persons or trust established for charitable purpose only . . . and so far as the same are applied to charitable purposes only."

It was important to summarize the facts of the case. The society was formed at a meeting at York held on October 10, 1837, and the first resolution passed at that meeting was "That a society be formed called 'The Yorkshire Agricultural Society,' the object of which shall be to hold an annual meeting for the exhibition of farming stock, implements, &c., and for the general promotion of agriculture." By rule 12 it was declared that no subject connected with any legislative enactment should be introduced into the proceedings of the society. All prizes were to be open to competition in the United Kingdom. Incidentally, there were, and had always been, certain privileges attaching to membership of the society, shortly speaking, free admission to the show, reduced prices for reserved seats, reduced rates for exhibits, and the benefit of any special railway facilities that might be in force. He thought that Mr. Justice Rowlatt was quite right in disregarding these privileges as not assisting one way or the other in arriving at his conclusion. Subscribers to other charities, such as hospitals, generally enjoyed privileges, such as that of introducing patients.

In 1923 the society annulled rule 12, and adopted as one of its objects "watching and advising on legislation affecting the agricultural industry." Mr. Justice Rowlatt had also rightly set that aside. It would be fair to describe the society as being one for the promotion of agriculture generally in the ways specified in its objects.

It was said, however, that certain privileges were granted to temporary members, who only joined for the year. That also might be set aside, as it did not alter the general nature and purpose of the society as a whole. To make out its claim for exemption the society must show that it was a body of persons established for charitable purposes only. The definition of "charity" always referred to as authoritative was that of Lord Macnaghten in *Commissioners for the Special Purposes of the Income Tax v. Pemsel* (7 *The Times* L.R., 657; [1891] A.C., 531, at p. 583), where he said:—

"'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

The fourth division was of a somewhat wide and indefinite nature. What was a "purpose beneficial to the community"? Examples of what had been held to be charities included the activities of an anti-vivisection society (*In re Foveaux—Cross v. London Anti-Vivisection Society,* 11 *The Times* L.R., 540; [1895] 2 Ch., 501). On the other hand, it had been held that where the purpose of an association was for the benefit of the members themselves only, it was not a purpose for the general benefit of the community, as in the case of a friendly society (*In re Clark's Trust,* 1 Ch. D., 497); or a headmasters' conference (*Rex v. Special Commissioners of Income Tax—Ex parte Headmasters' Conference,* 41 *The Times* L.R., 651).

If the society were formed for the general benefit of agriculture, it would, said Mr. Justice Rowlatt, be one for the general benefit of the community.

He thought that the society had been formed for the general improvement of agriculture, and not merely for the special benefit of its members in the county where it was established. It was, therefore, a society for the general benefit of the community. That conclusion having been reached, the next question was whether it had been established for charitable purposes only. No taint affecting the main purpose arose from the criticism that members enjoyed special privileges. The society, as Mr. Justice Rowlatt had held, was an established body of persons. It had existed for three generations, and there was no want of the element of permanency in its fine record of activity. Illustrations of cases where societies had failed in part to show that their objects were really charitable were *Morice v. Bishop of Durham* (10 Vesey, Jun., 522) and *Attorney-General v. National Provincial and Union Bank of England* (40 *The Times* L.R., 191; [1924] A.C., 262).

For these reasons he (the Master of the Rolls) thought that the society was originally established, and had continued to be, a society for the general promotion of agriculture; and agriculture could be, and in this case was, a charitable purpose.

The Income Tax Act, 1918, section 37 (1) (*b*), clearly contemplated persons who were not incor-

porated or connected by the bond of a trust deed. Section 237 defined a body of persons as meaning any body politic, corporate, or collegiate, and any company, fraternity, fellowship, and society of persons whether corporate or not corporate. The definition was, therefore, intended to embrace a mobile or shifting body not exactly defined by a trust deed. It was obvious that the facts in each case must be the basis on which one found whether there was a body established, and whether that body was established for a charitable purpose. A question of degree was a question of fact. This Court could not upset a finding of fact arrived at by the Special Commissioners, if there was evidence to support it, and there was evidence in this case upon which they could find that the society was established for charitable purposes only. Mr. Justice Rowlatt had set aside that finding of fact, and had come to the conclusion that the society was mainly intended to promote the taste and pleasure of the members for the time associated together. But that view was not taken by the Special Commissioners, and he (the Master of the Rolls) agreed with their finding.

In *Royal Agricultural Society of England v. Wilson* (40 *The Times* L.R., 763) the profits of the society's annual show were held assessable to income-tax because, in holding a show, the society was engaged in carrying on a trade. The effect of that decision was altered by the Finance Act, 1924, which, by section 23 (1), provided that any profits or gains arising to an agricultural society from an exhibition or show held for the purposes of the society should, if they were applied solely to the purposes of the society, be exempt from income-tax. The language of that section was based on the theory that a society for the promotion of agriculture was a charity.

The Court could not reverse the decision of the Special Commissioners on what was really a question of fact, and the appeal must, therefore, be allowed, with costs.

Lord Justice Atkin said that the case raised a question of some importance—namely, whether the society came within the definition in the Act—and this question must be dealt with under three heads. To comply with the test, the society must be (1) a body of persons, (2) established, and (3) established for charitable purposes only. The definition in the Act of a "body of persons" would include a voluntary association such as the present. One need not discuss to what extent permanence was a necessary element. Here the society was formed in 1837, it was intended to continue permanently, and it had existed for 90 years. The next point was whether it was established for charitable purposes. The objects were expressed in the original resolution forming the society, and they had been amplified by the rules without altering the main purpose. Education in agricultural matters and improvement of stock were forms of technical education, and it would be very difficult to say that such a purpose fell short of that which constituted a charitable purpose. Dealing with the cases which had been held to be charitable, one found the National Trust for places of historic interest or natural beauty (*In re Verrall*; [1916] 1 Ch., 100), trusts for the preservation of natural aspects of plant and animal life, or for the physical training of Army officers and soldiers. If the question had to be considered whether a bequest for the general improvement of agriculture was charitable, he (his Lordship) had no doubt that it would be so held. The next question was—could the society be held to be formed for charitable purposes only? A society formed for the mutual advantage of the members only would not be a society established for a charitable purpose only, but if a benefit were given to members with the ultimate object of improving agriculture, that benefit would not prevent the objects of the society from being purely charitable. In order to get a contribution of 9d., one might have to give the members a benefit worth 4d. He (his Lordship) attached no importance at all to the fact that members were induced to become members by giving them privileges at the annual show. One of the objects of the society was watching and advising on legislation affecting agriculture. If that were the sole purpose, the object of the society would not be charitable, but, as an auxiliary object, it was one well within the main charitable purposes of the society. It was said, however, that the society might at any time devote its funds to a non-charitable purpose. His Lordship thought that that argument involved a *non sequitur*. It might apply to any charitable society which could dissolve at any time and re-associate itself for other purposes. The society might add or substitute a non-charitable purpose, and if it did so it would cease to be a society established for a charitable purpose, but until it did so it remained a society established for a charitable purpose. The Yorkshire Agricultural Society had never changed its constitution, and its investments and the income thereof were plainly devoted to its main purposes. In his opinion the society fell within the definition in the Act. The question was one largely of fact. It was said that a serious consequence might follow to the Revenue if the appeal were allowed, but he (his Lordship) was not alarmed by that consequence. The General Commissioners themselves in 1924 admitted that the Royal Agricultural Society was a charity. He agreed that the appeal ought to be allowed.

Lord Justice Lawrence, who agreed, said that he would only offer a few observations. Agriculture was not merely beneficial to the community but vital to its welfare. Mr. Justice Chitty, in *In re Foveaux—Cross v. London Anti-Vivisection Society* (11 *The Times* L.R., 540; [1895] 2 Ch., 501, at p. 504), said:—"After all, the best that can be done is to consider each case as it arises, upon its own special circumstances. To be a charity there must be some public purpose—something tending to the benefit of the community. The benefit in point of local area need not extend to the public at large; a trust for the benefit of the inhabitants of a particular district will suffice."

The general improvement of agriculture was clearly a charitable purpose within the fourth division of charities laid down by Lord Macnaghten in *Commissioners for the Special Purposes of the Income Tax v. Pemsel* (7 *The Times* L.R., 657; [1891] A.C., 531, at p. 583). He (his Lordship), however, must not be understood as saying that every trust of public general benefit to the community was charitable, for there might be philanthropic purposes which were not charitable, *In re Macduff—Macduff v. Macduff* (12 *The Times* L.R., 452; [1896] 2 Ch., 451). The purpose must come within the general spirit and intention of the statute of Elizabeth, as interpreted by many eminent Judges. It would require a bold advocate to assert that a bequest to promote the general purposes of agriculture was void for uncertainty. His Lordship then examined the contention put forward that the society was formed (1) only to promote an annual show, and (2) for the

general benefit and pleasure of its members. In his opinion it was plain that the only object for which the society was formed was the general benefit of agriculture, and holding an annual show was a means to that end. The second ground put forward, as to the benefits secured to the members of the society, involved a confusion of thought. A charity might give dinners, dances, and other entertainments to obtain funds for the benefit of the institution, and the privileges of the members did not prevent the society from being a charity. The contention that the society was a members' society, in his opinion, failed. The appeal would be allowed, with costs there and below.

[Solicitors—Messrs. Trower, Still, and Keeling ; the Solicitor of Inland Revenue.]

Court of Appeal.
(Lord Hanworth, M.R., Atkin and Lawrence, L.JJ.)
1927. Nov. 16.

WISBECH RURAL DISTRICT COUNCIL v. WARD.*

Negligence — Architect — Building contract — Interim certificates.

The plaintiffs, a local authority, made a contract with builders under which the defendant was the architect. Clause 29 provided : "No certificate of the architect, except for the final balance, shall be considered conclusive evidence of any works or materials to which it relates nor of the value thereof, nor shall it relieve the contractor from his liability to make good any defects as provided by these conditions, nor shall it in any way prejudice the employers in the final settlement of the accounts in any case where the contractor has been overpaid during the progress of the works." The Ministry of Health had the right to require the use of materials which the Disposals Board had for sale. While the houses were in course of erection the defendant gave interim certificates, and he also gave documents under which the plaintiffs paid the Board for articles supplied by the Board. Under these certificates and documents the plaintiffs had to pay both the builders and the Board for the same material. In an action by the plaintiffs to recover the amount from the defendant on the ground of negligence the defendant contended that he was a *quasi*-arbitrator and therefore not liable, and that the matter could be rectified under his final certificate which had not yet been given. The trial Judge held that the defendant was not, in giving the interim certificates, acting as an arbitrator or *quasi*-arbitrator, but was merely acting as agent for the plaintiffs, and was liable to pay the amount claimed.

Held, that as the certificates were only interim certificates, and as the defendant on going into the figures with the plaintiffs had indicated to them that the amount paid to the Disposals Board was to be deducted from the final balance due to the contractors, the defendant had not been guilty of negligence, and the action failed.

Decision of Sankey, J. (43 *The Times* L.R., 739 ; [1927] 2 K.B., 556) reversed.

This was an appeal from a decision of Mr. Justice Sankey (43 *The Times* L.R., 739 ; [1927] 2 K.B., 556).

The plaintiffs, the Wisbech Rural District Council, sought to recover from Mr. Frank Ward, the architect employed for a housing scheme of the plaintiffs, £221 3s., which they alleged they had been compelled to pay twice through the negligence of the defendant in granting interim certificates.

Shortly, the facts were that after the war the plaintiffs were minded to erect a number of houses under a housing scheme, and for that purpose they made a contract with Messrs. Wright and Wilson on September 30, 1920. The defendant was the architect under that contract. The Ministry of Health had in connexion with the scheme the right to compel the use of war material which the Disposals Board had for sale. The Ministry further had the right of revising the prices and making allowances in the event of the prices of labour or material rising or falling during the continuance of the contract.

In the years 1920-21 the houses were in course of erection, and the defendant gave 12 interim certificates, the first on November 29, 1920, and the last on November 24, 1921, in pursuance of clause 29, which regulated the method of payment and which was as follows :—

"No certificate of the architect, except for the final balance, shall be considered conclusive evidence of any works or materials to which it relates nor of the value thereof, nor shall it relieve the contractor from his liability to make good any defects as provided by these conditions, nor shall it in any way prejudice the employers in the final settlement of the accounts in any case where the contractor has been overpaid during the progress of the works."

The defendant also gave documents by virtue of which the plaintiffs paid the Disposals Board for certain articles, mainly baths. Unfortunately, he gave some interim certificates and documents under which the plaintiffs had to pay both the builders and the Board for the same material. The amount paid twice over was £221 3s. The mistake was discovered when, after considerable delay, which Mr. Justice Sankey declared to be the fault of the defendant, the accounts were gone through in 1923. It was then sought to get a refund from the builders. The latter, however, had dissolved partnership ; one had gone bankrupt, and the money was not recovered. The plaintiffs, therefore, sued the defendant for £221 3s.

The defendant contended :—(1) That he was a *quasi*-arbitrator, and, therefore, not liable. (2) That the action was premature because there was power to rectify under a final certificate and no final certificate had at present been issued. Should that final certificate be issued it would be found that the builders had not been over-paid, because a sum of £221 11s. 8d. was due to them in respect of sums which they ought to be allowed for paying increased wages, and so, in effect, the plaintiffs had suffered no damage. (3) If the matter could not be rectified there had been a final certificate contained in a document known as Summary No. 4, which was the document gone into between the parties to find what the exact position was, and the defendant had issued his final certificate and could not be sued for negligence. (4) If the defendant were negligent, so, too, were the

* Reported by G. T. Whitfield-Hayes, Esq., Barrister-at-Law.

plaintiffs for not keeping and checking their accounts.

Dealing with the last three points, Mr. Justice Sankey held, as to (2) that there was no power to issue a final certificate; as to (3) Summary No. 4 was not a final certificate; and as to (4) the plaintiffs had in no way been negligent. As to (1), he held that the position of the defendant was not that of an arbitrator or *quasi*-arbitrator. He was not, when he gave the certificates, deciding any disputes, or settling any final balance; he was, in effect, acting as agent for the plaintiffs. Judgment was, therefore, given for the amount claimed.

The defendant appealed.

Mr. Schiller, K.C., and Mr. Linton Thorp appeared for the appellant; the Hon. Sir Malcolm Macnaghten, K.C., and Mr. Gerald Dodson for the respondents.

The question of law argued before Mr. Justice Sankey, whether the defendant was or was not in the position of an arbitrator, or *quasi*-arbitrator, and so immune, was not entered into by the Court of Appeal as their judgment was to the effect that the defendant, on the facts, had not been negligent.

The MASTER OF THE ROLLS, in giving judgment, said that by clause 29 of the contract the architect had to certify for the amount of work done and materials supplied. The payments contemplated were to be no more than *interim* payments, and the architect was to give his certificate each month. It seemed to him that the mistake made in the Court below was in misunderstanding the effect of the duty imposed on the architect under clause 29, and treating the payments made as if they had been a final adjustment between the parties. There had been no final adjustment, and in that sense the action was premature.

As regarded the document known as Summary No. 4, that document, when produced, had been examined and corrected by the clerk to the council. The effect of Summary No. 4 had been much misunderstood at the trial, but to him it seemed that the evidence of the defendant was justified when he called attention to the fact that, on the face of it, that document showed that a sum of £270 to be paid was less the amount payable to the Disposals Board. The defendant, as architect, was clearly bound to certify for the full amounts, both of labour and material, and he had indicated that a certain amount was to be deducted. The appeal must be allowed, with costs.

LORD JUSTICE ATKIN and LORD JUSTICE LAWRENCE gave judgments to the same effect.

[Solicitors—Messrs. Withers, Bensons, Currie, Williams and Co., for Messrs. Metcalfe, Copeman, and Pettefar, Wisbech; Messrs. Lee, Ockerby, and Co., for Messrs. Sharp, Wade, and Whittome, Wisbech.]

K.B. Div. (Rowlatt, J.) } 1927. Nov. 11.

RECKITT v. BARNETT, PEMBROKE, AND SLATER, LIMITED.*

Action (Cause of)—Attorney—Cheque drawn on principal's account—Fraud on principal—Knowledge of payees—Right of principal to recover proceeds from payees.

The plaintiff gave a power of attorney to one T. and authorized him, in relation to the plaintiff's affairs, to draw cheques on the plaintiff's account at the bank. T. in fraud of the plaintiff drew a cheque on the plaintiff's account, in favour of the defendants, in part-payment for a motor-car which T. had obtained from them for his own purposes on the hire-purchase system. The defendants knew that the cheque was drawn by T. as agent for the plaintiff.

In an action by the plaintiff to recover from the defendants the proceeds of the cheque,

Held, that as the defendants knew that the cheque was being used to liquidate the private debt of the agent the plaintiff was entitled to recover.

This was an action by Sir Harold James Reckitt, Bt., of 30, Rutland-court, Knightsbridge, S.W., who claimed against the defendants, Barnett, Pembroke, and Slater, Limited, automobile agents, of Alexandra Garage, Old Barrack-yard, Knightsbridge, a declaration that he was entitled to recover from them the proceeds of a cheque for £200 drawn by Lord Terrington, as the plaintiff's attorney, to the order of the defendants upon the plaintiff's banking account with Barclays Bank Limited, at Hull, and wrongfully and fraudulently paid by Lord Terrington to the defendants in respect of a personal transaction between Lord Terrington and the defendants.

Mr. Schiller, K.C., and Mr. R. J. Willis appeared for the plaintiff; Mr. Austin Farleigh for the defendants.

Mr. SCHILLER said that the cheque was drawn by Lord Terrington and given to the defendants in part payment of a Rolls-Royce motor-car which Lord Terrington had purchased from them on the hire-purchase system. It was signed "Sir Harold J. Reckitt, Bt., by Terrington his attorney." Lord Terrington had made a first payment of £350, and when a further £175 became due he drew this cheque and paid it to the defendants. When the crash came and Lord Terrington was made bankrupt the defendants retook possession of the motor-car, and, as Lord Terrington had had it so short a time, they returned £100 of what he had paid.

MR. JUSTICE ROWLATT.—For £425 he had the use of a Rolls-Royce motor-car from February to July. That sort of thing is not within reach of you and me.

Counsel, continuing, said that the defendants, in addition to denying the conversion, denied that Lord Terrington had not the plaintiff's authority, and that the cheque was drawn without the plaintiff's knowledge. They further denied that Lord Terrington's authority to draw was confined to cheques in relation to the business or affairs of the plaintiff. And they did not admit that he was acting fraudulently or wrongfully. They further set up that the plaintiff was estopped from alleging any want of authority in Lord Terrington to draw the cheque and hand it to the defendants by reason of his own conduct and by reason of his want of reasonable care.

MR. JUSTICE ROWLATT.—Estoppel by negligence is calculated to enfeeble the strongest brain.

Mr. SCHILLER said that the power of attorney was originally given at the beginning of 1915, when Sir Harold Reckitt went to France to serve with the French Red Cross. Lord Terrington, or Mr. Woodhouse, as he then was, was a friend of Sir Harold Reckitt's family, and Sir Harold Reckitt had the utmost confidence in him. On its being pointed out by the bank that the power of attorney, though it gave power to indorse cheques payable to the

* Reported by J. W. HALL, Esq., Barrister-at-Law.

plaintiff, contained no power to draw cheques on the plaintiff's account, the plaintiff wrote a letter to the bank authorizing Lord Terrington to draw cheques.

For some years Lord Terrington had not much to do with the plaintiff's affairs, as the agent continued to manage the estates. But in 1918 the agent died, and, the new agent being less acquainted with the plaintiff's affairs, Lord Terrington took a greater part in the management. The amount that had disappeared through the channel of Lord Terrington was well over £250,000.

MR. JUSTICE ROWLATT.—From the plaintiff alone?

Mr. SCHILLER.—Yes. When Lord Terrington was operating he had no small ideas.

The plaintiff, continued counsel, wished his accounts to be audited, but Lord Terrington delayed the delivery of the accounts, and on December 4, 1925, the plaintiff left England for India. Before he left, another power of attorney to Lord Terrington was drawn up in much more specific terms, giving the attorney power "to draw, accept, indorse, &c., any cheque . . . in relation to the business or affairs of the principal." No sooner had the plaintiff left than Lord Terrington bought a Rolls-Royce motor-car. In April, 1926, Sir Harold Reckitt received a telegram, in response to which he came home and had an interview with Lord Terrington, who presented an account showing that he owed the plaintiff £47,800. That was on his own showing—actually, the amount was a great deal more.

The plaintiff made a formal demand for the money, but this demand, of course, was not satisfied. The power of attorney was revoked and Lord Terrington was dismissed from the position of being the plaintiff's solicitor. In May, 1926, the plaintiff issued a writ against Lord Terrington and obtained judgment. Lord Terrington's appeal was dismissed, and in July he was adjudicated bankrupt. Until the plaintiff received the telegram in Ceylon he had no idea that anything was wrong at all. He had not proved in the bankruptcy for this £200, nor had he made any demand upon the bank for it.

MR. JUSTICE ROWLATT.—The only question is whether the defendants were *bona fide* holders for value without notice of any defect.

Mr. SCHILLER.—In my submission it was decided by *R. E. Jones, Limited v. Waring and Gillow, Limited* (42 *The Times* L.R., 644; [1926] A.C., 670), that the payee of a cheque is not a holder for value. Anyone who took this cheque was put upon inquiry as to Lord Terrington's authority to draw upon Sir Harold Reckitt's account for the purchase of a motor-car, and, if he had notice, he had no title to retain the money.

The plaintiff gave evidence bearing out Mr. Schiller's opening statement. He proved in the bankruptcy for £213,000 odd. That figure was based on Lord Terrington's books, but there were many cheques that did not appear in the books. In July he received a bundle of paid cheques, and among them a number drawn in favour of persons about whom he knew nothing, including the defendants. He called on all those persons to ask how they came to have had his money.

Cross-examined, the witness said that the bulk of Lord Terrington's work in connexion with his affairs was of an office kind, and would not entail travelling or personal inspection. He did not remember ever seeing any item for travelling expenses. Until he returned from India he did not see any cheques paid to persons whom he did not know. He thought that there should be very few cheques to persons with whom he did not know that there was an account. For instance, when his house was burnt down he naturally knew who was rebuilding it. And his tailor's or bootmaker's bill, &c., would be sent to him personally and passed to Lord Terrington for payment. An examination of the pass-book would have shown cheques drawn in fraud of him, but the bulk of them were drawn after he had left England.

The witness said he could not conceive of the necessity for Lord Terrington to take a taxi on his affairs.

MR. JUSTICE ROWLATT.—He could not get a taxi, so he bought a Rolls-Royce.

The witness said that he had been told that if he had made this claim in April instead of July it would have saved the defendants £100.

Mr. FARLEIGH, on behalf of the defendants, cited *Bryant, Powis, and Bryant, Limited v. La Banque du Peuple and the Quebec Bank* (9 *The Times* L.R., 322; [1893] A.C., 170), and referred to section 25 of the Bills of Exchange Act, 1882. In *Bank of Bengal v. Fagan* (7 Moo. P.C., 61, at p. 74) Lord Brougham decided that words such as "in relation to the business or affairs of the principal" were not words of limitation of the power, but words defining the purpose for which it was intended to be used. He submitted that persons in the defendants' position, knowing something of Lord Terrington and something of the wealth of Sir Harold Reckitt, even if they had had the documents before them, might have said: "It is quite likely that a man in this position might need a motor-car, and obviously he is not going to have a Ford."

MR. JUSTICE ROWLATT.—Yes, but the question is whether, if they act on that impression, they may not burn their fingers.

Mr. John Law, a director of the defendant company, gave evidence of the receipt of the cheque for £200, of which £175 was a monthly instalment and the balance was on account of garage charges due to the defendants.

Other evidence having been given,

Mr. FARLEIGH, in addressing the Court, said that he was at a disadvantage in not being able to call Lord Terrington.

MR. JUSTICE ROWLATT.—I should have been tremendously impressed! I don't care how many persons of that sort you call, for I should not believe any of them.

Counsel referred also to *Westfield Bank v. Cornen* (93 Amer. Dec., 573) and *Hambro v. Burnand* (20 *The Times* L.R., 398; [1904] 2 K.B., 10) to show that if the act was authorized by the terms of the power a third person was not bound to inquire if it was within the actual authority.

If the defendants had inquired they would have found from the power of attorney and the letter of August, 1915, that the bank was expressly directed to pay cheques drawn in this way without restriction. Even though Lord Terrington was using his actual authority for his own ends, he was still using an actual authority. The defendants were not required to show more.

MR. JUSTICE ROWLATT.—It is a question of notice. Were not the facts here such as to give your clients notice of a fraud? Ought they not to have inquired whether Lord Terrington had authority to draw for his private debt?

Mr. FARLEIGH.—From whom could they inquire? The principal was abroad. The second power, which was given in 1925, contained a ratification by the principal of everything which the attorney should do "or purport to do" thereunder. If the defendants

had looked at that document they would have found that this cheque purported to be drawn under it.

Counsel also submitted that Sir Harold Reckitt was under a duty to make inquiries about this cheque and others as soon as he returned from India and discovered that Lord Terrington had been defrauding him. But he did nothing till July. Meanwhile, the defendants had parted with £100 to Lord Terrington on the faith that the £200 was good money in their bank. He referred to *Holt v. Markham* ([1923] 1 K.B., 504).

Mr. SCHILLER said that this case was quite different from *Holt v. Markham* (*supra*), where the plaintiffs themselves left the defendant under the impression that he was entitled to the money. The claim based on estoppel here was fantastic.

Powers of attorney given for the principal's affairs were construed with the greatest strictness. The rule was stated by Lord Campbell in *Perry v. Holl* (2 De G., F. and J., 38, at p. 48). A general power would be limited to the purposes for which the power was given. Here Lord Terrington had power to draw cheques only for his principal's business.

MR. JUSTICE ROWLATT.—Do you say that a cheque drawn otherwise was no better than a forgery ?

Mr. SCHILLER.—No one looking at these documents could possibly imagine that Lord Terrington had power to draw for his own purposes. The question of notice was, he submitted, finally decided by *John and Others v. Dodwell and Co., Limited* (34 *The Times* L.R., 261 ; [1918] A.C., 563).

MR. JUSTICE ROWLATT, in giving judgment, said that the case was in a small compass, but he would have put his judgment in writing if it had not been that he was due to go on circuit, and that it was, therefore, more convenient to dispose of the case. The powers of attorney given by Sir Harold Reckitt to Lord Terrington were of a very wide kind, and were, of course, given for the purpose of conducting Sir Harold Reckitt's affairs. They were not given him that he might exercise them for the purpose of filling his own pocket at the expense of the plaintiff. It was clear from the decision of Lord Brougham in *Bank of Bengal v. Fagan* (7 Moo. P.C., 61, at p. 74) that, whether they were expressed to be for the purpose of Sir Harold Reckitt's business, or were absolute, it did not affect the point that if Lord Terrington used them for himself it was a fraud.

Lord Terrington, being indebted to the defendants for an instalment of the purchase price of a Rolls-Royce motor-car, gave the defendants the cheque for £200 now in question signed "Sir Harold J. Reckitt, Bt., by Terrington, his attorney." It was remarkable that on the original cheque the part referring to Sir Harold Reckitt was put on with a rubber stamp and was indistinct, but that Lord Terrington's signature was in ink and quite clear. The defendants did not observe the form of signature, but the case had to be argued on the footing that the defendants knew that this was a cheque drawn by Lord Terrington as agent for Sir Harold Reckitt.

The cheque, as a cheque, was good. There was power to draw it, and it did not become bad because it was fraudulent. But everything turned on the fact that the defendants knew that it was being used to liquidate the private debt of the agent. Could they retain it ? Looking at the matter apart from authority, he would have said at once, "Certainly not," but after some hours of argument the precise authority had been produced by Mr. Schiller in the case of *John and Others v. Dodwell and Co., Limited* (34 *The Times* L.R., 261 ; [1918] A.C., 563). What happened in that case was precisely what happened here ; he could not see a shred of distinction. That concluded the main point.

There was a subsidiary point. The fraud was committed in February, 1926 ; Sir Harold Reckitt returned in April, 1926, and immediately discovered that he had been grossly defrauded, but not in this respect. He put the matter in the hands of his accountants. While the accounts were being investigated the defendants heard of trouble arising about Lord Terrington, and asked for their motor-car back, and got it on payment of £100. If they had not been paid the £200 they could have confiscated the motor-car. In July, Sir Harold Reckitt received a bundle of cheques, and discovered this one. In those circumstances it was said that the plaintiff was estopped. *Holt v. Markham* ([1923] 1 K.B., 504) was cited in support of that contention, but in that case the plaintiffs themselves were responsible for the defendant's misapprehension. Here there was no suggestion that Sir Harold Reckitt had done anything to mislead the defendants. There must, therefore, be judgment for the plaintiff.

[Solicitors—Messrs. Nicholl, Manisty and Co. ; Messrs. Chas. Humphries and Co.]

Chan. Div. } 1927.
Romer, J.) } Nov. 10.

GROEDEL v. ADMINISTRATOR OF HUNGARIAN PROPERTY.*

Aliens — Treaty of Peace — "Nationals of the former Kingdom of Hungary" — Charges on British property — Acquiring nationality of Allied or Associated Power—Satisfaction of the Administrator — Jurisdiction of the Court —Treaty of Peace (Hungary) Order, 1921, ss. 1 (ix.), 2.

By s. 1 (ix.) of the Treaty of Peace (Hungary) Order, 1921, it is provided that "All property rights and interests within his Majesty's Dominions or Protectorates belonging to nationals of the former Kingdom of Hungary at the date when the treaty came into force," namely, on July 26, 1921, shall be charged as therein mentioned.

Held (following *Rothschild v. Administrator of Austrian Property* [1923] 2 Ch., 542), that the expression "nationals of the former Kingdom of Hungary" meant persons who were Hungarian nationals on October 28, 1918, when the Austrian Empire ceased to exist by the deposition of the Emperor.

Where the Administrator of Hungarian property has determined that he is not satisfied that a national of the former Kingdom of Hungary has acquired *ipso facto* in accordance with the provisions of the Treaty the nationality of an Allied or Associated Power, the Court cannot go behind the decision of the Administrator and investigate the question anew.

Baron Reizes de Marienwert v. Administrator of Austrian Property (40 *The Times* L.R., 698 ; [1924] 2 Ch., 282) followed.

* Reported by J. L. DENISON, Esq., Barrister-at-Law.

This was an action in which the plaintiff, Baron Albert Groedel, claimed the sum of £22,204 had and received by the Administrator of Hungarian Property. The substantial question before the Court was whether the plaintiff could be said to be an enemy within the meaning of the Treaty of Peace so as to enable the Administrator to treat the above-mentioned sum as subject to the charge created by section 1 (ix.) of the Treaty of Peace (Hungary) Order, 1921.

Mr. Schiller, K.C., and Mr. C. M. Picciotto appeared for the plaintiff; and the Attorney-General (Sir Douglas Hogg, K.C.), Mr. Gavin Simonds, K.C., and Mr. Stamp for the Administrator of Hungarian Property.

Mr. Justice Romer delivered the following considered judgment:—On July 26, 1921, when the Treaty of Peace between the Allied and Associated Powers and Hungary (usually referred to as the Treaty of Trianon) came into force, the plaintiff was possessed of certain property in his Majesty's Dominions to the value of £22,204. The defendant claims that this sum is subject to the charge imposed by section 1 (ix.) of the Treaty of Peace (Hungary) Order, 1921. The object of this action is to establish if possible that this claim of the defendant is without foundation. By the section in question "All property rights and interests within his Majesty's Dominions or Protectorates belonging to nationals of the former Kingdom of Hungary at the date when the Treaty came into force" were charged with certain payments.

Now it is admitted by the plaintiff that at the time of the outbreak of the war between this country and the Austro-Hungarian Empire he was of Hungarian nationality. He alleges, however, that on July 26, 1921, or, alternatively, at some date between November, 1918, and July 26, 1921, he ceased to be a "national of the former Kingdom of Hungary." He puts his case in this way. On January 10, 1920, there came into force a treaty made between the United States of America, the British Empire, France, Italy, and Japan, on the one hand, and Poland on the other hand: that is, I am told, usually referred to as the Minorities Treaty. Article 3 of that Treaty, amongst other things, provides as follows: "Poland admits and declares to be Polish nationals *ipso facto* and without the requirement of any formality German, Austrian, Hungarian or Russian nationals habitually resident at the date of the coming into force of the present Treaty in territory which is or may be recognized as forming part of Poland." The plaintiff alleges that when this Treaty came into force he was habitually resident at Skole in Galicia, and that Galicia was at this date recognized as forming part of Poland. He became, therefore, he says, on January 10, 1920, a national of Poland. The plaintiff then relies upon Article 213 of the Treaty of Trianon. That article is as follows: "Hungary undertakes to recognize any new nationality which has been or may be acquired by her nationals under the laws of the Allied and Associated Powers, and in accordance with the decisions of the competent authorities of these Powers pursuant to naturalization laws or under treaty stipulations, and to regard such persons as having, in consequence of the acquisition of such new nationality, in all respects severed their allegiance to their country of origin." By virtue of this article the plaintiff contends that he lost his former Hungarian nationality at the moment when the Treaty came into force. Alternatively, the plaintiff alleges that the territory in which Skole is situated was severed from the Austro-Hungarian Empire and that the independent State of Poland exercised sovereign rights over such territory from November, 1918. In these circumstances he asks me to come to the conclusion that as a matter of international law he thereby became a Polish national and ceased to be a Hungarian national at some date prior to the date of the coming into force of the Treaty of Trianon. It will be observed, therefore, that his claim in the first place is based upon the two treaties to which I have referred, and alternatively upon some effect produced upon his Hungarian nationality by the warlike operations in the territories of the Austro-Hungarian Empire.

Now, even if I could bring myself to the conclusion that at the time when the Treaty of Trianon came into force the plaintiff had lost his Hungarian nationality for either of the reasons alleged by him, the plaintiff would not have established the proposition that his property is not subjected to the charge in question. For the property charged by the Treaty of Peace Order is not that of Hungarian nationals, but of "nationals of the former Kingdom of Hungary." It becomes necessary, therefore, to ascertain the meaning of this expression. The plaintiff contends that it means no more than Hungarian nationals. If by this he means, as I understand he does mean, persons who, when the Treaty comes into force, still remain Hungarian nationals, he is, I think, clearly wrong. For it is provided by section 2 of the Treaty of Peace Order that the expression "nationals of the former Kingdom of Hungary" does not include persons who within six months from the coming into force of the Treaty show to the satisfaction of the Administrator that they have acquired *ipso facto* in accordance with its provisions the nationality of an Allied or Associated Power. This refers (and, it may be, refers exclusively) to the provisions contained in section vii. of Part III. of the Treaty, entitled "Clauses relating to Nationality," and consisting of Articles 61 to 66 inclusive. The first of these articles is as follows: "Every person possessing rights of citizenship (*pertinenza*) in territory which formed part of the territories of the former Austro-Hungarian Monarchy shall obtain *ipso facto* to the exclusion of Hungarian nationality the nationality of the State exercising sovereignty over such territory." It seems evident, therefore, that, but for the express provision in section 2 of the Treaty of Peace Order, such persons, though losing their Hungarian nationality at the moment when the Treaty came into force, were intended to be included in the expression "nationals of the former Kingdom of Hungary." The expression is not, however, an easy one to understand. A person who was a Hungarian national in the days when Hungary was a kingdom does not cease to be a Hungarian national merely because Hungary ceases to be a kingdom or merely because she is dispossessed of part of her former territories. A person, for instance, who was residing in South America at the outbreak of the war and was then a Hungarian national has not, in the absence of other circumstances, lost his nationality. It would not be true to say that whereas he was formerly a national of the Kingdom of Hungary he is now a national of the Hungarian Republic. He was, and he remains, a Hungarian national. The expression "nationals of the former Kingdom of Hungary" might, therefore, mean "nationals of Hungary which was formerly a kingdom," in which case it would mean no more than Hungarian nationals; or it might mean "nationals of Hungary when it was a kingdom." For the reason already given (if for no other), the former construction must be rejected. Can I then treat it as meaning "nationals of Hungary when it

was a kingdom"? Apart from authority I should have felt some little difficulty in doing so. The expression would then *prima facie* include persons who were formerly Hungarian nationals but who before the war had lost their nationality and acquired the nationality of an Allied or Associated Power. It would also exclude persons who were Hungarian nationals when the Treaty of Trianon came into force but had acquired such nationality after Hungary had ceased to be a kingdom. It is difficult to see any reason for the exclusion of the latter class. The inclusion of the former class is unthinkable. If possible, therefore, I should have endeavoured to adopt a construction that would avoid both the exclusion and the inclusion. But is such a construction possible? For myself, I should have thought that it was. At the date of the Treaty of Trianon the Austro-Hungarian Empire had broken up. Hungary had become a Republic. Hungarian territory had been occupied by the Allied and Associated Powers, and this territory was in the course of being assigned by those Powers to other States. The consequence of all this was that numerous persons who at the outbreak of war had been of Hungarian nationality would, when the Treaty came into force, have been able to contend that they were no longer Hungarian nationals. If, therefore, Article 232 (1) (*b*) of the Treaty of Trianon had merely referred to Hungarian nationals it might well have been argued that only those persons who remained Hungarian nationals after it came into force were affected. A vast number of persons who had been enemies of the Allied and Associated Powers during the greater part or even the whole of the war might in this way have escaped. In these circumstances it might well have been thought desirable to make it clear that the Hungarian nationals to be brought within the scope of the article were not only those who were to remain Hungarian nationals, but those who were such nationals at the outbreak of the war and would have still remained such nationals after the Treaty, had it not been for the changes in nationality brought about by the war and the various treaties entered into at its conclusion. Until the Treaty of Trianon came into force a state of war between the Allied and Associated Powers and Hungary was still technically in existence. Had the Treaty negotiations broken down the war could have been resumed, and in theory, at any rate, Hungary might have repossessed herself of all her original territory. In that case, those who were Hungarian nationals at the outbreak of the war and had not lost their nationality by the ordinary operation of Hungarian law would have remained Hungarian nationals; and it was as representing all their people that the Republic of Hungary negotiated the Treaty of Trianon. How best could these people be described? It seems to me that they could best be described as "nationals of Hungary, treating Hungary as though it were still the former kingdom of Hungary." This is a meaning which might, I think, be given without impropriety to the expression "nationals of the former Kingdom of Hungary," and this is the meaning that I should have been inclined to give to it in the absence of authority.

My attention has, however, been very properly called to the decision of Mr. Justice Eve in *Rothschild v. Administrator of Austrian Property* ([1923] 2 Ch., 542). That case had to do with the provisions of the Treaty of Peace (Austria) Order, 1920, whereby the property of nationals of the former Austrian Empire were charged, and the learned Judge held that this expression meant those who were nationals of the Austrian Empire on October 28, 1918, when that Empire ceased to exist by the deposition of the Emperor. This construction avoids, of course, an unlimited retrospective operation. Such an operation, the learned Judge pointed out, would be absurd. It does, however, include within the expression persons who by Austrian law would have lost their Austrian nationality quite independently of the war before the Treaty of Peace with Austria came into effect; and this may or may not have been the intention of the Allied and Associated Powers. But it excludes persons who became of Austrian nationality by birth or marriage or otherwise after October 28, 1918, and before the Treaty came into force, and it does not seem probable that those Powers really intended this. So far as the present case is concerned, the plaintiff would not be excluded whether I give to the expression "nationals of the former Kingdom of Hungary" a meaning corresponding to the one given by Mr. Justice Eve to the expression "nationals of the former Austrian Empire" or the meaning which, unaided by his decision, I should probably have given it myself. But I am told that since Mr. Justice Eve's decision both the Administrator of Austrian and the Administrator of Hungarian property have, in pursuance of that decision, treated as not being subjected to the charge the property of persons who became Austrian or Hungarian nationals, as the case may be, after October 28, 1918. Between the Austrian and the Hungarian Orders I can see no difference that would enable me to distinguish the present case from that with which Mr. Justice Eve had to deal. In these circumstances I think that I ought to follow his decision and to hold that "nationals of the former Kingdom of Hungary" means persons who were Hungarian nationals on October 28, 1918.

The plaintiff is therefore within the category of "nationals of the former Kingdom of Hungary" referred to in section 1 (ix.) of the Treaty of Peace Order unless he be excluded from that category by reason of the provision in section 2, to which I have already referred.

Now the plaintiff at the trial adduced a considerable body of evidence which, he contends, shows that he acquired *ipso facto* in accordance with the provisions of the Treaty the nationality of an Allied or Associated Power, namely, Poland. But, unfortunately for him, this is not enough. In order to escape from the category it was necessary for him to show this to the satisfaction of the Administrator. He attempted to do so, and failed. This is admitted. In these circumstances, the defendant contends that it is not open to this Court to go behind the decision of the Administrator and investigate the question anew. Upon this contention the defendant in my opinion is entitled to succeed. A similar question arose upon the Treaty of Peace (Austria) Order, 1920, in *Baron Reizes de Marienwert v. Administrator of Austrian Property* (40 *The Times* L.R., 698; [1924] 2 Ch., 282), and was decided by the Court of Appeal in the Administrator's favour. It is not suggested that the Administrator in the present case did not arrive at his conclusion in good faith, or that there are any other grounds upon which the plaintiff, by appropriate proceedings before the proper Court, could compel a reconsideration of the matter.

In these circumstances I have, I fear, no option but to dismiss the plaintiff's action.

[Solicitors—Messrs. Stibbard, Gibson and Co.; the Solicitor to the Clearing Office.]

K.B. Div.
(Lord Hewart, C.J., Avory and Salter, JJ.)
1927. Nov. 9.

REX v. LEGISLATIVE COMMITTEE OF THE CHURCH ASSEMBLY AND THE CHURCH ASSEMBLY—EX PARTE HAYNES SMITH.*

Ecclesiastical Law—Church Assembly—Legislative Committee — Prohibition—*Certiorari*—Whether writs will lie.

Neither the Legislative Committee of the Church Assembly nor the Church Assembly itself is a body to which a writ of *certiorari* or of prohibition will issue, as neither of them is a body which is under a duty to act in a judicial capacity.

On October 28 the Court granted, at the instance of Sir William Frederick Haynes Smith, K.C.M.G., of Turleigh, Bradford-on-Avon, Wilts, a rule *nisi* for a prohibition, directed to the Legislative Committee of the National Assembly of the Church of England, to prohibit them from proceeding further with "The Prayer-book Measure, 1927"; and also rules *nisi* for a *certiorari*, directed both to the Legislative Committee and to the Church Assembly, to bring up and quash the Measure and the "deposited Book" annexed to it, upon the grounds, (1) that the Measure had not been passed by the Church Assembly within the meaning of section 3 (1) of the Church of England Assembly (Powers) Act, 1919, and (2) that the Measure was not passed by the Church Assembly in accordance with the requirements of article 14 (1) of the Constitution in that it was never debated by each House sitting separately.

The Hon. Sir Malcolm Macnaghten, K.C., and Mr. Storry Deans moved for the rules.

Sir Malcolm Macnaghten said that Sir William Haynes Smith was a member of the Church of England. To understand the present application it was necessary to refer to the Church of England Assembly (Powers) Act, 1919, and to the constitution and powers of the bodies created thereby. That Act began by defining the Church Assembly by reference to a Constitution set forth in an appendix to addresses presented to his Majesty by the Convocations of Canterbury and York on May 10, 1919. Article 11 of the Constitution provided:—

"The Assembly shall appoint a Legislative Committee, including members of all three Houses, to whom all measures which it is desired to pass into law shall be referred. The Legislative Committee shall thereupon take such action as may be authorized by statute in order that such measure may become law."

Section 2 of the Act provided:—

"(1) There shall be a committee of members of both Houses of Parliament styled 'The Ecclesiastical Committee.'

"(2) The Ecclesiastical Committee shall consist of 15 members of the House of Lords nominated by the Lord Chancellor and 15 members of the House of Commons nominated by the Speaker. . . ."

Section 3 provided:—

"(1) Every measure passed by the Church Assembly shall be submitted by the Legislative Committee to the Ecclesiastical Committee, together with such comments and explanations as the Legislative Committee may deem it expedient or be directed by the Church Assembly to add.

"(2) The Ecclesiastical Committee shall thereupon consider the measure so submitted to it, and may at any time during such consideration, either of its own motion or at the request of the Legislative Committee, invite the Legislative Committee to a conference to discuss the provisions thereof, and thereupon a conference of the two committees shall be held accordingly.

"(3) After considering the measure, the Ecclesiastical Committee shall draft a report thereon to Parliament, stating the nature and legal effect of the measure and its views as to the expediency thereof, especially with relation to the constitutional rights of all his Majesty's subjects.

"(4) The Ecclesiastical Committee shall communicate its report in draft to the Legislative Committee, but shall not present it to Parliament until the Legislative Committee signify its desire that it should be so presented.

"(5) At any time before the presentation of the report to Parliament the Legislative Committee may, either on its own motion or by direction of the Church Assembly, withdraw a measure from further consideration by the Ecclesiastical Committee; but the Legislative Committee shall have no power to vary a measure of the Church Assembly either before or after conference with the Ecclesiastical Committee.

"(6) A measure may relate to any matter concerning the Church of England and may extend to the amendment or repeal in whole or in part of any Act of Parliament, including this Act. . . ."

Their Lordships would see, said counsel, that the scheme was, that after a measure was passed by the Church Assembly it came under the control of the Legislative Committee, to carry it forward in connexion with the Ecclesiastical Committee.

Mr. Justice Salter.—The Ecclesiastical Committee may be described as the "tasters" for Parliament?—Yes.

The Lord Chief Justice.—You are asking for prohibition. Is either the Legislative Committee or the Church Assembly an inferior court?

Sir Malcolm Macnaghten submitted that they were so within the principles laid down in the Electricity Commissioners' case (39 *The Times* L.R., 715; [1924] 1 K.B., 171). The point which he wished to emphasize was that, even after the Ecclesiastical Committee began consideration of a measure, the Legislative Committee kept its hand on it and could at any time prevent the Ecclesiastical Committee from proceeding on it until the report was presented to Parliament. Unless, therefore, an irregularity were restrained while the matter was still under the control of the Legislative Committee, it would be too late, for the Ecclesiastical Committee was a Parliamentary Committee, not subject to the Court's jurisdiction.

But the powers of the Legislative Committee did not arise, except upon a measure "passed" by the Church Assembly, whose powers in this behalf were contained in article 14 of the Constitution, which provided:—

"The Assembly shall be free to discuss any proposal concerning the Church of England and to make provision in respect thereof, and where such provision requires Parliamentary sanction the authority of Parliament shall be sought in such manner as may be prescribed by statute:

"Provided that any measure touching doctrinal formulæ or the services or ceremonies of the Church of England or the administration of the Sacraments or sacred rites thereof shall be debated and voted upon by each of the three Houses sitting separately, and

* Reported by J. W. Hall and G. F. L. Bridgman, Esqrs., Barristers-at-Law.

shall then be either accepted or rejected by the Assembly in the terms in which it is finally proposed by the House of Bishops."

The submission of the applicant was that the Measure submitted for final approval to the Church Assembly on July 4, 1927, was a different Measure from "the Revised Prayer-book Permissive Use Measure, 1923," to which general approval was accorded by the three Houses in that year and which was debated and amended by the Houses of Clergy and Laity in the ensuing two years.

The LORD CHIEF JUSTICE.—Are you not too late? Ought not this objection to have been raised when the Measure was brought forward at the Church Assembly?

SIR MALCOLM MACNAGHTEN.—It was taken, both in writing to the Archbishop of Canterbury, and orally when the resolution was proposed, but it was overruled by the Archbishop of Canterbury.

Without going into controversial matters, their Lordships would realize that many members of the Church of England looked with reverence and devotion upon the Book of Common Prayer and were unwilling that it should be altered, though they might accept the need for allowing some additions or permissive omissions. The Measure of 1923 recognized that feeling, and was expressed to have for its object "to authorize the alternative use of certain omissions from, additions to, and deviations from the Book of Common Prayer." The Prayer-book was left intact, but permission was given to use certain alternative forms.

The "Prayer Book Measure, 1927," brought forward by the Bishops for approval, was expressed to be "to authorize the use of the Prayer-book referred to in this Measure and deposited with the Clerk of the Parliaments." Curiously enough, said counsel, a letter addressed to the Clerk of the Parliaments on the day after the passing of the resolution in the Church Assembly elicited a reply that no Book had been deposited in fact. There must have been some confusion over the matter, but the important point was that, as the applicant submitted, the deposited Book had no place in the 1923 Measure, and that the new Measure altered the Book of Common Prayer in important and controversial respects. This new Measure had never been debated by the Houses separately, and therefore it was contended that it was not passed by the Church Assembly within the meaning of section 3 (1) of the Act.

After some discussion of the question whether the Legislative Committee or the Church Assembly were the proper respondents to the rules, the applicant was granted, "at his peril," a rule for a prohibition to the Legislative Committee and for a *certiorari* against both.

When the rules came on for argument Sir John Simon, K.C., and Mr. Wilfrid Lewis showed cause for the Legislative Committee; Mr. Stuart Bevan, K.C., and Mr. F. H. L. Errington for the Church Assembly; the Hon. Sir Malcolm Macnaghten, K.C., and Mr. Storry Deans supported the rules.

SIR JOHN SIMON recalled that the rules were obtained on October 28. Something might be thought to turn on the fact that no application had been made to the Court before that date.

He would take three points, any one of which, he submitted, was sufficient to show that the rules should be discharged. First, he submitted that the rules of *certiorari* and prohibition were not, according to the law and practice of the Court, available or permissible in the circumstances of the present case. They were not dealing with that class of proceeding which, on a proper occasion, had been the subject of correction by the King's Bench Division by means of those prerogative writs. They were not dealing with the decision of a Court in the strict sense, nor were they dealing with the decision of any administrative body which, although not a Court in the strict sense, was engaged in exercising functions for which a judicial quality was very properly required. They were dealing with a subject-matter which could be more properly classed as in the nature of deliberation and legislation rather than of anything judicial or administrative.

Secondly, he submitted that the procedure which had been followed by the Legislative Committee and by the Church Assembly was entirely regular and was within the Constitution according to which they ought to operate.

Thirdly, if it became necessary to enter on a close comparison and examination of the conclusions reached in the course of that long matter by the Church Assembly and its component parts, it would be found that there was no ground for saying, as the rules suggested, that the Measure which was now before the Parliamentary Committee was not the same Measure as was considered by the Church Assembly at an earlier stage. The identity of the Prayer-book Measure had not been changed. It was the same Measure although, in the course of the elaborate deliberations on it, its terms had been altered in various ways.

The LORD CHIEF JUSTICE.—On your third submission, if I follow Sir Malcolm Macnaghten's argument, the point seems to be that "must" is not the same thing as "may."

SIR JOHN SIMON.—I think that that puts in a phrase the sort of view which my learned friend may wish to urge.

Counsel then read the affidavit of Sir Philip Wilbraham Baker-Wilbraham, secretary of the Church Assembly since its institution.

The affidavit stated that Sir William Haynes Smith had already addressed complaints to the Ecclesiastical Committee. In a letter dated July 20, 1927, but apparently not sent till October 22, 1927, he fully stated the grounds of his objection.

SIR MALCOLM MACNAGHTEN.—The applicant first wrote to the secretary of the Ecclesiastical Committee asking to be heard, but was informed that they were not hearing oral evidence. He then sent copies of the letter of July 20 to all the members of the Ecclesiastical Committee.

SIR JOHN SIMON.—My point is that by July 20 the applicant was fully aware of his position, but took no step to bring the matter before the Court till October 28.

The Church Assembly, continued counsel, was a voluntary unincorporated body. It was not a statutory body, though certain of its functions were regulated by statute. It was constituted in accordance with an address to his Majesty by both Houses of Convocation. Counsel proceeded to read the following material parts of the Constitution. The purpose of the Assembly was defined in Article 1 as being "to deliberate on all matters concerning the Church of England and to make provision in respect thereof."

Provisions were made for the Houses of Bishops and Clergy, which were to consist respectively of the members of the Upper and Lower Houses of Convocation, and for an elective House of Laity. The Assembly was to meet at least once a year under the chairmanship of the Archbishop of Canterbury, and

provision was made for sittings of the Houses to be held separately or together.

By Article 10 :—

"Nothing (except what relates only to the conduct of business) shall be deemed to be finally passed by the Assembly which has not received the assent of a majority of the members present and voting of each of the three Houses sitting together or separately, and accordingly at sittings of the Assembly, or of any two Houses—(1) Any motion relating solely to the course of business or procedure shall be determined by a show of hands; (2) any other motion may be similarly determined unless any ten members present demand a division by Houses, in which case the motion shall be lost unless it is carried by a majority of the members of each House present and voting."

By Article 11 :—

"The Assembly shall appoint a Legislative Committee, including members of all three Houses, to whom all measures which it is desired to pass into law shall be referred. The Legislative Committee shall thereupon take such action as may be authorized by statute in order that such measure may become law."

By Article 12 :—

"The Assembly may make, revoke, or alter standing orders, consistent with this constitution, for the conduct of elections, and for the meetings, procedure and business of the Assembly, and for the joint sittings of any two Houses."

It was clear from these provisions, said SIR JOHN SIMON, that for many functions of the Assembly no Parliamentary sanction or control was required. For instance, the Assembly could determine a matter relating to foreign missions without any Parliamentary sanction at all. But Article 14 provided that :—

"The Assembly shall be free to discuss any proposal concerning the Church of England and to make provision in respect thereof, and where such provision requires Parliamentary sanction the authority of Parliament shall be sought in such manner as may be prescribed by statute :

"Provided that any measure touching doctrinal formulæ or the services or ceremonies of the Church of England or the administration of the Sacraments or sacred rites thereof shall be debated and voted upon by each of the three Houses sitting separately, and shall then be either accepted or rejected by the Assembly in the terms in which it is finally proposed by the House of Bishops."

The language of that proviso made it clear that the identity of a measure was not necessarily changed because the terms of the measure were changed. Otherwise the alteration of a single word might make it a new measure.

Counsel next dealt with the procedure where Parliamentary sanction was required. That procedure was provided for under the Church of England Assembly (Powers) Act, 1919, section 2 of which provided :—

"(1) There shall be a committee of members of both Houses of Parliament styled 'The Ecclesiastical Committee.'

"(2) The Ecclesiastical Committee shall consist of 15 members of the House of Lords nominated by the Lord Chancellor and 15 members of the House of Commons nominated by the Speaker. . . ."

The LORD CHIEF JUSTICE pointed out that the Ecclesiastical Committee was not a Committee of Parliament. It was only a committee which consisted of members of Parliament. So might the committee of a golf club.

Counsel then read section 3 set out above.

Continuing, he said that Sir Philip Baker-Wilbraham's affidavit stated that the Measure entitled "The Revised Prayer-book (Permissive Use) Measure, 1923," was introduced by order of the House of Bishops on October 25, 1922, and was dealt with by the Church Assembly throughout all its stages in accordance with the Standing Orders. It was expressed to have for its object the authorization of not only "the alternative use of certain omissions from, additions to, and deviations from the Book of Common Prayer," as had been stated in Sir William Haynes Smith's affidavit, but also "the issue of supplementary forms of service in public worship in the Church of England and for purposes connected therewith." On the stage of general approval it was considered by the House of Clergy, sitting separately, on January 31, 1923, and was approved by a large majority. It was considered by the House of Bishops, sitting separately, on April 16 and 17, 1923, and was approved by a large majority. It was considered by the House of Laity, sitting separately, on April 25 and 26, 1923, and was approved by a majority of 175 to 46.

The Measure was next considered for revision by the Houses of Clergy and Laity, again sitting separately, this stage occupying about 22 days in the House of Clergy and 15 days in the House of Laity. It was then returned to the House of Bishops with the amendments which had been proposed. The House of Laity were opposed to the principle of an alternative Prayer-book, and they adhered to the plan of printing the permissible variations with the text of the existing Prayer-book, so that every worshipper might have "at least the services for Morning and Evening Prayer, the Litany, and the Holy Communion, with the permissible variations relevant to those services, in a single volume."

The House of Bishops took up the work of revision in the autumn of 1925. Between October, 1925, and March, 1927, six special sessions, occupying nearly 50 days in all, were held, practically all the diocesan Bishops, unless prevented by illness or other unavoidable cause, being present. During the course of those sessions conferences were held in committees of the Houses of Clergy and Laity. In February, 1927, before the revision was finally completed, the proposals of the Bishops were communicated in a provisional form to the Lower Houses of the two Convocations, who were thus given the opportunity to make further suggestions in detail before their consent was asked to the Measure being laid before the Assembly for final approval.

The revision by the House of Bishops made a considerable change in the form of the Measure, but it was submitted that such alterations in form and adjustments in detail did not, for this purpose, constitute the substitution of one Measure for another.

The LORD CHIEF JUSTICE.—If you convert something voluntary into something compulsory, is that a change of form or an adjustment of detail? If there are profound changes can they be called adjustments in detail?

SIR JOHN SIMON.—I submit that no profound change has been made at all.

The original Measure, the affidavit continued, had consisted of a few enacting clauses referring to a long schedule of amendments to the Book of Common Prayer. As time went on it became increasingly difficult to state the proposed alterations in the form of a schedule of amendments, and increasingly necessary and more convenient to embody those amendments in a complete consecutive book. Consequently

the Measure, as revised by the House of Bishops, consisted of enacting clauses referring to a completed Book, to be deposited with the Clerk of the Parliaments for purposes of identification. That was merely a change of form and not of substance.

Whereas the Book resulting from the amendments proposed in the original Measure would have been an *alternative* book, the deposited Book was, as desired by the House of Laity, a *composite* book, containing not only the proposed alternative uses, but also (with a few slight exceptions) the whole of the existing Book of Common Prayer. The deposited Book could be used equally in churches where the old forms of service were retained as in those where the new ones were desired.

After the revision in the House of Bishops had been completed, the Archbishops consulted their respective Convocations, and obtained their consent to the Measure being laid before the Assembly for final approval, and on July 5 and 6, 1927, it was finally considered by the Church Assembly for acceptance or rejection.

MR. JUSTICE AVORY.—In your view is this analogous to a Bill before Parliament which is referred to a committee and returns to the House of Commons after having been amended ?

SIR JOHN SIMON.—Yes, my Lord.

The LORD CHIEF JUSTICE.—It would be a strange thing if a Bill for local option became in committee a Bill for local coercion.

SIR JOHN SIMON.—Stranger things than that have happened.

The LORD CHIEF JUSTICE.—I think that, if it did occur, it might lead to a troublesome debate on the third reading.

SIR JOHN SIMON, continuing his argument against the rules, referred to Order XXXII. of the Standing Orders of the Church Assembly, which provided procedure for the introduction into, and consideration and approval by, the three Houses of the Assembly sitting separately, and by both Houses of Convocation, of a measure touching doctrinal formulæ, the services and ceremonies of the Church of England, or the administration of the Sacraments or their sacred rites. There could be no doubt, he said, that the carefully framed provisions of that Order had been strictly complied with, and the question on that part of the case was, therefore, in substance, whether that Standing Order could be impeached as being in conflict with the Constitution of the Church Assembly under which it was made.

The LORD CHIEF JUSTICE said that the Measure of 1923 was entitled the "Revised Prayer-book (Permissive Use) Measure," and was proposed to be passed to authorize certain alternative uses. Was it an amendment of that to say, with regard to certain vital matters :—"We are no longer speaking of alternative use. This new form shall be obligatory" ? Did it come within the sphere of the alternative to announce a new and obligatory course ? Was not one the exact antithesis of the other ?

SIR JOHN SIMON.—That question may be a very grave one if your Lordships, after examination, consider that any such grave change has taken place. I think that I shall be able to satisfy your Lordships that, as a matter of fact, the changes in their final form really remain of a permissive character. It is rather a greater latitude that may be found than a mandatory change from one established use to another.

MR. JUSTICE SALTER.—Do you agree that the Book of Common Prayer survived the 1923 Measure untouched, but that it did not survive this Measure [*i.e.*, the Measure of 1927] untouched ? In other words, after 1923 anyone could follow the Book of Common Prayer in every respect if he wished. Now that would be wrong.

SIR JOHN SIMON.—We have to see to what extent that is so.

The LORD CHIEF JUSTICE.—Is it not true to say that, if you draw a line at 1923, what was offered then was in all respects an alternative ? Although, no doubt, there is now a considerable area within which what is offered is permissive or alternative, there are certain respects in which a new thing is imposed.

SIR JOHN SIMON.—I think that your Lordships will find that, so far as regards the services of the Church, that is not so. The extent to which it might plausibly be said to be so is really that there was implicit in the proposals, in the shape in which they were first put forward and were generally approved, certain very minor modifications which, when one comes to consider the matter in detail, involve minute adjustments. They are not adjustments which say that in the future the services which are authorized *shall* be in a certain form, whereas previously they had been in another form.

The LORD CHIEF JUSTICE.—Is your answer to the question that there is no sense in which the Measure of 1927 does more than offer an alternative ?

SIR JOHN SIMON.—I think so, my Lord.

SIR JOHN SIMON, continuing to read the affidavit of Sir Philip Baker-Wilbraham, the secretary of the Church Assembly, said that when the Measure was brought forward for final approval on July 5 and 6, 1927, the three Houses sat together, under the chairmanship of the Archbishop of Canterbury. Mr. Patrick White's protest was made and overruled publicly by the Archbishop, who then put the motion to the Assembly that the Measure be approved. After a two days' debate, in which a number of members of each House took part, the motion for approval was carried. The total voting was 517 for the Measure, and 133 against.

On July 13, 1927, the Book referred to in the Measure was deposited and the Legislative Committee of the Assembly, in pursuance of Article 11 of the Constitution and section 3 (1) of the Church of England Assembly (Powers) Act, 1919, submitted the Measure to the Ecclesiastical Committee, together with comments and explanations in the shape of a report.

SIR JOHN SIMON was reading the shorthand note of Mr. Patrick White's objection and submitting that the Archbishop acted in accordance with the Standing Orders and the Constitution, when

SIR MALCOLM MACNAGHTEN said :—If this Measure of 1927 is the same as the Measure of 1923, I do not complain of Order XXXII. or the way in which it was applied.

The LORD CHIEF JUSTICE.—You say that this Measure never reached the point at which that Standing Order could be applied to it. If it did, then I understand that you agree that the procedure of the Standing Orders and the Constitution was correctly applied to it ?

SIR MALCOLM MACNAGHTEN.—Yes ; I say that the Archbishop ought to have ruled that the Measure was a new Measure.

SIR JOHN SIMON.—This must surely be one of those matters of procedure which are essentially for the decision of the presiding authority. It is as though, on the third reading of a Bill which has been away from the House of Commons to a Select Committee,

a member objected that the amendments made by the Committee were of such a character that it was not the same Bill. Would it not be the right and duty of the Speaker to rule on that question ?

The LORD CHIEF JUSTICE.—Would there not be a way of dealing with that matter at an earlier stage ?

SIR JOHN SIMON.—No doubt the Chairman of Committees would refuse to accept amendments which were clearly outside the scope of the Bill, but I am assuming the case of a member who thought that the amendments which were in fact made still went too far. I do not wish to press the analogy unduly, especially for this reason : that in Parliament one body at a time considers a Measure and passes it on, with the amendments, to the next stage until the conclusion is reached. At no stage do the House of Lords or the House of Commons consider a Measure at the same time. But the Church Assembly (Powers) Act, 1919, seems to contemplate a simultaneous consideration of a Measure by the three Houses, and the final vote is taken, not upon a precise text agreed on by each House after consideration of the amendments made by the others, but upon a revised text proposed by the House of Bishops.

The LORD CHIEF JUSTICE.—But their revision must not go so far that it ceases to be the Measure.

SIR JOHN SIMON.—I should contend for greater latitude for the Bishops than merely to reconcile or combine things suggested by the other Houses.

The LORD CHIEF JUSTICE.—Your contention is that the raw materials in the shape of the suggestions made by the House of Laity and the House of Clergy are to be collected and laid before the House of Bishops, who may add any suggestions of their own and bring forward the result for final approval so long as it is in some sense the same.

SIR JOHN SIMON.—Yes. It is not a case of one House amending the Measure and the Measure going forward, *plus* amendments, to the next House.

MR. JUSTICE SALTER.—Are the amendments of one House binding on the others ?

SIR JOHN SIMON.—Not in the least.

SIR JOHN SIMON, continuing, said that when the House of Bishops began its consideration of a Measure it had before it the suggestions of the Houses of Laity and Clergy. The method was that those two Houses completed their suggestions and the House of Bishops then had the duty of considering, with the help of those suggestions, what were the terms in which the House of Bishops would propose that the Measure would be finally expressed.

The LORD CHIEF JUSTICE.—The Bishops have the matter entirely in their hands because, if the point is raised that the amendments amount to such transformation that the Measure before the Assembly is no longer the Measure, the determining voice on the question is that of the Archbishop ?

SIR JOHN SIMON.—Certainly.

The LORD CHIEF JUSTICE.—If your contention is right about the meaning of the Constitution, the position is really that the decisions of the House of Laity have no binding effect on the House of Clergy ; that those of the House of Clergy have no binding effect on the House of Laity ; and that the decisions of neither House have any binding effect on the House of Bishops. The Bishops may do as they please subject to the provision that the question may be raised whether the Measure is the original Measure and, if that is raised, the Bishops decide it.

SIR JOHN SIMON.—Your Lordship has omitted some overwhelming considerations. Before any change can be effected the affirmative approval must be obtained of the Church Assembly, a body of some 500 persons, about 40 of whom are Bishops.

Continuing, SIR JOHN SIMON said that, with regard to matters of doctrinal formulæ, services, ceremonies, and the administration of the Sacraments, the Archbishop of Canterbury and the Bishops had a veto. They could prevent proposals of that kind from coming before the Church Assembly for approval, except in such terms as the House of Bishops thought to be right. It was incorrect to say that the Bishops could do what they liked. They could prevent what they did not like.

The LORD CHIEF JUSTICE.—The Bishops can do what they like on the matter with which we are dealing, the question being whether what is to be put to the National Assembly is the original Measure. In exercising their veto the Bishops may transform the Measure into something else, subject to the peril that it may be rejected. Subject to that, *vis inertiae* may carry it, or the liking for some clauses may cause some people to put up with others.

SIR JOHN SIMON.—I certainly should consider that to be so. The Bishops had the responsibility of determining in what terms a proposal should come before the Assembly for final approval. If one could imagine that power being used improperly, there was the check that the Archbishop of Canterbury acted as chairman of the Assembly as the head of the whole Church and not as the head of the Bishops. Another security was that a proposal which commended itself to the Bishops came before an Assembly in which the Bishops numbered only 40 out of 500. Lastly, a bare majority of one of the Houses would hold up the whole matter.

The LORD CHIEF JUSTICE.—Are there not two sufficient answers which avoid the suggestion that it will be necessary to examine in detail whether the Measure of 1923 was the same as the Measure of 1927 —(1) that it was for the Archbishop of Canterbury to determine whether it was the same Measure, and he has decided it ; (2) the Measure of 1927 was submitted, as being the Measure of 1923, to the Assembly for acceptance, and the Assembly has accepted it ? What has this Court to do with the domestic question whether the ruling can be supported ? It *has* been supported in the only two quarters which matter. Where has there been any usurpation of jurisdiction by anything which can be called a Court ?

SIR JOHN SIMON.—I outlined yesterday that my first point would be that the writs did not lie ; my second that what was done was done within the terms of the Constitution. The ruling of the president of a deliberative assembly, whether right or wrong, if given in good faith, is final. A man may often have it thrust upon him that he has to determine the ambit of his own jurisdiction.

MR. JUSTICE AVORY.—I have been waiting to hear how a writ of prohibition can go to a Legislative Committee.

SIR JOHN SIMON.—The difficulties appear to me still greater in the case of *certiorari*, which brings up a record—a particular document—to be quashed.

MR. JUSTICE AVORY.—We are asked to quash the record of the Measure and the record of the Book. Where is the "record" of the Measure ?

SIR JOHN SIMON.—I have not the faintest idea. There is no "record" of the Measure. The Book is in the hands of 30 members of the two Houses of Parliament, and, presumably, the writ would have to go to them.

The LORD CHIEF JUSTICE.—What are the judicial functions of the Church Assembly or of the Legislative Committee ?

Sir John Simon.—Where you have a body whose functions are deliberative, it is as absurd to talk of *certiorari* as to ask for *certiorari* to Convocation. That application would have short shrift.

He submitted that the language of the proviso to Article 14 of the Constitution abundantly justified what had been done.

The Lord Chief Justice.—The Measure has yet to run the gauntlet of a Parliamentary Committee, and either House of Parliament, or both, may reject it.

Mr. Justice Salter.—I appreciate, Sir John, what you say as to *certiorari*; but as to prohibition, suppose that the Constitution says that a Measure shall not be put forward by the Legislative Committee, except after a certain procedure. If a Measure is put forward without going through that procedure, may not a person aggrieved say: "If this were an ordinary Bill, Parliament might amend it; but Parliament cannot amend a Measure, and is hardly likely to reject it if it gets there"?

Sir John Simon.—The Ecclesiastical Committee have under the Act (section 3 (3)), the express duty of guarding "the constitutional rights of all his Majesty's subjects."

The Lord Chief Justice.—If you had the incredible position of the Church Assembly sending up to the Ecclesiastical Committee a Measure without observing any formalities, the Ecclesiastical Committee would report to Parliament: "We have had a piece of paper put before us purporting to be a Measure, but upon investigation we find that the required formalities were not complied with, and we think it is not expedient that it should be proceeded with."

Mr. Justice Avory.—Even if they did not so report, neither House of Parliament is under any obligation to send the matter forward to his Majesty for approval.

The Lord Chief Justice at this point intimated that the Court need not trouble Sir John Simon any further. His Lordship asked Sir Malcolm Macnaghten how he overcame the difficulties (*a*) that the matter complained of was one of procedure, which had been decided by the chairman of the Assembly, the Archbishop of Canterbury; and (*b*) that, in any event, neither the Church Assembly nor the Legislative Committee was of the nature of a Court to which a writ of prohibition or a writ of *certiorari* could be directed.

Sir Malcolm Macnaghten said that his answer to the first question was that what he complained of was not a matter of procedure, but a matter of jurisdiction. Assuming that the Measure of 1927 was not the Measure of 1923, and had never been debated separately by the Houses of Clergy and Laity, he submitted that, according to the practice of that Court, any subject of his Majesty, who was a member of the Church of England, was entitled as of right to writs of prohibition and *certiorari*.

It had been suggested that there was nothing to quash. What he wished to quash was the order of the Church Assembly directing that the Measure of 1927 be passed. There must also be a similar order of the Legislative Committee directing that the Measure be submitted to the Ecclesiastical Committee. If he could establish that the Church Assembly and the Legislative Committee had exceeded their jurisdiction in submitting to the Ecclesiastical Committee a Measure which had not been passed by the Church Assembly according to its Constitution, then, by the practice of the Court, the writs would issue.

A voluntary, unincorporated body was obliged to keep within the powers conferred on it by law, and if it failed to do so the Court would compel it to do so. Both the Church Assembly and the Legislative Committee were Courts within the meaning of the phrase when used in connexion with writs of prohibition and *certiorari*, and their orders were orders in the same sense.

The Church Assembly derived its powers solely under the Act of 1919. The extent of those powers depended on the true construction of that Act. If matters were dealt with in a way which exceeded those powers, this Court was the only place to which an aggrieved person could go.

Sir Malcolm Macnaghten submitted that the Ecclesiastical Committee had no power to investigate whether a Measure was duly passed, any more than the House of Commons or the House of Lords. The question might depend on the construction of rules. There was no tribunal but this, and if there was no jurisdiction in this Court there was no redress, although something would have the force of law which ought not to have the force of law if right were done.

Mr. Justice Salter.—You are arguing, I presume, on the footing that the Archbishop's ruling was wrong?

Sir Malcolm Macnaghten.—More than that. Not only that his ruling was wrong, but that he failed to appreciate the point.

Counsel read from the shorthand note of the objection by Mr. Patrick White and the Archbishop's ruling upon it.

The Lord Chief Justice.—The Archbishop there states what the objection is, and rules that the new Measure is the same as the original Measure within the meaning of the Standing Orders. How can you possibly say that the Archbishop did not apply his mind to the question?

Sir Malcolm Macnaghten.—Because the question was not whether the amendments were within the Standing Orders, but whether they were within Article 14 (1) of the Constitution.

Mr. Justice Salter.—While you are arguing on the footing that the ruling is wrong, can you deny that it is a ruling?

Sir Malcolm Macnaghten.—If the Archbishop's ruling on the question whether white is black is conclusive, I am out of Court. But I submit that it is the duty of the Court to ascertain whether the complaint of the subject is correct that the Archbishop has decided wrongly.

The Lord Chief Justice.—If you are right, it cannot end here. We may be called on whenever the question arises whether amendments are within the Constitution or Standing Orders, and, whatever the decision of his Grace may be, to review that decision.

Sir Malcolm Macnaghten.—Why not?

The Lord Chief Justice.—I should have thought the question was rather "Why?"

Sir Malcolm Macnaghten referred to the decision in *Rex v. Electricity Commissioners* (39 *The Times* L.R., 715; [1924] 1 K.B., 171).

The Lord Chief Justice.—We are very familiar with that case, which is a very long way from this case.

Sir Malcolm Macnaghten said that the Measure of 1923 was to provide a Book of Common Prayer alternative to the Book annexed to the Act of Uniformity, 1662. That Measure did not touch the Book annexed to the Act of 1662. In matters of that sort the importance of alterations depended on what persons considered to be important, and some people

thought that the alterations contained in the Measure of 1927 were of vital importance. Sir John Simon had said that all that was done was to extend the permission given to use various services. The parishioner, however, was deprived of the right which he had at present to have the service which he attended performed in accordance with the Act of 1662. Therefore the Measure of 1927 was outside and inconsistent with the Measure of 1923. What had been done was to tack on to a Measure for an alternative Prayer-book a Measure for the alteration of the existing Book.

The LORD CHIEF JUSTICE pointed out that the Archbishop of Canterbury did not say that the Measure had not been changed. On the contrary, he said that there had been great and undeniable changes in it. He held, however, that the Measure in its final form was not a new Measure.

SIR MALCOLM MACNAGHTEN said that, to arrive at that decision, the Archbishop must have formed an opinion regarding what Article 14 of the Constitution meant. But the interpretation of an Act of Parliament was for the Court and not for any other tribunal. The Archbishop could not give to the Assembly a jurisdiction which it did not possess by deciding wrongly a question of fact.

Sir Malcolm Macnaghten was about to conclude his argument with the observation that, if their Lordships were against him on the question of the finality of the Archbishop's ruling, it would be waste of time to deal with the question whether the writs of prohibition and *certiorari* would lie. If the Archbishop's ruling was infallible and could not be questioned, he had no more to say. But if the case went further he relied on all the matters in the applicant's affidavit.

The LORD CHIEF JUSTICE.—To say that it is infallible is one thing ; to say that it cannot be questioned is quite another ; and you ought even to that to add the words "in this Court." But you should not assume that we are going to decide against you on this point.

MR. JUSTICE AVORY.—You spoke of the possibility of the matter going further. It would be inconvenient if in the House of Lords it were found that this question had not been argued.

The LORD CHIEF JUSTICE.—Is it not the great merit of a case in the Court above that it should be so different from the case in the Court below that every one can recognize it as a new Measure ?

MR. JUSTICE SALTER asked how a writ of *certiorari* or prohibition could be enforced.

SIR MALCOLM MACNAGHTEN referred to *Rex v. Electricity Commissioners* (*supra*) ; *Rex v. Inhabitants of Glamorgan* (1 Lord Raym., 580).

MR. JUSTICE AVORY.—Do you say that the obligation to listen in church to something which is not in the Prayer-book of 1662 is analogous to the making of rates to repair bridges ?

SIR MALCOLM MACNAGHTEN.—The Church is the Church established by law, and every one has the right to go to a church and hear the services laid down by the Prayer-book of 1662. There is also the point of view of the ministers who had declared their adherence to the Book of Common Prayer.

Counsel also cited *In re Constables of Hipperholme cum Brighouse* (5 Dowling and Lowndes, 79), and dealt fully with *Rex v. Electricity Commissioners* (*supra*).

Mr. STORRY DEANS, dealing with the question whether the ruling by the Archbishop of Canterbury, as chairman of the Church Assembly, was conclusive on the point that the Measure of 1927 was the same as the Measure of 1923, and therefore had been properly debated, said that whether or not the ruling of the chairman of any meeting or assembly was absolute and unchallengeable depended on the nature and constitution of the meeting or assembly. Convocation was *sui generis* and an old body that once was part of the Legislature. It had no written constitution. It had unlimited powers and was master of its own procedure. Its chairman, like the Speaker of the House of Commons, was responsible only to the Assembly itself. Where, however, a body was constituted by statute with a strictly limited constitution one had to consider whether the act of the chairman was within the Constitution. The Courts ought to restrain such a body from acting in a manner outside its powers.

The Archbishop of Canterbury, as chairman of the Church Assembly, had no special, absolute authority. He had only the limited class of powers that a chairman of, for instance, a limited company possessed, and there was nothing to prevent his rulings from being impeached in the King's Bench Division (*Henderson v. Bank of Australasia* (6 *The Times* L.R., 424 ; 45 Ch. D., 330)). Those rulings affected not a class of persons, not only members of the Church of England, but the public generally, and, if the Archbishop failed to comply with the Constitution, it was important that any member of the public should be able to come to the Court and challenge his ruling by prohibition.

There was a great distinction between cases where a tribunal had to decide whether a certain state of facts which gave it jurisdiction existed and cases where a collateral matter had to be found before the tribunal had jurisdiction. In the latter case the tribunal, by a wrong adjudication on that collateral matter, could not give itself jurisdiction. In the present case the Assembly had met to discuss the merits of the Measure, and then the collateral point arose of the identity of the Measure. If that was wrongly decided the Court would interfere (*per* Mr. Justice Coleridge, in *Bunbury v. Fuller* (9 Ex., 111, at p. 140)). Counsel also referred to *Reg. v. Nunnelley* (E. B. and E., 852).

It would be absurd to contend that either the Archbishop of Canterbury or anyone else was allowed to say that something was that which it plainly was not. If a Measure had been debated and subsequently so changed that it ceased to be the original Measure, and the Archbishop ruled that it was the original Measure, that was not a matter of mere business and procedure.

Mr. STORRY DEANS was entering upon the question whether the writ of prohibition would lie, when

The LORD CHIEF JUSTICE said :—On prohibition, have you any case which helps you more than that which Sir Malcolm Macnaghten cited yesterday of *Rex v. Electricity Commissioners* (39 *The Times* L.R., 715 ; [1924] 1 K.B., 171) ? That is a very modern authority.

Mr. STORRY DEANS.—I have a very ancient authority. In the third edition, 1687, of Williams's Registrum Brevium——

MR. JUSTICE AVORY.—I did not catch the reference.

Mr. STORRY DEANS.—The title is "Registrum Brevium Tam Originalium Quam Judicialium——

MR. JUSTICE AVORY.—That's enough of the title ; what is the point ?

Mr. STORRY DEANS.—At folio 40 is an example of a writ prohibiting a person from visiting a hospital under the jurisdiction of the Crown.

The LORD CHIEF JUSTICE, in giving judgment, said that various questions which were doubtless of interest and importance in their proper place had

been suggested in the course of the argument, but they did not seem really to arise on the rules under consideration. The Court were not concerned with such questions as (1) what were the merits or demerits of the Constitution recognized by the Church of England Assembly (Powers) Act, 1919; (2) whether the true effect of the statute and the Constitution taken together was to subtract large powers from Parliament and to confer on the Bishops far-reaching powers of veto and initiative; (3) whether it was a paradox or a commonplace to say that the offer of an optional alternative was the same thing as the imposition of a compulsory change; (4) whether a Measure which left the Prayer-book intact was the same as one which insisted on fundamental changes in it; or (5) whether the Church Assembly had accepted a Measure which ought never to have been proposed to it, or whether there had been referred to the Legislative Committee a Measure which ought never to be passed into law.

Such questions, whatever their difficulty or importance, were not for this Court. They had not been developed in argument because it had not appeared to be necessary to develop them. If they were to be examined it would be necessary to ascertain not only whether the conclusion of the argument flowed from the premises, but also whether the premises themselves were well founded. In his opinion there was a preliminary question which was of a decisive character. It was whether either the Legislative Committee or the Church Assembly was a body of the kind to which a writ of *certiorari* or prohibition ought to issue. The circumstances in which those discretionary writs were issued had often been considered. They were restated in concise and clear terms by Lord Justice Atkin in *Rex v. Electricity Commissioners* (39 *The Times* L.R., 715; [1924] 1 K.B., 171, at p. 204). Speaking of the matter which was then before the Court of Appeal the Lord Justice said:—

"The matter comes before us on rules for writs of prohibition and *certiorari* which have been discharged by the Divisional Court. Both writs are of great antiquity, forming part of the process by which the King's Courts restrained Courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; *certiorari* requires the record or the order of the Court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

There followed in the judgment of Lord Justice Atkin references to a series of cases on very different subject-matters in illustration of that cardinal proposition. The question, therefore, which the Court had to ask themselves in the present case was whether either the Church Assembly or the Legislative Committee of the Assembly was a "body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially." It was to be observed that in that phrase Lord Justice Atkin used "and," not "or." That a body might, therefore, satisfy the test, it was not enough that it should have legal authority to determine questions affecting the rights of subjects. There must be added to that characteristic the characteristic that the body had the duty to act judicially. That ingredient in such cases must never be absent. As, in earlier days, those writs were issued only to bodies which, without any harshness of construction, could be called Courts, so to-day they did not issue except to bodies which were under the duty to act in a judicial capacity.

It was neither necessary nor useful to inquire whether the Church Assembly or the Legislative Committee could properly be said to have legal authority to determine questions affecting the rights of subjects. That question might well give rise to much controversy. Speaking for himself, he was disposed to take the view that the position of those bodies was rather to set in motion, in a preliminary way, proposals for legislation which might or might not mature into legislation. However that might be, he was satisfied that it was not true to say that either of those bodies had the duty to act judicially.

The opening words of the Constitution, recognized and given the force of law by the statute, were: "There shall be a National Assembly of the Church of England to deliberate on all matters concerning the Church of England and to make provision in respect thereof." As part of the appropriate machinery the Assembly was required to appoint a "'Legislative Committee' including members of all three Houses, to whom all measures which it is desired should pass into law shall be referred." It was further provided that "the Legislative Committee shall thereupon take such action as may be authorized by statute in order that such measure may become law."

In other words, they were dealing with the machinery and internal economy of a deliberative assembly the function of which, so far as the present matter was concerned, was to deal with the earlier stages of that which, if the whole programme were carried out to the end, might become a statute. That did not seem to be a judicial body. It seemed to be a deliberative or legislative body. Neither the Assembly nor its Legislative Committee was a body of the kind to which it would be appropriate to issue either a writ of prohibition or a writ of *certiorari*. In those circumstances he was of opinion that the rules should be discharged.

Mr. Justice Avory agreed that the rules should be discharged on the ground that neither writ would lie, either to the Church Assembly or to the Legislative Committee in the circumstances of this case. There seemed no ground for distinguishing between the writ of prohibition and that of *certiorari*. The practical difficulties of enforcing them might not be the same, but the same principle applied to both, the principle laid down in *Rex v. Electricity Commissioners* (39 *The Times* L.R., 715; [1924] 1 K.B., 171). He would only add to the passage already read these words from the judgment of Lord Justice Bankes at page 194:—

"These authorities are, I think, conclusive to show that the Court will issue the writ to a body exercising judicial functions, though that body cannot be described as being in any ordinary sense a Court."

Adopting that principle, he was of opinion that neither of these bodies was a body exercising judicial functions, or determining judicially questions affecting the rights of subjects.

The appellation "Legislative Committee" appeared repugnant to the idea that they were exercising judicial functions. In his view the purpose of the Church of England Assembly (Powers) Act, 1919, was to authorize the Church Assembly, through its Legislative Committee, to promote legislation subject to certain safeguards. That seemed clear from the preamble to the Act :—

"Whereas the Convocations of Canterbury and York have recommended in Addresses presented to his Majesty on the tenth day of May, 1919, that, subject to the control and authority of his Majesty and of the two Houses of Parliament, powers in regard to legislation touching matters concerning the Church of England shall be conferred on the National Assembly of the Church of England. . . . And whereas it is expedient subject to such control and authority as aforesaid that such powers should be conferred on the Church Assembly, &c."

It was suggested that what had been done in this case had invaded, or purposed to invade, the right of members of the Church to have the Book of Common Prayer used without amendment of any kind. Even if that were so, no right had been judicially determined by either of those bodies.

Standing Order XXXII. (*d*) provided that, when the House of Bishops had concluded all the stages of a Measure, except the stage of final approval, they were to submit it for the consent of the Convocations of Canterbury and York to its presentation to the Assembly for final approval. If the Convocation of either Province withheld its consent, the Measure could not be proceeded with. It was admitted that no writ of prohibition or *certiorari* would lie to the Convocation of Canterbury or York, yet, if the applicant were right, the curious result would follow that prohibition might lie to the Assembly after the Measure had been approved by Convocation.

It had been suggested that *Reg. v. Archbishop of York* (4 *The Times* L.R., 483 ; 20 Q.B.D., 740) was a decision based only on the antiquity of Convocation, but the true ground of the decision was to be found in the concluding words of the judgment of Lord Coleridge, at page 748 :—

"Such an interference would not only be without a shadow of precedent, but would be inconsistent with the character and constitution of the body with which we are asked to interfere."

Those words seemed just as applicable to the Legislative Committee and to the Church Assembly as they were to the Convocation of York then, and as they would be to Convocation to-day.

That ground being sufficient to dispose of the rules, it was unnecessary to express any opinion upon the other question—namely, whether the decision of the Archbishop of Canterbury was final and conclusive or whether this Court could go behind it. It was sufficient to quote from *Reg. v. Archbishop of York* (*supra*), at p. 745 :—

"Whether the decision of the Archbishop was correct in point of law is a matter on which we offer no opinion, an expression which must not be taken as suggesting anything in any way unfavourable to it."

For those reasons he agreed that these rules should be discharged.

Mr. Justice Salter also agreed that the rules should be discharged. The powers conferred on the Church Assembly were powers to initiate legislation. No doubt the Measures which the Church Assembly put forward might affect the rights of the subject, but Parliament had not conferred on it any power to determine judicially any question affecting the rights of subjects. He thought that the Church Assembly had no such power and, therefore, no such duty. Their powers were purely deliberative and legislative, and they had no judicial functions.

The widest statement of the rule with regard to the issue of the writs of prohibition and *certiorari* was to be found in *Rex v. Inhabitants of Glamorgan* (1 Ld. Raym., 580) :—"This Court will examine the proceedings of all jurisdictions erected by Act of Parliament." It was to be noted that the word used was "jurisdictions." Chief Justice Holt did not say "the proceedings of all persons or bodies entrusted with powers by Act of Parliament." The meaning to be attached to "jurisdiction" was found in another part of that judgment. Counsel in that case had been arguing that no writ of *certiorari* lay to remove orders made by commissioners of bankrupts. In the judgment the reason given was : "And as to the commissioners of bankrupts, . . . they had only an authority and not a jurisdiction." He thought that that was the precise point here.

Those observations applied *a fortiori* to the Legislative Committee. He could not understand how it could be argued that it had judicial functions. It seemed to be no more than the machinery through which the Church Assembly carried out its legislative functions.

The rules were discharged with costs.

[Solicitors—Messrs. Gregory, Rowcliffe, and Co. ; Messrs. Wainwright and Co.]

House of Lords.
(Viscount Dunedin, Viscount Sumner, Lord Atkinson, Lord Shaw of Dunfermline, and Lord Carson.)

1927.
Nov. 7.

J. C. HOUGHTON AND CO. v. NOTHARD, LOWE AND WILLS, LIMITED.*

Company—Agreement by director confirmed by secretary—Ostensible authority—Estoppel.

Two rival companies, the P. Company and the W. Company, formed a new company, the respondent company, to take over certain branches of their business of fruit importers, the shares in the new company being held in equal proportion by the old companies, and the board of the new company consisting of two directors of the P. Company, namely, M.L. and his brother, and two directors of the W. Company. By an agreement embodied in a letter of July 22, 1924, between M.L. and the appellants, a firm of fruit brokers, it was arranged that the appellants should make certain advances to the P. Company and should receive all fruit consigned either to the P. Company or to the respondent company and keep back 70 per cent. of the net proceeds in reduction of the advances, and it was stipulated that the respondent company should subscribe to this arrangement. This arrangement was followed by a formal agreement under the seal of the P. Company, but there was no corresponding agreement by the respondent company. The secretary of the respondent company, however, wrote to the appellants purporting to confirm the arrangement. This arrangement was

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

not known to the directors of the respondent company, other than the L. brothers, until some months after it had been put in operation, and, as soon as they became aware of it, it was put an end to. The appellants obtained certain fruit consigned to the respondent company without production of the bills of lading on giving an indemnity to the ship, and they sued the respondents for delivery of the bills of lading. The respondents counterclaimed for the proceeds of fruit belonging to the respondents and not accounted for.

Held (Lord Shaw of Dunfermline dissenting), (1) that there was not in fact any agreement binding on the respondents ; (2) that the respondents were not estopped from denying the existence of the agreement by the knowledge of the two directors who were participators in the wrong done to the respondents, or on the ground that an inspection of the books of the company would have disclosed the arrangement.

In re Hampshire Land Company (12 *The Times* L.R., 517 ; [1896] 2 Ch., 743) applied.

Decision of the Court of Appeal ([1927] 1 K.B., 246) affirmed.

This was an appeal from a decision of the Court of Appeal ([1927] 1 K.B., 246) reversing a judgment of Mr. Justice Wright.

The action was brought by the appellants against the respondents for a declaration that the appellants were entitled to certain bills of lading in respect of fruit consigned to the respondents at Liverpool on board certain ships named in the statement of claim during the month of November, 1924, and other consequential relief.

The respondents counterclaimed for the total sum retained by the appellants out of the proceeds of the respondents' fruit.

The facts are fully stated by Lord Dunedin in his judgment.

Mr. Justice Wright gave judgment for the appellants on the claim and counterclaim.

The Court of Appeal (Lords Justices Bankes, Atkin, and Sargant) reversed the decision of the learned Judge.

Sir John Simon, K.C., Mr. A. T. Miller, K.C., and Mr. Porter, K.C., appeared for the appellants ; and Mr. Upjohn, K.C., and Mr. R. Fortune for the respondents.

Viscount Dunedin.—My Lords : The appellants in this case are fruit brokers and the respondents are a fruit importing company. The action which was raised by the appellants was for delivery of certain bills of lading. This was met by denial of the right to ask for them and by a counterclaim for a sum of money which has eventually been settled at £19,757 8s. 7d., being the proceeds of fruit, belonging to the respondents and sold by the appellants, for which they had not accounted. The learned trial Judge gave judgment in favour of the appellants on both points, the Court of Appeal reversed his decision on both points, hence this appeal.

To make the case intelligible, it is necessary to detail the history of the parties. As regards the appellants little need be said ; they are an ordinary firm of well-established fruit brokers. The business of a fruit broker is to sell fruit for the importer to the various retail dealers in the United Kingdom. The fruit is bought abroad by the importer and consigned to him, bills of lading being made out in his name as consignee. In many cases the fruit actually arrives before the bills of lading, and as fruit is a perishable commodity it is common practice for the broker, who has been advised of the consignment expected on a certain ship, to go to the ship and get immediate delivery, giving an obligation to the ship to present the bills of lading when received and giving an indemnity against any possible claim if the bills of lading are not forthcoming. It is also a common practice for an agreement to be come to between the broker and the importer by which the broker finances the importer by making advances and recoups himself by being allowed to retain the proceeds of the fruit when sold.

The position of the respondents needs more explanation and history. There was a firm of fruit importers known as George Wills and Company, which had been formed into a company called Wills and Co., Limited. There was another firm of fruit importers called Nothard and Lowe, which had been formed into a company called Nothard and Lowe Fruit Preserving Company, Limited. Although this was the proper title of the company, the company was generally known and spoken of as Nothard and Lowe. The two companies, finding that they were apt to be in competition, agreed to eliminate this competition in certain branches of the fruit trade. To effect this object they formed another company called Nothard, Lowe and Wills, Limited, who are the respondents in this case. This company had within its memorandum very wide powers, but practically it was to be a fruit importing company. The shares were practically all held in substantially equal proportions by the two companies which had arranged for its formation. Two of the directors, namely, Messrs. Walker and Braund, were taken from the George Wills Company, they being directors of it, and the other two directors were taken from the Preserving Company, being directors of it.

Contemporaneously with the formation of the company, a tripartite agreement was entered into between the two old companies and the new. By this agreement the nomination of the directors as aforesaid and the equal contribution to the capital was provided for. Fresh fruit was defined as all fruit except tomatoes, in all parts of the world except Italy, Spain, Portugal, Nova Scotia, the Canary Islands, and France. Then each of the two older companies undertook to leave the trade in fruit, as defined, exclusively to the new company, they being free to continue their own trade in all other classes of fruit.

For the purposes of this case it may therefore be stated that American apples were the province of the new company, Nova Scotian apples the province of the other companies, and, in particular, of the Preserving Company which I shall hereafter designate by its trade soubriquet of Nothard and Lowe. It was also provided that the new company should have the benefit of Nothard and Lowe's premises and the use of its *personnel*. A certain payment was to be made in return for these services. The date of the registration of the new company was April, 1920.

The new company started business. By arrangement Maurice Lowe was the director to whom were entrusted the arrangements as to brokerage. In this matter George Lowe was associated with him. Walker looked after the shipping arrangements and the buying of fruit for importation. For some time brokers other than the appellants were employed, but in May, 1924, Maurice Lowe approached Mr. Dart, who repre-

sented the appellants, with a view to making a brokerage arrangement as to apples. The apples he wished dealt with were American apples, the property of the respondents, and Nova Scotian apples, the property of Nothard and Lowe. As Nothard and Lowe were throughout acting for the respondent company, Maurice Lowe was in the habit of dealing with the two sets of apples together. Now at this time the Nothard and Lowe Company was hard pressed for money. This was, of course, known to the two Lowes but was not known to the other two directors, Walker and Braund. Maurice Lowe and Dart had several meetings which were spoken to by Dart before the trial Judge. Maurice Lowe was not examined. It is, however, unnecessary to consider the exact terms of Dart's evidence because undoubtedly the result of all the preliminary arrangements was reduced to writing in a letter which passed between the two contracting parties. The final position was expressed in a letter of July 16, 1924, written by Dart to Maurice Lowe. It is in the following terms :—

"Dear Mr. Lowe,—I think it well to confirm the conversation we had on Monday in writing, to see if we understand each other correctly. I wish to commence by thanking you for the offer of the business and feel that if we once start working together we shall neither of us have anything to regret.

"I understand that you wish my firm to advance to Messrs. Nothard and Lowe £10,000 now, and another £5,000 on 25th August and a final £5,000 some time in September, making a total of £20,000, and that you would give us the deeds of your packing houses as security, which are worth some £13,000. Presumably, these documents you will have recorded at the Registry of Deeds in the usual way. You will guarantee a minimum of 50,000 barrels of Nova Scotian apples. Besides your Nova Scotian fruit, we will receive free of advance all the goods consigned to Messrs. Nothard, Lowe and Wills at Liverpool, and the total of the two firms would amount to about 150,000 packages. We would keep back 70 per cent. of the net proceeds whether the goods belonged to your firm or to Messrs. Nothard, Lowe and Wills. I should presume the arrangement with respect to Messrs. Nothard, Lowe and Wills would have to be subscribed to by them.

"As regards your Marine Insurance Policy, presumably you have something better than the ordinary F.P.A. clause, and that you are covered against breakdown of steamer or delay in arriving at its destination.

"The interest would be ½ per cent. over Bank rate with the minimum of 5 per cent. from the date of advance to the time of making up account sales.

"I sincerely hope that you have made rapid progress and are now feeling better.

"With my very kindest regards,

"Yours very truly,

"J. W. Dart.

"Maurice Lowe, Esq.,
"C/o Messrs. Nothard and Lowe,
"Cotton's Wharf, Tooley-street,
"London, S.E.1."

Following upon this an agreement was made and executed by Nothard and Lowe, as the Preserving Company, to which agreement Maurice Lowe, George Lowe, and a Mr. Prescott who was also secretary of the respondent company, as individuals, were associated as guarantors. The material parts of the agreement were as follows. By Clause 1, the plaintiffs were to advance to the Preserving Company, at various dates, sums amounting in all to £20,000 ; by Clause 2, the Preserving Company were, in security of these advances, to deliver to the plaintiffs the title deeds of certain premises in Nova Scotia belonging to them ; by Clause 3, the individual guarantors guaranteed the loan to the extent of £10,000 ; by Clause 4, the Preserving Company appointed the appellants sole brokers for its fruit during the season 1924-25 and guaranteed 50,000 barrels of Nova Scotian apples. Then Clauses 5 and 6 must be quoted in full :—

"Clause 5.—Seventy per cent. of the net proceeds which shall arise from the sale of fruit so consigned to the agents after deducting the usual brokers' commission and sale expenses shall be retained by them and applied in or towards repayment of the said advances and the balance of 30 per cent. of such net proceeds shall be payable by the agents to the company forthwith on the making up of the account of any and every such sale.

"Clause 6.—For the consideration aforesaid the company and the guarantors hereby jointly and severally undertake that the agents shall be entitled to retain and apply in or towards repayment of the said advances 70 per cent. of the net proceeds of the sale of goods sold by the agents on behalf of or as agents for Nothard, Lowe and Wills, Limited."

This agreement was executed under the seal of the Preserving Company and by the signatures of the individual guarantors ; a counterpart of the agreement was executed by the appellants.

Finally, on the same day, the following letter was despatched and it was received by the appellants.

"Nothard, Lowe and Wills, Limited.
"Cotton's Wharf, Tooley-street,
"London, S. E.1.
"July 22, 1924.

"Directors : M. A. Lowe, F. W. Braund, H. W. Walker, G. N. Lowe.

"Messrs. J. C. Houghton and Co.,
"1, Temple-court, Liverpool.

"Dear Sirs,—We confirm the arrangement made with you to the effect that the proceeds of any shipments of fruit sold by you on our behalf are to be placed by you in reduction of advances made to Messrs. Nothard and Lowe in the same proportion and on the same basis as the proceeds of shipments handled by you on behalf of Messrs. Nothard and Lowe. We shall, in accordance, credit the proceeds of such sales against the advances above referred to.

"Yours faithfully,

"For Nothard, Lowe and Wills, Limited.
"A. V. Prescott, Secretary."

The initial advance of £10,000 was made and shipment then began both of American and Nova Scotian apples. The whole was treated by Maurice Lowe as in one account. The appellants first retained 70 per cent. of all the sales which were effected ; eventually further advances were made and by agreement with Maurice Lowe the appellants retained the whole proceeds of the sales of the fruit in respect of which these advances were made. The whole of the advances were applied by Maurice Lowe or George Lowe to meeting the necessities of the Preserving Company and were not put, to any extent, to the credit of the respondent company.

It will have been observed from the whole recital that there was no meeting of directors or minute of the respondent company sanctioning these arrangements and no agreement under seal of the company, agreeing to, or ratifying them.

I shall now turn to the movements of the directors. Walker was absent up till August 9. By that time Maurice Lowe had left the country and he did not

return till October. Braund had been in London in early August and then was away till the third week of September. During the whole time, therefore, there had been no meeting of directors and neither Walker nor Braund had met Maurice Lowe. After Walker got back in August, early in September he had a conversation with George Lowe as he found that the advances from George Wills and Company, his company, to the Preserving Company, were rather large. George Lowe explained that owing to a strike in Covent Garden there had been great difficulty in recovering accounts and Walker was satisfied with the explanation. There was no conversation as to the position of the respondent company and the Preserving Company. Maurice Lowe having returned in the middle of October, a few days after this his accountant, whose name was Nash, applied for a further advance from George Wills and Company to the Preserving Company. Walker refused the request and it was renewed by Maurice Lowe. Maurice Lowe not being able to give satisfactory explanations why the money was wanted, Walker reported the matter to the board of George Wills and Company and they then instructed their own accountant, Curtis, to look into the books of the two companies. This was about October 10. As a result of the investigation, Walker and Braund became aware, for the first time, that the advances by the plaintiffs had been entirely applied to the needs of the Preserving Company and that the Preserving Company was hopelessly insolvent. As a result, a directors' meeting of the respondent company was held on November 7, and on that day the following minute was passed :—

"It was resolved—No further loans by Nothard, Lowe and Wills, Limited, to any other company to be made and no proceeds of any of Nothard, Lowe and Wills, Limited's, fruit to be diverted from the company's funds and no further payments of any sort to be made to the Nothard and Lowe Fruit Preserving Company, Limited, or their subsidiary companies.

"Present : Messrs. M. A. Lowe (chairman), F. W. Braund, H. W. Walker, G. N. Lowe, and the Secretary."

After this Curtis called Walker's attention to the retention by the plaintiffs of the proceeds of the respondents' apples and said that he had been given to understand that there was some sort of agreement under which this had been done. Upon that Walker had a meeting with Maurice Lowe, who then produced the agreement of July 22. He did not then make any mention of the letter of the same date. Walker, looking at Clause 6 of the agreement, said that it purported to make the company a third party to the agreement without their seal and that as it stood it was not binding on the company. A few days afterwards the letter of July 22 was produced for the first time. Walker then repudiated the idea of the company being bound ; a directors' meeting was held on November 14 and George Lowe was removed from the board.

At this time there had been a delivery of apples to the plaintiffs of which, as explained above, the bills of lading had not arrived. The plaintiffs applied for the bills of lading and were refused, whereupon, on November 21, the plaintiffs raised the present action. This was met by a counterclaim for the sums due in respect of the company's apples which had been sold by the plaintiffs and of which the proceeds had been retained, either to the extent of 70 per cent. or altogether, as set forth above.

The real question in the case is, therefore, whether the arrangement contained in the agreement of July 22 and the letter of the same date bind the company. Viewed as documents it is clear that neither the one nor the other can have that effect. The company is not a party to the agreement and the arrangement is of such a character as to be quite beyond the power of a secretary to impose on the company, there having admittedly been no meeting of directors to authorize the despatch of the letter.

The case of the plaintiffs is rested on quite different grounds and may be stated thus. It is a well-known custom of the fruit trade that the importers should make arrangements with brokers for advances, the latter being allowed to retain from the sales the amount of such advances. With the sanction of the whole of the directors of the company, Nothard and Lowe, or the Preserving Company, of which Maurice Lowe was the acting director in such matters, were empowered to make brokerage arrangements for the company. True it is that such an authority to conclude brokerage arrangements would not authorize the impledging of the company's apples for another person's debt. But then, to the knowledge of the directors, Nothard and Lowe acted not only for the company but also for themselves in the sale of Nova Scotian apples. Accordingly the authorization would include any arrangement which Nothard and Lowe made as to advances to them as managers of the pooled apples of the company and of the preserving company. It is said that that was the arrangement made and that it binds the company.

Now various arguments may be directed against this contention, but without stating them it is obvious that the keystone of the arch is the fact that the advances in respect of which retention is said to be authorized were made to Nothard and Lowe, as managers of the pooled apples. If the advance was not made to them in that capacity, but simply in their capacity of the Preserving Company, the whole argument breaks down.

My Lords, I am of opinion that the Court of Appeal was right in holding that the advances made by the plaintiffs in respect of their agreement with Maurice Lowe were knowingly made to the Preserving Company as the Preserving Company ; and they looked to Maurice Lowe to obtain additionally the sanction of the respondent company to allow their apples to be subject to retention for these advances. This is clear from the first. In the letter of July 16, Dart says, in specifying the arrangements, "I should presume the arrangement with respect to Messrs. Nothard, Lowe and Wills will have to be subscribed by them." Then came the formal agreement to which the Preserving Company was a party and the defendant company was not. The advances are to be made to the party of the first part, *i.e.*, the Preserving Company, and that they are not made to them as managers of a combined stock is made quite clear by Clause 6, which treats the binding of the defendant company as a separate arrangement which the Preserving Company is to secure. It is perfectly plain from this that the appellants were still in the same mind that they were in when they wrote the letter of July 16. They knew they were making the advances to the Preserving Company and that therefore in order to pledge the property of the defendant company for that debt they would need special authorization. They believed that Nothard and Lowe could get them that authorization and they bound the Preserving Company to get it for them. They, in the sequel, rested content with the letter signed by the secretary. In doing so they took a risk which they must have known—namely, the risk that the letter was unauthorized. They took care to bind the Preserving Company by the seal of the company ;

they neglected that precaution with the defendant company and they must suffer for it. Unfortunately not only Maurice Lowe but Prescott was interested in procuring the arrangement, for Prescott was one of the individual guarantors under the agreement. I do not wish to use unnecessarily strong language or to sit in moral judgment on the persons concerned, but all that happened is but another instance of how perilous a thing it is for persons who are in a fiduciary position to entangle themselves with absolutely conflicting interests. The interests of the two Lowes and Prescott were bound up with the Preserving Company and their duty to the defendant company suffered in consequence.

The plaintiffs, for whom one cannot help feeling sympathy, for they were betrayed by their confidence, have, however, another ground of action—namely, estoppel. The class of estoppel is estoppel by conduct amounting to acquiescence. They say that the agreement was known to the company through the Lowes, two of the directors, and was allowed to continue, and that if it had been disclosed after the initial advance that the arrangement, so far as the defendant company was concerned, was unauthorized, they would have made no further advances. They say further that apart from the knowledge of the Lowes an inspection of the books would have disclosed the arrangement, and that the company were guilty of negligence in not having examined their own books.

The state of knowledge of the various directors has already been set forth. It is quite clear that the only directors who did know were the Lowes, who were active agents in leading the plaintiffs to advances on an arrangement which they knew had not been authorized by the company.

My Lords, there can obviously be no acquiescence without knowledge of the fact as to which acquiescence is said to have taken place. The person who is sought to be estopped is here a company, an abstract conception, not a being who has eyes and ears. The knowledge of the company can only be the knowledge of persons who are entitled to represent the company. It may be assumed that the knowledge of directors is in ordinary circumstances the knowledge of the company. The knowledge of a mere official like the secretary would only be the knowledge of the company if the thing of which knowledge is predicated was a thing within the ordinary domain of the secretary's duties. But what if the knowledge of the director is the knowledge of a director who is himself *particeps criminis,* that is, if the knowledge of an infringement of the right of the company is only brought home to the man who himself was the artificer of such infringement? Common sense suggests the answer but authority is not wanting.

In *In re Hampshire Land Company* (12 *The Times* L.R., 517; [1896] 2 Ch., 743, at p. 749) Lord Justice Vaughan Williams expresses himself thus: "If Wills had been guilty of a fraud, the personal knowledge of Wills of the fraud that he had committed upon the company would not have been knowledge of the society of the facts constituting that fraud; because common sense at once leads one to the conclusion that it would be impossible to infer that the duty, either of giving or receiving notice, will be fulfilled where the common agent is himself guilty of fraud. It seems to me that if you assume here that Mr. Wills was guilty of irregularity—a breach of duty in respect of these transactions—the same inference is to be drawn as if he had been guilty of fraud. I do not know, I am sure, whether he was guilty of actual fraud; but whether his conduct amounted to fraud or to breach of duty, I decline to hold that his knowledge of his own fraud or of his own breach of duty is, under the circumstances, the knowledge of the company."

The same view is to be found in the case of *Lacey v. Hill* (4 Ch. D., 537). This law, in my view, applies to the present case. The only knowledge brought home to the company is through the Lowes and the secretary. They were all parties to the arrangement which was a fraud on the true interests of the company.

It only remains to consider whether negligence on the part of the unincriminated directors can found an estoppel against the company. I am of opinion that it cannot. It is no part of a director's duty to inspect accounts every day. There was nothing in the circumstances to arouse the suspicions of the two directors as to the existence of any such agreement. As soon as they were all at home the whole thing was found out and the arrangement stopped, and to hold that there was estoppel because Walker, during the month of August, near the end of it, did not inspect the accounts and find out the arrangement would be, in my opinion, going much beyond what has ever been decided against a company. I am therefore of opinion that the judgment of the Court of Appeal is right and that this appeal should be dismissed, with costs, and I move accordingly.

Viscount Sumner (read by Lord Blanesburgh).—My Lords: I agree in the motion proposed by my noble and learned friend on the Woolsack.

The appellants' claim to retain as against the respondents part of the sale proceeds of their fruit rests on express contract or, in the alternative, on estoppel. The claim in contract really depends on the effect of the appellants' letter of July 16, 1924, to Mr. Maurice Lowe.

This person, who was at the same time a director of the respondent company and managing director of the company which has been spoken of as Nothard and Lowe, had been the intermediary who discussed with Mr. Dart, the appellants' representative, the terms on which the appellants would act as brokers for fruit imported by the respondent company and by Nothard and Lowe respectively. The terms, which the appellants were willing to agree upon as the result of this discussion, were reduced by them into writing in this letter and were, in accordance with its terms, accepted in writing respectively by Nothard and Lowe and by the respondent company under the signature of Mr. A. V. Prescott, their secretary, on July 22, 1924.

There is in my view no evidence on which it could be held that the appellants dealt with Nothard and Lowe and the respondents as clients, who were co-contractors, or agreeing with them to regard the whole business as done on their joint account. Had it been so, the appellants would have lent money to them as joint borrowers, against whom they could equally exercise a right of set-off without any special and inconsistent stipulation, such as they introduced. Had the two companies been engaged in a joint account, a loss on the respondents' apples might have been made good out of profits made on Nothard and Lowe's imports and they must both have taken their share of the money advanced by the appellants. On Mr. Dart's letter it is quite plain (1) that the consignments to be dealt with were known to be the several property of Nothard and Lowe and of the respondent company, as the case might be; (2) that the sales were to be made for the respective owners severally and not on

any joint account ; (3) that all the money to be lent by the appellants was to be lent to Nothard and Lowe and to be secured by them and none of it was to be lent to the respondent company ; and (4) that the appellants were not willing to take and did not ask for or get the acceptance of their terms from Nothard and Lowe or from Maurice Lowe on behalf of and as agents for the respondent company. They were not prepared to give credit to him, but required the latter company's independent written assent in their own names. We need not, therefore, consider the extent of the authority, if any, which Nothard and Lowe may have had to act for the respondent company generally and to bind them in other matters, for it was not exercised on this occasion. When the nature of the bargain under discussion is considered, it becomes obvious that such an authority could not be inferred or implied, but would be credible only if expressed plainly and in writing. It is plain, too, that Mr. Dart saw, as any business man would see, that nothing but the respondent company's own written acceptance could be relied on and hence it was stipulated for. The bargain proposed was that the appellants, instead of paying over to the respondents their full sale proceeds, less commission, should be at liberty to retain them up to 70 per cent. to satisfy any unpaid balance of the loans they had made to the other company. They were to apply the money of their creditors and clients, the respondent company, to satisfy claims on their other debtors, if they should be in default. No wonder Mr. Dart asked for something signed in the name of the respondent company itself. No wonder Maurice Lowe did not put his name to this bargain on the respondent company's behalf. He left that to the secretary.

In the result, however, the letter that the appellants got, signed only by their secretary, could not bind the respondents, nor has it been contended that it did. The secretary had not, as such, any power to bind the respondent company by his signature to such an arrangement. Who had that authority, was a question which depended on their Articles, and it was the appellants' business to ascertain from them where the power resided and to see that it purported to have been exercised. Under their Articles only the Board of Directors could have bound the respondent company in this matter.

My Lords, I think Mr. Dart must at the time have had his doubts whether Mr. Prescott had any authority to bind his company at all. Why else should clauses 5 and 6 of the agreement of July 22, 1924, have been entered into ? Why should the appellant company take the guarantee of Mr. Prescott himself, among others, that the appellants should be entitled to retain and apply the moneys in question ? If Mr. Prescott's signature bound the respondent company, his guarantee was superfluous. I think this obvious intimation to the appellants, that the respondents were not contractually bound, may be material on the question of estoppel, for I doubt if the appellants, knowing so much, can be said to have changed their position on the faith of any standing by on the respondent company's part. I think they acted throughout in the hope that Prescott and the Lowes would be able to see them safely through.

The appellants' case on the estoppel point is, that the respondent company, knowing that they were acting on the faith of the contract which purported to have been concluded between them, stood by and, apparently with assent and at any rate without objection, allowed them to change their position for the worse, upon the footing that the purported contract was valid. Of course, if this is made out, the respondents are beyond question estopped from disputing the contract.

How do the appellants essay to prove that the respondent company knew that the alleged agreement purported to have been made and had been acted on accordingly ; a fact which they must establish or fail ? They rely on two circumstances. One is, that the parties to the guarantee, Maurice Lowe and George Lowe, directors, and Prescott, secretary, of the respondent company, knew all about it. The other is that account sales were rendered to the respondent company, in which 70 per cent. of the proceeds of their goods were treated as attributable to the extinction of the loans to Nothard and Lowe and were retained accordingly, of which corresponding entries to the like effect were then made by their clerks in the respondent company's books. About the first there is no doubt. Of course the persons who gave the guarantee knew of the transaction which was its subject, and, as the respondent company's fruit department was managed by Maurice Lowe with the concurrence of the other two, we may assume their knowledge of the fact that the business was proceeding as arranged, and that the respondent company's books contained entries in accordance with it. The question is whether either of these things or both carry the appellants any farther.

When the case is clearly understood I think these entries in the respondent company's books become a mere matter of prejudice. Of course they are evidence against the respondent company, but evidence of what ? Not of the company's knowledge of the 70 per cent. arrangement nor of the system on which the account sales were being prepared. Neither did they constitute any representation to the appellants, for they were never communicated to them. At any time they might have been corrected or cancelled without affecting the appellants' rights, nor was it on the faith of these entries, of which they were unaware, that the appellants acted or changed their position at all. The documents that really matter are the account sales. They did convey to those affected with knowledge of their contents what the appellants were doing and claimed to be entitled to do, but a company is not, without more, deemed to know what every letter received by it contains, so as to be estopped from asserting its rights unless those contents are promptly challenged.

There is a further circumstance that I think can be put aside as immaterial. The appellants, it is said, handed to Maurice Lowe the advances that they made and such sale proceeds as they received and did not themselves retain, and must be deemed to have done so treating him as the agent not only for Nothard and Lowe but for the respondent company. They certainly did not pay to him the money lent otherwise than as the official of Nothard and Lowe, and I do not know to whom else they were to hand sale proceeds intended for the respondent company, whose fruit business he managed, but what then ? This, if it is to amount to anything, must be equivalent to a plea of payment. I cannot see that this is sound in fact. How could anything done by the appellants alter or enlarge Maurice Lowe's duty towards or his authority from the respondent company ? How could they relieve themselves from their own liability by leaving Maurice Lowe to "adjust" matters, as it is called, between the two companies with which he was connected ? The point is that they have sold the respondent company's goods for them and have kept back part of the money, and this they have to justify.

They were brokers for the respondent company and they must settle with the respondent company themselves and not with other people. If the result is that they have to pay over again moneys that they have paid already, this is no answer. Those who pay the wrong persons always have to pay over again when the right ones come forward and get justice. Let the appellants sue their guarantors, Prescott and the Lowes, if they are worth proceeding against. In truth this contention is a mere phrase. The appellants are not asked to pay over again. They have not already paid the proceeds of the respondent company's apples to others. The fact is that they have never paid over the sale proceeds in question at all. They lent their own money to others and they kept the respondent company's money themselves. It is plain law and there are no hardships and no equities about it.

Has knowledge then been brought home to the respondent company on which to found the alleged standing-by? In the case of a natural person, if information is intelligibly conveyed to and received by him, its source, whether a servant or a stranger, whether he is high or low, matters little, if at all. With an artificial incorporated person it must necessarily be otherwise, for an impersonal corporation cannot read or hear except by the eyes and ears of others. Who are to be the organs, by which it receives knowledge so as to affect its rights, may be specially determined by the articles of its constitution, but otherwise, in a matter where knowledge may lead to a modification of the company's rights according as it is or is not followed by action, the knowledge which is relevant is that of directors themselves, since it is their board that deals with the company's rights. The mind, so to speak, of a company is not reached or affected by information merely possessed by its clerks, nor is it deemed automatically to know everything that appears in its ledgers. What a director knows or ought in the course of his duty to know may be the knowledge of the company, for it may be deemed to have been duly used so as to lead to the action which a fully informed corporation would proceed to take on the strength of it.

There are two exceptions, however, to this rule, which are now material. The directors, other than the Lowes, did not in fact know till a late date what the Lowes had been doing, and when they found out they took prompt and proper action. The circumstances have been detailed by my noble and learned friend. It is plain, and I think uncontested, that they could not have been made personally liable for any neglect or misfeasance, and, if so, the company cannot be affected as if it had known from them what it neither knew nor could have been expected to know under the system of domestic management established by the company. On the other hand, the Lowes knew everything all along, and if, by their keeping the matter to themselves, their company could be estopped from denying that it was bound by the 70 per cent. arrangement, they would have relieved themselves and Mr. Prescott from personal liability under their guarantee at the sacrifice of their company's interests. Their silence was accordingly a notable breach of duty. It has long been recognized that it would be contrary to justice and common sense to treat the knowledge of such persons as that of their company as if one were to assume that they would make a clean breast of their delinquency. Hence, for the purpose of estopping the company, some knowledge other than theirs has to be brought home to other directors, who can be presumed not to be concerned to suppress it. This was laid down, following earlier cases, in *In re Hampshire Land Company* (12 *The Times* L.R., 517 ; [1896] 2 Ch., 743, at p. 749) and was even then treated as incontestable. So far as I know it has never been doubted since. If so, there was in this case no standing by and no estoppel. The cases on which the above propositions are based were not contested by Sir John Simon in his reply, nor were any authorities cited which conflicted with them. It is not for us to dispute settled law, and accordingly the appeal fails.

Lord Shaw of Dunfermline.—My Lords : A company of the name of George Wills and Sons, Limited, and another company of the name of the Nothard and Lowe Fruit Preserving Company, Limited, had for some time traded in fresh fruit in Great Britain and other parts of the world in competition with each other. In the year 1920 they were minded to form a new company, "being desirous of promoting and protecting their trade and of facilitating and economizing the working of such trade." These words are taken from the preamble of an agreement of date July 14 of that year, and the preamble states, and states accurately, that they, the two companies mentioned, "have been instrumental in forming a new company of which they are the sole shareholders." The new company was in short a combine and will be so called in this judgment.

Certain business, however, and this is a matter which has caused some confusion, was, so to speak, reserved for the Preserving Company. For the purposes of this case the trade in apples purchased in Nova Scotia was trade reserved for Nothard, Lowe and Company, that is to say, for the Preserving Company. Other trade, including the large American trade, was to be the business of the combine.

In the practical working out of this scheme, it was expedient and advantageous that various other things should be done. In the first place, the combine should be really a combine in the sense of belonging to the same body of shareholders as those of the former companies. This was accomplished. Next, the interests of the two companies in the combine were practically halved. Thirdly, the purchases coming, say, from the other side of the Atlantic should be slumped so far as carriage was concerned, and from the first this also was done, the goods from Nova Scotia and those from other parts being shipped in the same vessels and dealt with on arrival under the same agency.

Fourthly, as to management, the directors appointed were—two from the Wills company, namely, Messrs. Walker and Braund, and two from the Preserving Company, namely, Messrs. Maurice Lowe and George Lowe. As will be afterwards seen, Mr. Maurice Lowe and Mr. George Lowe were directors, the former being the chairman of the Preserving Company, and Mr. Maurice Lowe became also chairman and George Lowe a director of the combine. Fifthly, when the apples arrived in this country they were, according to the practice of the trade, sold through brokers. Lastly, according to the ordinary practice of this trade, advances were made by brokers on the security of the goods to be sold and accounts were sent forward.

The new company or combine occupies the same office as the Preserving Company. Mr. Maurice Lowe being, as already stated, chairman of both companies and Mr. George Lowe a director. When the accounts arrived it was the duty of Mr. Maurice Lowe and his brother to segregate the business done and the receipts therefor according to the rights of the respective companies. With all that the brokers had no concern.

I have no doubt whatsoever that in this distribution of the payments transmitted to London the defendant company treated, and were justified in treating, the Preserving Company as its agent not only for the receipt of the advances of their brokers but for the distribution as against the appropriate cargoes of the moneys received from those brokers for the respective cargoes. It is not unnatural that the letters should pass to and from the same office sometimes in the name of the one company and sometimes in the name of the other.

The defence and counterclaim by the defendants, however, set up the case that there was no such agency for the combine and they contend that the plaintiff brokers, who unquestionably made the advances as against the total cargoes as already described, must strike such advances out as against the combine and account to the combine for the proceeds of the apples realized in this country belonging to it and make payments therefor. The result would be, of course, that so far as the plaintiffs, the brokers, were concerned they would be in a position of making double payment in respect of the same goods. And so far as the combine is concerned, the result would be still more startling. It did not act as its own brokers, it required brokers not only to obtain delivery and realize the goods, but to make the advances necessary to release them. All this was done, and the combine now claims that it shall be credited with the goods and not debited with the advances made against them (without which they would not have been delivered).

In my opinion this demand of the combine is a mere juggle to defeat the plain equities of the case, and Mr. Justice Wright properly declined to sanction it.

The Preserving Company, being in embarrassed circumstances, has for some time past been putting the advances from the plaintiffs (unknown to them) to their own, the Nothard, Lowe, account and not passing the payments, so it is alleged, into the combine, or Nothard, Lowe and Wills, account. In the view which I take of the case, it is accordingly most necessary to see what were the actual arrangements when the advances from the plaintiffs were got.

I hold that the circumstances cannot be explained on any other footing than that these advances were made to both companies under the combined agency, that the responsibility for distribution *inter se* of the proceeds of cargoes lay with Nothard, Lowe and Co. and, particularly, with Maurice Lowe, the director of both companies, who, so far as the combine was concerned, was the agent for receipt and distribution as already mentioned.

So far as the outside markets were concerned, this is how their advertisements represented them :—

"Nothard and Lowe and Nothard, Lowe and Wills, Limited, Cotton's Wharf, Tooley-street, S.E.1 ; green fruit importers. We specialize in apples from all parts of the world, especially from Nova Scotia and then from various other parts, namely, Ontario, British Columbia, &c."

It is clear that a combination in the closest sense is thus intimated to traders.

The evidence and correspondence are voluminous, but after hearing the full argument I am of opinion that the judgment reached by Mr. Justice Wright, upon both the facts and the law of the case, is sound.

I see no reason for doubting the evidence of Mr. Dart, the senior partner in the plaintiff firm ; it was uncontradicted, neither of the Messrs. Lowe giving evidence in the case ; and what was said by Mr. Dart is confirmed both by the correspondence and by the acts of the parties. There being a desire to transfer the brokerage business to the plaintiff firm, Mr. Dart in December, 1923, met Mr. Walker, one of the directors who had formerly been a director of the Wills Company, and, as Mr. Walker himself states in his evidence, "I told him (Mr. Dart) that Mr. Maurice Lowe was looking after the selling end of the business." Without any doubt Mr. Maurice Lowe was doing, and continued to do, this. Mr. Dart's account of the interview is that he, Walker, said, "You do not sell any of our apples and Maurice Lowe has the control of our apples and I will talk to him." It does not appear to me to be reasonable to say that Mr. Maurice Lowe was represented to be acting merely for his own firm, of which Mr. Walker was not a partner. The view taken was that which was reasonable, namely, that Mr. Maurice Lowe was representing the new company and all the business done, whether by the old or by the new.

It may now be mentioned that this manner of trading with brokers and of pooling and adjustment of accounts was by no means new, but had continued for years. One of the agents of the combine concerned was the Manchester Fruit Brokers, Limited, who, on December 19, 1922, wrote to Nothard and Lowe, "As we have only the one account in our ledger, namely, in the name of Nothard and Lowe, we shall feel much obliged if you will kindly endorse the bills of lading accordingly in order to regularize matters." To this Messrs. Nothard and Lowe replied :—

"We are afraid we cannot do this as the bills of lading are made out to Nothard, Lowe and Wills, Limited, and if we were to endorse them as Nothard and Lowe we would not be able to take delivery of same.

"With reference to this, it will not matter in any way if you place it to Nothard and Lowe's account ; we will adjust and place to the proper account when we receive same from you."

Similarly, in October, 1923, Messrs. James Adams, Sons and Co., of Liverpool, wrote to Mr. Maurice Lowe :—

"As arranged, we send you herewith cheque for £5,000 and perhaps you will be good enough to let me know if it is your wish that we should keep all your consignments under one account. So far the account in our books appears as Nothard and Lowe, and it would perhaps be more convenient if we continued in this way."

The answer to this on the following day was, "Many thanks for yours enclosing £5,000 to hand, and I shall be glad if you will kindly keep this under one account, as it makes things easier and we can do the adjusting this end." This was signed, "per pro Nothard and Lowe, B. Metcalfe for Maurice A. Lowe." It may be noticed that the one account which is here referred to is an account headed "Messrs. Nothard, Lowe and Wills, Limited."

These instances are only given to show the completeness of what may be called the combination of the new firm, and the duty which it, through its chairman, undertook of adjusting the accounts as between the new and the old firm. I decline to believe that this course of business, including the dealings with large quantities of goods and the receipt of large remittances from brokers, which remittances were adjusted by the new firm in accordance with the rights of each constituent part, was not perfectly well known to all engaged in managing the affairs of the combined company, including its directors. The case, accordingly, is not one in which it can be alleged that there was any novelty in brokers'

making these advances upon the goods of both companies and dealing on joint account.

This being the ordinary course of business, the transactions with which the present case has to do may be said to have begun by the following letter, written by Mr. Dart to Mr. Maurice Lowe :—

"I understand that you wish my firm to advance to Messrs. Nothard and Lowe £10,000 now, and another £5,000 on August 25, and a final £5,000 some time in September, making a total of £20,000, and that you would give us the deeds of your packing houses as security, which are worth some £13,000. Presumably, these documents you will have recorded at the Registry of Deeds in the usual way. You will guarantee a minimum of 15,000 barrels of Nova Scotian apples. Besides your Nova Scotian fruit, we will receive free of advance all the goods consigned to Messrs. Nothard, Lowe and Wills at Liverpool and the total of the two firms would amount to about 150,000 packages. We would keep back 70 per cent. of the net proceeds whether the goods belonged to your firm or to Messrs. Nothard, Lowe and Wills. I should presume the arrangement with respect to Messrs. Nothard, Lowe and Wills would have to be subscribed to by them."

On the 17th, Mr. Maurice Lowe replied :—

"We agree that we will give you all goods consigned to the firm of Nothard, Lowe and Wills, Limited, at Liverpool. . . . You could keep back 70 per cent. of the goods whether they belonged to our firm or to Nothard, Lowe and Wills, Limited."

And, on July 22, Messrs. Nothard, Lowe and Wills wrote by their secretary to the appellants as follows:—

"Dear Sirs,—We confirm the arrangement made with you to the effect that the proceeds of any shipments of fruit sold by you on our behalf are to be placed by you in reduction of advances made by Messrs. Nothard and Lowe in the same proportion and on the same basis as the proceeds of shipments handled by you on behalf of Messrs. Nothard and Lowe. We shall, in accordance, credit the proceeds of such sales against the advances above referred to."

It seems to me that the three things, the pooling of the cargoes, the making of advances by the plaintiffs in respect of the cargoes so pooled, and the doing so on one account are proved to have been matters of agreement as to the manner in which this business should be conducted. Had the plaintiffs not conformed to that agreement and had they declined to make the advances, a question might have arisen as to the respective powers of those signing these letters for the respective companies, and the companies might have declined to have been bound. But when the advances were made, all such defects of authorization appear to me to have been cleared away ; the assumedly inchoate arrangements became an agreement which was complete. The principle of such completion is the familiar one both in England and in Scotland, as approved and explained by Lord Selborne in *Maddison v. Alderson* (8 App. Cas., 467).

I shall show in a few moments that the large sums mentioned in these letters, amounting in all to £20,000, were actually advanced. The payments were accepted and goods were realized on one account and the entire transactions were carried out on this one joint account. To these circumstances it appears to me that the words of Lord Chancellor Campbell in *Cairncross v. Lorimer* (3 Macq., 827) are applicable :—

"The doctrine will apply which is to be found, I believe, in the laws of all civilized nations, that, if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained,—he cannot question the legality of the act he had so sanctioned,—to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct."

A difficulty in deciding this case upon this ground is said to arise in consequence of the fact that subsequently to the letters above quoted a written agreement was entered into of date July 22, 1924. That was an agreement between the Nothard and Lowe Preserving Company and the two Messrs. Lowe and Prescott, the secretary, as so-called guarantors, on the one part, and the appellants, the brokers, on the other part. It confirms the arrangement in the letters, adds to it the guarantee and undertakes to consign not less than 50,000 barrels of Nova Scotian apples, making provision for the retention, after the advance of £10,000, of 70 per cent. of the net proceeds that would arise from the sale of those apples. It does not specifically mention the 120,000 tons of apples consigned to Liverpool to the combined company of Nothard, Lowe and Wills, Limited, but clause 6 of the agreement is in these terms :—

"For the consideration aforesaid, the company and the guarantors hereby jointly and severally undertake that the agents shall be entitled to retain and apply in or towards repayment of the said advances 70 per cent. of the net proceeds of the sale of goods sold on behalf of, or as agents for, Nothard, Lowe and Wills, Limited."

There is, however, no separate agreement between this combined company and the appellants, as brokers. Had there been, the question would have been at an end ; but clause 6 quoted seems undoubtedly not to go one step farther than the arrangement embodied in the letters, because these letters covered goods from the combine and, in point of fact, the apples to be dealt with by the brokers included, along with the 50,000, 120,000 tons belonging to the combine. The reference in clause 6 of Nothard and Lowe's agreement is a reference to an actual fact, an arrangement made, and it was upon the footing of that arrangement, which included the combine and its apples, that the advances were made.

I should incline to the opinion that the letters in themselves form a complete and effective contract. Personally, I do not think it required to be followed by a formal agreement. I think it was *in re mercatoria* operative and effective.

But for the reason about to be stated, I think this question, in the circumstances of this case, need not be so viewed in the abstract, for the actions of all parties, the combine and the preserving company and the brokers, proceeded from day to day and from consignment to consignment upon the important footing that, on the one hand, large advances were made in cash and, on the other, they were so made as against goods pooled in the manner described. I can hardly bring myself to believe that the law can sanction resiling from a contract so acted upon, to the brokers' great loss. It is an admitted fact that there is no element of fraud in the case ; the advances were honestly made and, in my opinion, the demand of the combine, which embraces a claim for payment again to them of the price of all their goods so realized, cannot be justified in law.

The testing point of fact is that, upon the realization of the apples received, the appellants, as brokers, having previously made advances, were to retain 70

per cent. of the price and remit 30 per cent. to the companies. Was the allocation of that 30 per cent. and 70 per cent. respectively made ? The answer is that it was made in repeated transactions following, say, in the months of August, September, and October, 1924, and the further answer is that it was made to the knowledge of all parties.

To give one instance from the accounts : On September 5 apples ex the Celtic and the Cythia, amounting in net value to two sums of £429 and £423, in all £852, were sold. How was this sum disposed of ? In point of fact, these two sums appear on the credit side of the account in order, but upon September 6 not £825 but £255, being 30 per cent. thereof, is debited to the defendants. That is to say, on the very face of the accounts it appears clear that 70 per cent. has been retained and 30 per cent. paid, all as per the arrangement in the letters described. Other instances might be given appearing from the accounts, and it is beyond all question clear that the brokers were carrying out, on their part, the three things which they had to do—namely, make advances, realize the goods and remit 30 per cent. thereof to the vendors.

This is admitted to be in no way an unusual transaction and large masses of business appear to be carried out on the same footing. It may be said, however, that this was done behind the backs and without the assent of the combine. The fact is the other way ; the entries showing the distribution of the realizations in 30 and 70 per cent. appear from Messrs. Houghton's, the appellants', account in the defendants', the combine's, own ledger. That is to say, that the combine stands committed in its own books to the 30 plus 70 per cent. arrangement. When it is noted that the demand of the combine now is that, notwithstanding this, they shall now have that 70 per cent. and refuse to give credit for the advances which the brokers were making, it will be seen how important in mercantile circles the case comes to be.

As to the advances themselves, the first £10,000 was, in fact, advanced by the plaintiffs on July 28. The cheque was made payable to Nothard and Lowe, but the receipt was in the following terms :—

"30th July, 1924.

"Messrs. Nothard and Lowe received from Messrs. J. Houghton and Co. cheque value £10,000, ten thousand pounds.

"Received with thanks.

"£10,000.

"30th July, 1924.

"Nothard, Lowe and Wills, Limited.

"George H. Key."

This was the very first of the advances made which are now challenged as having been paid under any agreement with which the combine had nothing to do. I do not think it is open for the combine, whose receipt has just been quoted, to deny the receipt of that money either for itself or as a payment made into the joint account.

Turning again to the combine's own books and to the account appearing in its own ledger, the first item of the allocation into 30 per cent. and 70 per cent. appears therein as on August 22 and 25, 1924. Such a transaction was not repudiated ; the accounts show that it was accepted, and a further instalment was advanced on the very next day, August 26, £2,000. The advances of September 5 and 6 giving the same allocation of 30 per cent. to the owner and 70 per cent. to the advancing broker were preceded by one day by an advance of £3,000. At the end of September, on the 26th, similar transactions of considerable amount took place as to the allocation of the 30 and 70 per cent. and £5,000 was advanced on October 7 following by the appellants. It appears to me impossible either in law or in equity for the defendants to repudiate a transaction so followed up in important particulars from month to month. In my humble judgment estoppel has been established, even on the assumption, which I myself could not make, that there was no concluded contract under the documents. It appears to me to be well established in this case that the combine is not entitled to put forward such a claim, having been committed to the course of dealing which I have described by illustrative instances. Of one thing there is no doubt, that had it been indicated to the appellants that they were to make these advances without the security of the retention of the 70 per cent. of the proceeds of the cargoes, such advances would not have been made. The case has arisen solely because the combine and the companies constituting it have not sufficiently attended to the correct distribution of the moneys transmitted ; the distribution *inter se* has been negligent. With such things, it does not appear to me that the appellants, the brokers, who acted and advanced their money honestly throughout, have anything to do. They can, in my view, have no bearing as against an innocent third party, upon the plea of estoppel.

After much consideration I am of opinion that the judgment of Mr. Justice Wright should be restored and that the appellants should succeed.

Lord Carson.—My Lords : I agree with the noble Viscount on the Woolsack that this appeal fails. Looking at the contract of July 22, 1924, I think it is clear that the appellants were contracting with the Nothard and Lowe Fruit Preserving Company, Limited, alone and not with the defendant company, which in no way is made a party. It is formally executed on behalf of the said company by Maurice Lowe and another director, and also by the secretary (Mr. Prescott) of the said Preserving Company, and, in addition, it is executed by Maurice Lowe, George Nothard Lowe, and the said Prescott as guarantors in their personal capacity up to the extent of £10,000. It is not suggested on the face of the contract, nor is it a fact, that the moneys to be advanced were in whole or in part for the benefit of the defendant company—on the contrary, the advance is truly stated to be made to the Preserving Company. The agreement, it is to be observed, is strictly in accordance with the terms of the letter of July 16, 1924, written by Dart to Maurice Lowe (already quoted), which upon the face of it states that the advance is to Nothard and Lowe, and that the goods which were to be received by them for sale on behalf of the defendants were to be free of advance. The question, therefore, of authority in Maurice Lowe to render the defendant company liable for the repayment of a loan made to another company does not, in my opinion, arise, as on the face of the documents it appears clear that he never purported to do any such thing, nor did the appellants even require that the defendant company should be made a party to the agreement. This is made still clearer by the terms of the letter referred to of July 16, 1924, in which Mr. Dart, as agent for the appellants, himself states : "I should presume the arrangement with respect to Messrs. Nothard, Lowe and Wills would have to be subscribed by them." It is said, however, that the letter of July 22, 1924, purporting to be signed on behalf of the defendant company by Mr. Prescott as secretary, is binding upon the defendant company. My Lords, I cannot find a

particle of evidence that Mr. Prescott had any authority, actual or ostensible, to write such a letter on behalf of the defendant company, or to create any such obligation as it purports to create on the part of the defendant company; and I find it difficult to understand how the appellants could have been satisfied that Prescott had any such authority to enter into an agreement by which the proceeds of sale of the defendants' apples was to be made liable for a debt of another company and from which they derived no benefit. In addition, the appellants knew that Prescott was a director and secretary of the Preserving Company and was himself one of the guarantors of the advances proposed to be made to that company.

Finally, the appellants raised, by an amendment of their original statement of claim, the point that the defendants were estopped from denying the agreement by reason of the method adopted for carrying on the business. The appellants mainly relied upon the fact that it appeared from the defendants' books that in the case of apples, the subject-matter of the agreement, at first only 30 per cent. and ultimately no part of the proceeds, was remitted to the defendant company, and this they alleged would be apparent at once to anyone looking at the books. My Lords, of course if it was shown that the defendant company had notice of the course of dealings disclosed by the books there would be great force in their contention. But the only persons who had notice were the Lowes and the staff of the Preserving Company by whom, under the arrangements entered into, the books were kept. It is, in my opinion, impossible to hold that the knowledge of the Lowes or of the Preserving Company, who were the very persons who were obtaining a loan for themselves, which, as the Lowes knew, was not authorized by the defendant company, was notice to the defendant company. Apart from such knowledge there is no evidence that the defendant company through their other directors had any notice whatever, and in my opinion this contention also fails. I agree that the appeal should be dismissed with costs.

VISCOUNT DUNEDIN stated that Lord Atkinson concurred in the judgment which he had read.

[Solicitors—Messrs. Gregory, Rowcliffe and Co., for Messrs. Hill, Dickinson and Co., Liverpool; Messrs. Kimber Bull, Howland, Clappé and Co.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)
1927. Nov. 14.

PALMOLIVE COMPANY (OF ENGLAND), LIMITED v. FREEDMAN.*

Restraint of Trade—Price maintenance agreement—Validity.

The defendant, who was a wholesale and retail dealer, purchased from the plaintiffs 12 gross of Palmolive soap tablets and signed an agreement that he would not sell the plaintiffs' soap at less than 6d. a tablet. The defendant then sold the soap at 5d. a tablet, and, in an action to restrain him from breaking the agreement, he contended that it would be robbing the public to sell at 6d. a tablet and that the agreement was in restraint of trade and illegal.

Held (Sargant, L.J., dissenting), that the agreement was valid and enforceable and the plaintiffs were entitled to the injunction claimed.

Decision of Astbury, J. ([1927] 2 Ch., 333) affirmed.

This was an appeal by the defendant, Mr. Morris Freedman, trading as Economical Bazaars, of Rye-lane, S.E., from a judgment of Mr. Justice Astbury ([1927] 2 Ch., 333), given on May 27, 1927, granting an injunction to restrain him from breaking a price maintenance agreement which he had entered into with the plaintiffs, the Palmolive Company (of England), Limited, not to sell Palmolive Soap under 6d. a tablet.

The defendant, who carried on business at a wholesale warehouse and at a number of retail branch shops, purchased from the plaintiffs on August 24, 1926, 12 gross of Palmolive soap tablets, and signed an agreement in the form usually required by the plaintiffs that he would not sell their soap to retailers and customers below the price specified in the agreement. The price fixed by the agreement for Palmolive soap was 6d. a tablet. He subsequently purchased another 12 gross and signed a similar agreement. The plaintiffs discovered that the defendant was selling the soap at 5d. a tablet.

The defendant claimed that he was not bound by the agreement, and said that he did not propose to abide by it, because if he did he would be guilty of profiteering. He said that the profits which he would make would be so exorbitant that it would amount to robbing the public. He later challenged the plaintiffs to bring an action. The plaintiffs issued a writ and asked for an injunction.

The defendant submitted that the agreement was one in restraint of trade, contrary to public policy, and illegal.

Mr. Justice Astbury held that the defences failed and granted an injunction.

The defendant appealed.

Mr. Archer, K.C., and Mr. P. B. Morle appeared for the appellant; Mr. Jowitt, K.C., and Mr. Courtney Terrell for the respondents.

The MASTER OF THE ROLLS, in giving judgment, stated the facts and said that it was plain that the system of the plaintiffs for maintaining prices had not proved perfect; for it took time to eliminate sellers at the undervalue and to stop supplies from reaching them. The defendant's attitude was to test the validity of the agreement, and the real question was whether that agreement was valid and enforceable.

Agreements to maintain prices had been upheld in a number of cases, as in *North-Western Salt Company, Limited v. Electrolytic Alkali Company, Limited* (30 *The Times* L.R., 313; [1914] A.C., 461), where Lord Moulton said that it was a hopeless task to argue that such a contract was, *ex facie*, against public policy. In *Attorney-General of Australia v. Adelaide Steamship Company, Limited* (29 *The Times* L.R., 743; [1913] A.C., 781) Lord Parker delivered the judgment of the Privy Council. He said that the Crown could not rely upon the mere intention to raise prices as proving an intention to injure the public. He also gave expression to the wider considerations which applied, even from the public point of view, as, for instance, the obtaining of fair remuneration for capital and labour so as to prevent business from being carried on at a loss and wages from being reduced to

Reported by H. LANGFORD LEWIS and G. T. WHITFIELD-HAYES, Esqs., Barristers-at-Law.

a minimum. Lord Parker further said that their Lordships knew of no case in which a restraint, reasonable in the interest of the parties, had been held unenforceable because it involved some injury to the public.

Concluding his judgment in the famous case of *Mitchel v. Reynolds* (1 P. Wms., 181 ; 1 Smith's L.C., 458, at p. 469), Lord Macclesfield said :—

"In all restraints of trade, where nothing more appears, the law presumes them bad ; but, if the circumstances are set forth, the presumption is excluded, and the Court is to judge of those circumstances, and determine accordingly ; and if upon them it appears to be a just and honest contract, it ought to be maintained."

That statement gave a wider range and greater flexibility to the considerations to be weighed than appeared in some of the later decisions. It was clear that a contract involving restraint of trade, and in particular the maintenance of prices, was not necessarily bad. There must be consideration for the contract, even though its adequacy would not be inquired into, and the restraint must be reasonable. As Lord Macnaghten said in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Company, Limited* (10 *The Times* L.R., 636 ; [1894] A.C., 535, at p. 565), the restraint must be reasonable both

"in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

As Lord Parker said in the *Adelaide Steamship* case (*supra*, at p. 797) :—

"It is really a question of public policy and not a question of fact upon which evidence of the actual or probable consequences, if the contract be carried into effect, is admissible."

To him (the Master of the Rolls) it seemed from those authorities that slight evidence only was needed to justify an agreement to maintain prices, the Court regarding the parties as the best judges of what was reasonable as between themselves (see *per* Lord Haldane in the *North-Western Salt* case, *supra*, at p. 471). The real question was whether the scope and terms of the present agreement were reasonable, and the defendant, who had entered into it, must justify his changed attitude. He (the Master of the Rolls) attached no significance to the point that it covered, in respect of those particular goods, all sources of supply ; to make the agreement effective it must necessarily do that.

It was important, however, to bear in mind the subject-matter of the agreement. It was not a case of services rendered by a servant to an employer, a relation which the Courts had safeguarded and not allowed to be the basis of unfair terms. Further, it did not cover the whole trade of the defendant, as in *Joseph Evans and Co., Limited v. Heathcote* (34 *The Times* L.R., 247 ; [1918] 1 K.B., 418). It did not enforce a general restraint. It related only to a few proprietary articles. There was no definite evidence as to the *quantum* of the plaintiffs' articles sold by the defendant, nor as to the percentage of those articles in the defendant's turnover. But it would seem that not much inconvenience would be caused to the defendant if he never sold any more of the plaintiffs' goods.

In the *Maxim Nordenfelt* case (*supra*) a covenant not to manufacture articles, though unlimited as to space, was held not unreasonable. In *Joseph Evans and Co., Limited v. Heathcote* (*supra*) the covenant was held unreasonable, but in that case there was a restriction on the sale of the plaintiffs' goods to any but five purchasers, who entered into no corresponding obligation to buy the plaintiffs' output, and the plaintiffs had no power of withdrawal from the agreement.

These considerations did not apply here. If the plaintiffs fixed a price so high as to preclude a sale of their goods, that would be their loss. There was no restriction upon the defendant's selling other people's soap. Different considerations might well apply if the defendant was bound by contract to buy definite amounts of the plaintiffs' goods and was precluded from buying the goods of others. He (the Master of the Rolls) was unable to find that the contract was unreasonable, and the appeal must be dismissed, with costs.

Lord Justice Sargant, in the course of a dissenting judgment, said that it was well settled that the Court ought first to ascertain the special circumstances in which the contract impugned was executed, and then consider whether its terms were reasonable in the interests both of the parties and of the general public. If the contract failed in either test the defence succeeded (*Attorney-General of Australia v. Adelaide Steamship Company, Limited* (29 *The Times* L.R., 743 ; [1913] A.C., 781) ; *Herbert Morris, Limited v. Saxelby* (32 *The Times* L.R., 297 ; [1916] 1 A.C., 688) ; *Joseph Evans and Co., Limited v. Heathcote* (34 *The Times* L.R., 247 ; [1918] 1 K.B., 418)).

The plaintiffs were the sole recognized distributors of Palmolive soap and other toilet preparations made by the manufacturers in Canada, and at the date of the contracts in question were anxious to secure that the Palmolive preparations should be sold to the public at fixed, uniform prices, and the price in the case of the soap was to be 6d. a cake, and for that purpose they drew up and caused to be printed certain forms of contract. At the date in question, however, the plaintiffs were unable from various causes to secure any such uniformity of price in the wholesale trade, and still less in the retail market, particularly owing to the extraordinary depreciation in the French exchange, which reached its maximum in the summer of 1926 and made it profitable to obtain Palmolive soap from other sources of supply and sell it at 5½d., 5d., and even as low as 4½d. It was admitted by the plaintiffs, and proved by the defendant, that at that date there were scores of places where the soap could be bought retail for less than 6d. a cake. The plaintiffs' scheme was not then a success, and they had been forced to meet the French and other competition, first, by a bonus scheme, and afterwards by a coupon scheme. It was clear from the evidence that the plaintiffs had failed to bind a large number of retailers, who could sell at less than 6d. without committing any breach of contract.

Was the contract here reasonable, both in the interests of the contracting parties and in the interests of the public ? The defendant had affected to pose as a champion of the public, and had protested on their behalf with regard to the enormous percentage of profit evidenced by the difference in price between the price paid to the plaintiffs by wholesalers and that paid to retailers by the public buying at 6d. a cake. He had, in effect, said, "*res ipsa loquitur* ; there is here a clear case of extortion from the public." To his (his Lordship's) mind, the defendant was not successful in that part of the case, having made no trustworthy estimate of the necessary expenses either

of the wholesaler or of the retailer. The soap was, after all, only one of many proprietary soaps and must necessarily find its level both in value and in price. To speak of extortion from the public in regard to it was little better than an absurdity. The observations of Lord Parker in the *Adelaide Steamship Company's* case (*supra*) were very relevant and practically conclusive.

The real point of the present case was as to the reasonableness of the contract between the two parties to it. There was no reciprocity in the agreement ; the wholesaler had no definite right to a continued supply of the soap. Again, the obligations imposed on the defendant did not merely relate to soap (which was what he bought), but to all the other preparations of the plaintiffs. Those obligations were not dependent on the success of the scheme propounded by the plaintiffs, but were unlimited in point of time. Their result, as enforced, was that the defendant, as the consequence of a single purchase, was precluded for the rest of his life from selling any of the plaintiffs' preparations except at prices which were at present considerably higher than the current market price in other retail shops. The prices were those to be fixed from time to time by the plaintiffs, and the sale was only to be to customers approved by the plaintiffs.

The defendant probably did not grasp at first the sweeping and permanent nature of the restrictions to be imposed upon him. The form of agreement as drafted by the plaintiffs was entirely in their own interests, and without any regard to the interests of those who were asked to sign it. The terms of the contract devised by the plaintiffs went, in his (his Lordship's) opinion, far beyond what was required for their reasonable protection, and imposed unreasonable obligations on the defendant, particularly as regarded duration. With great respect, he thought that the appeal should be allowed.

Lord Justice Lawrence said that it was well established that an agreement in restraint of trade could be enforced if it were reasonable in reference to the interests of the parties and also of the public. That was the principle laid down by the House of Lords in the *Nordenfelt* case (10 *The Times* L.R., 636 ; [1894] A.C., 535) and treated ever since as the governing principle in cases of the sort. Different considerations would apply in cases where the agreement operated to prevent altogether a person's carrying on his accustomed trade from those applying where, as in the present case, the trader was left free not only to sell the same kind of articles made by other manufacturers, but also numerous other articles, in fact to carry on his business as theretofore.

He (the Lord Justice) thought that the agreement now in question did not differ materially from the price maintenance agreements considered in *Elliman, Sons and Co. v. Carrington and Son, Limited* ([1901] 2 Ch., 275), or in the two Dunlop cases, *Dunlop Pneumatic Tyre Company Limited v. New Garage and Motor Company, Limited* (30 *The Times* L.R., 625 ; [1915] A.C., 79), and *Dunlop Pneumatic Tyre Company, Limited v. Selfridge and Co., Limited* (31 *The Times* L.R., 399 ; [1915] A.C., 847). Mr. Justice Phillimore in the second *Dunlop* case (29 *The Times* L.R., 270) stated that such agreements were then in almost universal commercial use, and at the present day they were exceedingly common. He (Lord Justice Lawrence) could not see how the agreement in the present case could be injurious to the public. Without wishing to cast any reflection upon the plaintiffs' goods, he did not think that the English public would have serious grounds of complaint if none of them were sold in this country. They were not essential to the community. It was not as if the plaintiffs were controlling the output of an indispensable commodity such as coal or salt. As was pointed out in the *Adelaide Steamship Company's* case (29 *The Times* L.R., 743 ; [1913] A.C., 781), it was improbable that the vendor would want to fix unreasonable prices, and it was worthy of notice that in that case their Lordships said that they knew of no case in which a restraint reasonable in the interest of the parties had been held unenforceable because it involved some injury to the public. In his (Lord Justice Lawrence's) view the suggestion that this agreement was unreasonable in the interest of the public was ill-founded.

Reviewing the terms of the agreement as affecting the parties themselves, his Lordship agreed with the view of those terms which was set out in the judgment of the Master of the Rolls. The provisions to which the defendant took exception were part of the machinery for effectively working an admittedly lawful object and did not seem to go beyond what was reasonably required for that purpose. The real burden of the defendant's complaint was that these provisions were too stringent, because they operated to prevent him, for all time and in all circumstances, from cutting the prices of the plaintiffs' goods. His contention really amounted to this, that the Court ought to uphold an agreement for the maintenance of the price of a proprietary article only if the machinery for working out that object afforded an opportunity of escape. If there were no such opportunity, then, so the defendant contended, the Court ought to hold that there was an unreasonable restraint of trade. He (the Lord Justice) agreed with the Master of the Rolls that the appeal should be dismissed, with costs.

[Solicitors—Messrs. Armitage and Craig ; Messrs. Stock and Slater.]

Chan. Div. (Eve, J.) 1927. Nov. 16.

MANCHESTER CORPORATION v. AUDENSHAW URBAN DISTRICT COUNCIL AND OTHERS.*

Highways—Road maintenance—Obligation imposed by private Act—Increase of traffic—Extent of obligation—Manchester Corporation and Waterworks Improvement Act, 1875 (38 and 39 Vict., c. clxi.), s. 14 (ii.).

A road was constructed by the plaintiff corporation under powers conferred by a private Act of 1875, which enacted that the road should be constructed according to a certain specification and that it should thereafter be maintained at the plaintiffs' expense. The road was completed by the plaintiffs in 1878 as a water-bound macadamized road in accordance with the statutory requirements and was duly maintained by them for many years, but ultimately it deteriorated owing to the increase of traffic of a kind unknown in 1878, and the position was that unless resort was had to tar-spraying or to some similar modern expedient the existing traffic would rapidly destroy the road.

* Reported by A. W. Chaster, Esq., Barrister-at-Law.

Held, that on the construction of the Act the plaintiffs were liable only to maintain the road in the condition in which it was completed in 1878 and they were not liable for the cost of providing for all modern means of locomotion by reconstructing the fabric of the road so as to be entirely different in formation from the road which was the subject-matter of the obligation imposed by the Act.

The *Sharpness* case (31 *The Times* L.R., 254 ; [1915] A.C., 654) followed and applied.

The plaintiffs in this action claimed a declaration that with regard to a road constructed in the areas of the defendants, the Audenshaw Urban District Council and the Denton Urban District Council, under the Manchester Corporation Waterworks and Improvement Act, 1875, the extent of the plaintiffs' liability as to the maintenance thereof was determined by that Act and that they were not required to make or maintain a better road. The defendants pleaded that the plaintiffs' obligation was to maintain the road in a state adequate for the traffic of the present day, and in the alternative they counterclaimed that the plaintiffs were at any rate liable to maintain a macadamized carriage-way as specified in the Act, whatever might be the nature of the present-day traffic.

Sir Herbert Cunliffe, K.C., and Mr. John Bennett appeared for the plaintiffs ; Mr. Scholefield, K.C., and Mr. H. A. Hill for the defendants.

Mr. Justice Eve delivered the following considered judgment :—This action has been brought to determine the liability of the plaintiff corporation in respect of the maintenance of a road, known as Corporation-road, situate partly in each of the districts of the defendant councils.

The road was constructed by the plaintiffs in 1878 under powers conferred by the Manchester Corporation Waterworks and Improvement Act, 1875, whereby the plaintiffs were authorized to make, construct, lay down, and maintain the reservoirs and roads (including the road in question) therein enumerated, and, when and so soon as the same were completed and opened to the public, to stop up and appropriate to the purposes of the new reservoirs (*inter alia*) a portion of Taylor-lane therein defined, and by section 14 (ii.) of the Act it was enacted that the road in question in this action should be at all times thereafter maintained by and at the expense of the plaintiffs, and should be of the width of 14 yards, inclusive of a stone boundary wall to be erected by the plaintiffs on each side, fencing off the road from the adjoining lands, and should have a footway not less than 7½ feet wide on each side, to be made with a rubble or cinder foundation and gravel cover not less than 12 inches in depth altogether, and with curb-stones, and that the carriage-way of the road should be macadamized, and the foundation thereof was to be rubble 6 inches in depth, covered with hard macadam to the depth of at least 12 inches. And it was thereby further provided that the road should not be deemed to be completed until it should have been made and sewered in accordance with the provisions of the Act and to the reasonable satisfaction of the defendants' predecessors, the Audenshaw and the Denton Local Boards respectively.

In April, 1878, the road was completed in accordance with the statutory requirements and to the satisfaction of the two Local Boards. It served a district which, at the time of its construction and for many years thereafter, was mainly of an agricultural character. In the early years of the present century a foundry and some dwelling-houses were erected on land abutting on the road. Down to that time it had remained fenced off from the adjoining lands by the walls mentioned in the Act. Some other works fronting on the road have since been erected and the neighbourhood has now become of a distinctly industrial character. In the absence of any complaints on the part of the defendants, who are the highway authorities of their respective districts, it may, I think, be assumed that down to a date shortly after the conclusion of the war the plaintiffs had duly discharged their statutory obligations to maintain the road.

But from a date somewhere about the commencement of the war it had become apparent that the road, an ordinary water-bound macadamized structure, would not be adequate to carry the increasing traffic of the district or to sustain the disintegrating shocks inseparable from the passage along it of the heavy and fast motor traffic which was rapidly supplanting the slow-moving traffic of the seventies. The rapid deterioration of the road and the increasing costs thereby imposed on the plaintiffs brought matters to a head, and for some considerable period before the commencement of this action discussions were carried on between the plaintiffs and the defendants, both oral and written, as to the proper party to be charged with the expense necessary for restoring the road to a condition suitable for accommodating present-day traffic. A divergence of opinion on the construction of the statute, and the failure to arrive at any compromise acceptable to both sides, resulted in the institution of this action.

The conclusions to be drawn from the evidence adduced at the trial can, I think, be summarized thus : (1) By a macadamized road in 1875, and for a quarter of a century afterwards, was meant a road of water-bound macadam. Tar-spraying and the use of tar macadam did not exist before the commencement of the present century. (2) Such a road was adequate for the traffic over this road in 1878 and the next 40 years. (3) During such last-mentioned period, the road was maintained by the plaintiffs in accordance with their statutory obligations. (4) The road at the commencement of this action was, and it still remains, in a condition of serious disrepair. This condition is in the main due to traffic of a character unknown in 1878 and for many years afterwards. (5) The road is not incapable of being repaired as a water-bound macadamized road, but unless such repair is supplemented by the introduction of some binding material and by tar-spraying, or some other expedient unknown before 1900, the already existing traffic over it will inevitably bring about rapid destruction. (6) The result is that, from the economic standpoint, the road constructed in accordance with the statutory requirements of 1875 cannot be maintained in a condition adequate for present-day traffic without expenditure of a nature unknown, and work never contemplated, until the road had been completed and in use for a quarter of a century and more. (7) The traffic over the road when repaired is more likely to increase than to remain stationary.

It is in these circumstances that the plaintiffs seek to have the measure of their obligation judicially determined. Is it limited to the expense attendant on the maintenance of the road as completed in 1878, or does it extend to the already substantially

increased, and to the unknown future, cost of providing for all modern means of locomotion? Questions of a similar nature have arisen not infrequently of late and the answer in each case depends on the construction of the Act by which the obligation is imposed.

In the present case, the primary obligation was to construct to the reasonable satisfaction of the defendants' predecessors a particular length of road in accordance with the specification contained in the Act, and to open it to the public as a substituted highway for so much of the old thoroughfare known as Taylor-lane as the undertakers were thereby authorized to stop up and appropriate to the purposes of the new reservoirs. This primary obligation was duly carried out, and on the evidence it is quite clear that the substituted road was a more convenient and more substantial thoroughfare than the closed one. The obligation to maintain is coupled in section 14 (ii.) of the Act with the provision specifying the actual mode of construction, and I come to the conclusion that the true intent and effect of the language are to impose on the undertakers the burden of maintaining the road so constructed and not to create a liability so to supplement, alter, or replace the construction thereby specified, as to make it available for the passage of traffic wholly dissimilar from that for which the specification was framed. The case, in my opinion, is covered by the decisions in the cases cited in argument on behalf of the plaintiffs. Applying what Lord Parker says in his speech in the *Sharpness* case (31 *The Times* L.R., 254; [1915] A.C., 654, at p. 668) to the facts of this case, I should say that what the plaintiffs have to maintain is the fabric of the particular road of which the size, character, and formation were determined by the Act and that there is no principle of interpretation by which an obligation to maintain a particular structure can be enlarged into an obligation to reconstruct the fabric in such a way that it is materially different in size, character, or formation from the particular fabric the subject of the obligation. Lord Parker adds, at page 669: "The standard by which the obligation is to be judged is neither the ordinary traffic when the canal was constructed nor the ordinary traffic of to-day, but the bridge itself as determined by the commissioners under the Act." From this, it would appear that if the plaintiffs are entitled to a declaration it ought to be one in the terms of paragraph 1 of their original claim—a declaration that they are only liable to maintain the road in the condition in which it was completed in April, 1878, and on this the defendants raise the argument that, inasmuch as the road is not so deformed as to be incapable of repair without actual reconstructive work, the plaintiffs ought to be held liable to effect such repairs as will restore the road to its original condition, and that it is no answer to such a claim to assert and prove that when so repaired the road will again be destroyed within a space of time altogether out of proportion to the expenditure incurred. There are, I think, two answers to this contention, first, that no Court would compel an expenditure, proved—if not indeed admitted—to be of a most extravagant and wasteful nature, and, secondly, that on the evidence, although, as I have already stated, the road has not yet so thoroughly deteriorated as to be incapable of repair without fundamental reconstruction, I am satisfied that some reconstruction work to the surface and the foundations alike would be called for. But on the other hand the facts that the road has been, and is still being, so used, and that present-day conditions are such as to render an obligation to maintain it as in 1878 of no practical use, do not, in my opinion, operate to free the plaintiffs from all liability to contribute to the cost of repair, and, if in fact it can be established that any default on the part of the plaintiffs, in the years during which they have suspended work on the road, has increased the expenditure which will now have to be incurred in restoring the road, the plaintiffs are, in my opinion, liable to contribute to the extent of such increase. I propose to make a declaration in the terms of paragraph 1 of the prayer and to dismiss the counterclaim. I will give leave to the defendants to apply for an inquiry as to any contribution which they may allege ought to be made by the plaintiffs to the cost of reconditioning the road and generally. The defendants must pay the costs of the action and counterclaim.

[Solicitors—Messrs. Sharpe, Pritchard and Co., for Mr. P. M. Heath, Manchester; Messrs. Stibbard, Gibson and Co., for Mr. R. Wood, Ashton-under-Lyne, and for Mr. W. Richards, Denton.]

Judicial Committee of the Privy Council.
(Viscount Cave, L.C., Lord Buckmaster, Lord Carson, Lord Darling, and Lord Warrington of Clyffe.)
1927. Nov. 17.

WATSON v. HAGGITT AND OTHERS.*

Partnership — Dissolution by death of partner —Provision in articles for salaries—Share of net profits payable to executors — Whether survivor entitled to deduct salary for himself.

The appellant and one H. entered into a partnership as barristers and solicitors, the articles providing that each partner was entitled to a salary and half the "net profits" during the term of the partnership, and that if either partner died the surviving partner was for five years to pay to the executors a third of the "net annual profits." H. died and the partnership was thereby dissolved.

Held, that the expression "net profits" was not necessarily to be interpreted as having the same meaning in every part of the articles, and that the appellant, in calculating the share of the net profits payable to the executors, was not entitled to deduct any salary for himself.

This was an appeal from a judgment of the Court of Appeal of New Zealand relating to the interpretation of a deed of partnership.

Mr. F. H. Maugham, K.C., and Mr. J. H. Stamp appeared for the appellant; Mr. G. B. Hurst, K.C., and Mr. H. Brasch (of the New Zealand Bar) for the respondents.

Lord Warrington of Clyffe, in delivering their Lordships' judgment, said that the appeal raised a question of construction upon articles of partnership between the appellant, Mr. John Lachlan McGillivray Watson, and Mr. Arthur Bryan Haggitt. The business of the partnership was that of barristers and solicitors. The articles were dated May 18, 1905, and the term of the partnership was 15 years from that date. The term expired on May 18, 1920, but the partners continued the business as partners at will without fresh

* Reported by Sir W. J. Soulsby, Barrister-at-Law.

articles, and, therefore, upon the old terms so far as they were applicable to a partnership at will. Mr. Haggitt died on January 3, 1926, and the partnership was thereby dissolved. The respondents were his executors.

The articles contained the following clause (No. 21) :—

"If at any time during the term of the said partnership either of the said partners shall die or become permanently incapacitated for work or shall become insane or of unsound mind to such an extent as to render him unable or unfit to carry on the business of the partnership then and in any such case the surviving or remaining partner shall during the period of five years from the occurrence or happening of such event or contingency pay to the executors and administrators of such partner so dying as aforesaid or as the case may be to the committee or representatives of such partner so incapacitated as aforesaid a sum equivalent to a one-third part or share of the net annual profits of the said partnership business for each year of the said term of five years."

Taken by itself that clause presented no difficulty of construction. The net annual profits, by which the amount of the sum to be paid by the surviving partner in each of the five years was to be measured, would be ascertained by deducting from the receipts and earnings of the business such outgoings and expenses as were, under the articles or by the use and wont of the partners, so deducted during the partnership, the business being for that purpose treated as a continuation of the partnership business (*Ex parte Harper*, 1 De G. and J., 180). A payment, however, which under the articles ceased with the dissolution of the partnership would not be properly deducted.

The appellant, however, contended that he was entitled to deduct, in addition to the ordinary business expenses and outgoings, an annual sum payable to him by way of "salary" during the partnership. Whether that contention was correct was the question for decision.

The clause of the articles providing for payment of "salaries" to the partners was clause 3, which was in the following terms :—

"The said Arthur Bryan Haggitt shall receive a salary of £600 for the first year of the said partnership term, a salary of £750 for the second year of the said partnership term, and the said John Lachlan McGillivray Watson shall draw all the net profits of the said business during the first two years aforesaid. During each of the third, fourth, and fifth years of the said partnership term the said J. L. M. Watson shall draw a salary of £1,500 per annum and also one-half of the net profits for each such year, and the said A. B. Haggitt shall draw a salary of £750 per annum for each of the said third, fourth, and fifth years and also one-half of the net profits for each such year. Thereafter during the continuance of the said partnership term the said J. L. M. Watson shall draw a salary of £1,500 per annum and one-half of the net profits each year, and the said A. B. Haggitt a salary of £1,000 per annum and one-half of the net profits for each year during the term of the said partnership, and the said partners shall be allowed to draw the aforesaid amounts by monthly instalments in anticipation of their respective shares or profits in the said partnership business."

Clause 5 was a common form of provision for the payment of expenses, outgoings, and losses out of the receipts and earnings of the business :—

"And in case of deficiency thereof then by the said partners in the shares in which they shall for the time being be entitled to the net profits of the said business."

The contention of the appellant was based upon a supposed rule of construction that the same meaning ought to be given to an expression in every part of the document in which it appeared.

Applying that supposed rule it was said that "net profits" in clause 3 and in clause 5 meant what was left after the deduction of salaries, and, therefore, it must have the same meaning in clause 21. If that conclusion were logically applied the "salary" of Mr. A. B. Haggitt should also be deducted and paid to his executors, but the absurdity of paying a "salary" to the executors of a dead partner who could not give any assistance in the business was recognized, and those of the Judges who were in the appellant's favour stopped short of the logical application of their conclusion by deciding that the "salary" of the appellant alone ought to be deducted.

The truth was that there was no rule of such general application as was contended for by the appellant. A difficulty or ambiguity might be solved by resorting to such a device, but it was only in such cases that it was necessary or permissible so to do.

In the opinion of their LORDSHIPS, it was in the present case quite clear that in clause 21 the expression "net profits" had a different application from that which it had in clause 3 and clause 5. Clause 21 was dealing with a state of things wholly different from that dealt with in clause 3. The partnership was dissolved, the "salaries" which were payable "during the continuance of the partnership term" had ceased, and the business was being carried on by the appellant on his own sole account and for his own benefit, the annual sum payable to his deceased partner's executors being, in substance, purchase money for his interest in the assets of the business. In those circumstances it was impossible to hold, without an express provision to that effect, that the partners intended to allow a salary to the surviving partner.

Their LORDSHIPS were of opinion that the appeal failed and ought to be dismissed, with costs, and they would humbly advise his Majesty accordingly.

[Solicitors—Mr. Cecil J. Wray; Messrs. Blyth, Dutton, Hartley, and Blyth.]

Court of Appeal. (Scrutton, Sargant, and Greer, L.JJ.) 1927. Nov. 11.

KONSKIER v. B. GOODMAN, LIMITED.*

Trespass—Building contractor—Demolition of party wall—Limited licence by adjoining owner—Undertaking to make good damage to adjoining premises—Debris dropped on adjoining premises—Omission to clear away debris after completion of demolition operations—Duty to new occupier—Continuing trespass.

In March, 1926, the defendants carried out demolition work on premises adjoining other premises (described here as X) under a limited licence given by the owner of premises X. One of the conditions of the licence was that the defendants should make good all damage done to the premises X by reason of the demolition operations. In the course of these operations

* Reported by T. W. MORGAN, Esq., Barrister-at-Law.

the defendants allowed debris to drop on an inaccessible part of the roof of premises X and did not remove all the debris therefrom when the demolition work was completed. In July, 1926, the plaintiff became the occupier of premises X under a lease and carried on business there as a ladies' blouse and robe maker. In September, 1926, a heavy storm of rain washed the debris, which had been left by the defendants on the roof of premises X in the previous March, into the gutters on the roof, and a gulley was choked and the basement of premises X was flooded and some ladies' gowns which the plaintiff kept there were damaged. In an action by the plaintiff claiming damages for the defendants' negligence Mr. Justice Salter gave judgment for the plaintiff, holding that the act of the defendants in not removing the debris was an act of continuing negligence for which they were liable to the plaintiff.

Held, that there could be no negligence as there was no duty on the part of the defendants towards the plaintiff, but that the act of the defendants in leaving the debris where they left it after the completion of the demolition work was a continuing trespass which gave the plaintiff a right of action.

This was an appeal by the defendants from the judgment of Mr. Justice Salter in an action tried by him without a jury.

The plaintiff, Mr. Moss Konskier, was a ladies' blouse and robe maker and he carried on business at 87 and 88, Houndsditch. The defendants were a firm of contractors. The plaintiff claimed that the defendants, in doing demolition work on premises adjoining the plaintiff's premises, No. 87, Houndsditch, failed to take proper care to clear up all the debris after the completion of the demolition work, so that a quantity of debris from the demolition work was allowed by the defendants to remain on the plaintiff's roof after the demolition work had been completed.

In March, 1926, the plaintiff's father, Mr. Max Konskier, who then owned the premises, No. 87, Houndsditch, had given the adjoining owners permission to carry out this demolition work on the terms of a letter dated March 4 signed by the owners of the adjoining property and addressed to the plaintiff's father. The letter was as follows: "In consideration of your giving us permission to pull down at our own expense the chimney-stack of your premises, No. 87, Houndsditch, to within three feet of the existing roof of your building, No. 87, Houndsditch, aforesaid, we . . . hereby undertake at our own expense (*a*) to restore the said chimney-stack to its present height at any future period, or when the adjoining property is rebuilt, on receiving a written request from you to that effect, and (*b*) to make good any damage which may be caused to No. 87, Houndsditch, by all or any of the before-mentioned works."

In the course of the demolition operations which were carried out by the defendants debris was dropped on an inaccessible part of the roof of the premises, No. 87, Houndsditch, occupied at the time of the action by the plaintiff, and was not all cleared away when the demolition operations came to an end. The work of demolition was completed before April 1, 1926. In July, 1926, the plaintiff became tenant of No. 87 under a lease from his father. On September 1, 1926, a heavy rainstorm washed the debris into the pipe which drained the back gutter of the roof of No. 87 and caused a choke of the gulley of the drain in the basement into which the pipe discharged, with the result that the basement was flooded and some blouses and robes which the plaintiff kept in the basement were damaged.

The plaintiff brought the action claiming from the defendants damages for injury to his premises and to his goods by reason of the defendants' negligence.

Mr. Justice Salter held that the damage to the plaintiff's premises and goods was caused by the defendants' negligence and that the act of the defendants in leaving the debris on the roof of the plaintiff's premises was an act of continuing negligence and that they were liable to the plaintiff for the damage caused to his goods and premises by the flooding of his basement, and his Lordship entered judgment for the plaintiff.

The defendants appealed.

Mr. Malcolm Hilbery appeared for the appellants; and Mr. G. R. Blanco White for the respondents.

Lord Justice Scrutton, in the course of his judgment, said that the plaintiff was the occupier of No. 87, Houndsditch. In March, 1926, the owners of the adjoining premises obtained a licence from the plaintiff's father, the owner of No. 87, Houndsditch, to pull down the party wall, which consisted of a chimney-stack. The licence was given on the terms of a document dated March 4, 1926, signed by the adjoining owners and addressed to Mr. Konskier, the plaintiff's father, as follows:—"In consideration of your giving us permission to pull down at our own expense the chimney-stack of your premises, No. 87, Houndsditch, to within three feet of the existing roof of your building, No. 87, Houndsditch, aforesaid, we . . . hereby undertake at our own expense, (*a*) to restore the said chimney-stack to its present height at any future period, or when the adjoining property is rebuilt, on receiving a written request from you to that effect, and (*b*) to make good any damage which may be caused to No. 87, Houndsditch, by all or any of the before-mentioned works."

Under that licence the defendants started pulling down the chimney-stack, and in the course of that pulling down they deposited debris on an inaccessible part of Mr. Konskier's roof (No. 87, Houndsditch) and did not make good the damage by removing all the debris from Mr. Konskier's roof when the demolition operations were completed, which was before April 1, 1926. In July, 1926, Mr. Konskier let the premises No. 87, Houndsditch, to his son, the plaintiff. On September 1, 1926, a heavy storm of rain washed the debris which had been left on the roof of No. 87 by the defendants, into the guttering so that it choked the gulley and caused a flood in the basement of No. 87 and the plaintiff's goods were damaged.

The plaintiff brought this action claiming damages for injury to the plaintiff's premises and to the plaintiff's goods by the negligence of the defendants' servants in the pulling down of premises adjoining thereto and of part of the plaintiff's premises and for damages for injury caused by mortar and debris from the housebreaking operations of the defendants and their servants.

By paragraph 2 of the statement of claim the plaintiff alleged that the defendants in executing the said demolition negligently and wrongfully caused

and permitted debris to fall and remain upon the roof of the plaintiff's premises, Nos. 87 and 88, Houndsditch, so that much debris fell and was washed down by rain into the gutters of the plaintiff's said premises and completely choked the gulley in the basement thereof, and by paragraph 3 he alleged that in consequence of the foregoing, on the morning of September 1, 1926, when a heavy rainstorm occurred the basement of the said premises was flooded with dirty water and great damage was done to the plaintiff's stock of gowns therein and the plaintiff lost the use of the said basement while the same was being cleared out, whereby the plaintiff suffered great loss amounting to £119 11s. 6d.

It appears that the plaintiff's case was based on negligence, and the learned Judge (Mr. Justice Salter) deals with the negligence in this way. He says in his judgment : "Was it negligent, assuming a duty, to leave this roof with a quantity of debris on it ? I cannot entertain a moment's doubt about that. It cannot have been the exercise of proper care and skill to leave the roof in such a condition as that. In asking myself how the flood was caused, I have the evidence of Mr. Coles, which was very plain and feasible, and, on the other hand, I only get the evidence of workmen who were on the roof, and people who say that they cannot imagine how this can have happened. Then I have assumed a duty and I am not able to accept the contention of Mr. Hilbery that there is no evidence here of a duty owed by the defendants to the plaintiff. When they did the work and finished it there was a duty upon them to all persons who were using or had property on the premises of No. 87. The plaintiff was not at that time a person who had property, so far as I know, in that house. But this was an act of continuing negligence, and that negligence was continuing at a time when the plaintiff became lessee and brought property to that house."

Mr. Hilbery has argued that there was here no continuing negligence because there was no continuing duty by the defendants to the plaintiff in respect of acts committed before the plaintiff became the occupier of the premises. That contention is sound, but it does not dispose of the cause of action about which there is a dispute ; for, if there was a trespass by the defendants when the debris was allowed to remain on the roof of the plaintiff's premises, it was a continuing trespass. It was argued by Mr. Hilbery that there could not be a trespass because the defendants had a right to put the debris where they did put it in the first instance. But the right to drop it there was a limited right, and when the defendants had put the debris on the roof of the premises for a limited purpose, the failure to remove it at the completion of the demolition operations or within a reasonable time thereafter was a trespass. And it was a continuing trespass which entitled the new owner or occupier of the premises to sue. The point was discussed in *Hudson v. Nicholson* (5 M. and W., 437), where the declaration stated that the plaintiff was lawfully possessed of a certain close, and the defendants were possessed of a certain building and premises near to and adjoining thereto. The declaration continued : "Yet the defendants, well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiff and deprive him of the use, benefit, and enjoyment of the said close, and to annoy and incommode him in the use, possession, and enjoyment of the same—to wit, on, &c., and on divers other days and times afterwards and before the commencement of this suit, wrongfully and injuriously kept and continued, and caused to be kept and continued, for a long and unreasonable time, to wit, from thence hitherto, in and upon and over the said close of the plaintiff, divers, to wit, nine shores and nine timbers, before then, and before the plaintiff became possessed of the said close as aforesaid, by the defendants and others whose names to the plaintiff are unknown, wrongfully and injuriously put, placed, fixed, and erected in, upon, and over the said close of the said plaintiff, and the defendants so kept and continued the said shores and timbers in, upon, and over the said close, although they were, to wit, on the day and year first aforesaid, requested by the plaintiff to remove, take, and carry away the same from and off the said close. By means of which premises, and by reason also of the plaintiff being unable to remove and take away the said shores and timbers without causing the said building and premises of the defendants to tumble and fall, the plaintiff has been deprived of the use and enjoyment of his said close, and also thereby the plaintiff hath been and still is hindered and prevented from building and erecting a certain dwelling-house, buildings, and premises on the said close, which he intended to do and otherwise would have done, and thereby the plaintiff hath lost and been deprived of all the benefits, rents, profits, and advantages he would have derived and acquired from the said dwelling-house and premises, had the same been built and erected," &c.

It was held that notwithstanding the omission of the words *vi et armis,* which was of no importance after verdict, the declaration stated a continuing act of trespass by the defendants.

The case of *Hudson v. Nicholson* (*supra*) is an authority for the proposition that if the present case had been argued on trespass there would have been no answer to the claim and there would be no injustice done to the parties in this case if the Court dealt with it as a claim in trespass and not as one of negligence. In that connexion the Court endeavoured to do justice without following technical rules too strictly. The judgment of Mr. Justice Salter would be allowed to stand on the ground of trespass and not on the ground of negligence, but without costs.

Lord Justice Sargant, in concurring, said that he was unable to agree with Mr. Justice Salter with regard to the question of continuing negligence. If and in so far as the action was based on negligence there would be a good answer to the claim, because there was no contract between the defendants and the plaintiff, and the defendants were under no duty towards him. On the other hand, the licence given by the plaintiff's father for the demolition work to be done only justified allowing the debris to remain on the roof of No. 87 during the progress of the demolition operations and for a reasonable time afterwards, and the act of the defendants in allowing the debris to remain on that roof after that time was a trespass. It was a continuing trespass which entitled the plaintiff to recover damages. His Lordship agreed that the appeal should be dismissed, without costs.

Lord Justice Greer agreed. It was quite clear that, in order to recover damages for negligence against the defendants, the plaintiff must prove that the defendants were under a duty towards the plaintiff himself and had committed a breach of such duty, but here there was no duty on the part of the defendants towards the plaintiff, and therefore the claim in negligence failed. But it was equally clear

that if the case was to be fought in trespass the plaintiff would succeed. The dropping of the debris on the roof of No. 87 would have been a trespass but for the licence, which was a limited one. The act of leaving the debris there, or the omission to remove it at the completion of the demolition operations, was a trespass. The appeal must be dismissed, but without costs.

[Solicitors—Messrs. Harris, Chetham and Cohen; Messrs. Kenneth Brown, Baker, Baker.]

K.B. Div. } 1927.
(Salter and Talbot, JJ.) } Nov. 17.

BROOKS AND OTHERS v. LIFFEN.*

Landlord and Tenant—Rent restrictions—Decontrol — Dwelling-house — Rent less than two-thirds of rateable value—Tenant in occupation on July 31, 1923—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 12 (7)—Rent and Mortgage Interest Restrictions Act, 1923 (13 and 14 Geo. V., c. 32), s. 2 (1).

The tenant of a dwelling-house under a 98 years' lease at a rent which was less than two-thirds of the rateable value of the house was in possession of the house at the passing of the Rent and Mortgage Interest Restrictions Act, 1923.

Held, that although s. 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides that where the rent of a dwelling-house is less than two-thirds of its rateable value the Act shall apply to the dwelling-house as if no such tenancy existed, the tenant was not, as against the freeholders, to be deemed to be the landlord of the house for the purposes of s. 2 (1) of the Act of 1923 so as to cause the house to become decontrolled.

This was an appeal by the plaintiffs from a decision of Judge Tobin at Westminster County Court. The plaintiffs had claimed possession of a dwelling-house, but the county court Judge had held that the tenant, the defendant, was protected by the Rent Restriction Acts. The plaintiffs appealed.

Mr. Bensley Wells appeared for the appellants; Mr. Ronald Walker for the respondent.

Mr. WELLS said that the plaintiffs' claim in the county court was for possession of a house known as 15, Gillingham-street, Pimlico, S.W., of which they owned the freehold. The facts were agreed between the parties. In 1904 Mr. Liffen, the defendant, became the assignee of a 98 years' lease of the premises which expired in June, 1924, and he entered into possession of the premises under that assignment. The net rateable value of the premises at all material times had been £38 a year. The rent reserved under the lease was £5 and was, therefore, considerably less than two-thirds of the rateable value of the house. (See section 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which is set out *infra*). On July 31, 1923, the date of the passing of the Rent and Mortgage Interest Restrictions Act, 1923, Mr. Liffen was still in actual occupation of the premises. On June 4, 1924, the plaintiffs wrote to him pointing out that the long lease was coming to an end and offering to allow him to remain in the house as a quarterly tenant at a yearly rent of £56 5s. Mr. Liffen accepted that and he remained as quarterly tenant on those terms after the expiration of the long lease. In November, 1926, however, an admittedly proper notice to quit was served on him by the plaintiffs determining the quarterly tenancy as from March 25, 1927. Mr. Liffen refused to leave the premises. The present proceedings were started by Messrs. Brooks in the county court to recover possession of the house and Mr. Liffen's defence to the claim was that he was protected by the Rent Restriction Acts.

Counsel submitted that that was not so as the premises had become decontrolled. Section 12, subsection 7, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provided: "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . . and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed." Section 2, subsection 1, of the Rent and Mortgage Interest Restrictions Act, 1923, provided: "Where the landlord of a dwelling-house to which the principal Act [The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920] applies is in possession of the whole of the dwelling-house at the passing of this Act [July 31, 1923] or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house. . . ."

In *Finèy v. Gougoltz* (42 *The Times* L.R., 501; [1926] 2 K.B., 322) it was decided that a tenant under a long lease at a rent less than two-thirds of the rateable value was to be deemed to be the landlord of the demised premises for the purpose of section 2 (1) of the Act of 1923. In the present case, therefore, Mr. Liffen was to be deemed to be the landlord of the premises; he was in possession of the whole of them on July 31, 1923; and the premises thus became decontrolled.

Mr. RONALD WALKER was not called on to argue on behalf of the defendant.

MR. JUSTICE SALTER.—This case is, in my opinion, a plain one. The question for our decision is whether or not this dwelling-house had been decontrolled in June, 1924, when it was let to the defendant on a quarterly tenancy. Every matter which arises under those parts of the Rent Restriction Acts which deal with tenancy is a matter between landlord and tenant—either between contractual landlord and contractual tenant, or between statutory landlord and statutory tenant, and every such case must also relate to a dwelling-house which is the subject of tenancy between that landlord and that tenant. It is important, in considering cases under the Rent Restriction Acts, to bear in mind who is the landlord and who is the tenant and what is the dwelling-house for the purpose of a particular decision.

This case, in my opinion, depends on the construction of section 12 (7) of the Act of 1920 and of section 2 (1) of the Act of 1923. In the light of section 12 (7) of the Act of 1920 I ask myself what is to be regarded as the legal position on July 31, 1923, of the parties to this action with reference

* Reported by G. F. L. BRIDGMAN, Esq., Barrister-at-Law.

to the dwelling-house which is its subject-matter. Section 12 (7) directs us to shut our eyes to the fact of an existing tenancy. It does not direct us to shut our eyes to anything else. It is admitted that on July 31, 1923, the plaintiffs were the owners of this dwelling-house and Mr. Liffen was in occupation of the whole of it. We must, however, say, for the purpose of these Acts, that no relationship of landlord and tenant existed between them. They were owners and occupier. There is no reason to assume that Mr. Liffen was a trespasser. He must be regarded as having been rightly on the premises and a person who is rightly on the premises in the absence of a tenancy must be a licensee.

Was the landlord of this dwelling-house in possession of it on July 31, 1923, within section 2 (1) of the Act of 1923? The word "landlord" must be loosely used in that subsection because, strictly speaking, there cannot be a landlord without a tenant and a tenure, and the subsection deals with a case where there is neither tenant nor tenure. "Landlord" clearly must mean nothing more than "owner." Were the owners of this dwelling-house in possession of it on July 31, 1923? Mr. Liffen was certainly not the owner and, in my view, he certainly was not the landlord. In fact, he was the tenant, but we are not allowed to say so. The plaintiffs were the owners. They were not in possession.

In my opinion, it is quite plain that section 2 (1) of the Act of 1923 never came into operation as regards this dwelling-house and the Act of 1920 never ceased to apply to it. For these reasons I think that the county court Judge was right and that this appeal fails.

Mr. Justice Talbot.—I am of the same opinion. We are much indebted to counsel for the plaintiffs for the clear statement of his argument, but that argument bears on its face its own refutation. It is desirable in cases under these Acts to avoid saying anything which does not directly bear on the actual case before the Court.

Here an ingenious attempt has been made to apply section 2 (1) of the Act of 1923 in a way which, in my opinion, is manifestly outside the contemplation of those who framed and enacted the section. The object of the section is to confer certain rights on a man who is a landlord at the time when the question of his position as against a tenant arises, if he can show that he was in possession of, or took possession of, the dwelling-house at either of the times specified in the Act. The argument here has suggested that, because a tenant under a long lease, who has not sublet, would be a landlord if he did sublet, he is therefore to be deemed to be a landlord, in relation to the freeholder who is in fact his landlord, for the purposes of this section which was passed with the object to which I have referred. It is said that the freeholder can say to the person who is in truth his tenant: "You, my tenant, who would be in the position of a landlord if you sublet, were in possession on the critical date and although I, who was your landlord then and am so now, was not then, and never have been, in possession, the premises are decontrolled and I can charge you what I like." That seems to me to be an entire perversion of the scope of this subsection, and a fallacious deduction from the fact that a tenant may in other proceedings be himself put in the position of a landlord. The argument is founded on section 12 (7) of the Act of 1920, and is that, because *alio intuitu* there is supposed to be no tenancy when the rent under a long lease is below a certain figure, the tenant is to be considered, *qua* a person who is in fact landlord, not a tenant, but a landlord.

It is often possible by looking at portions of Acts of Parliament outside their context and by disregarding the intention with which they have been passed to construct artificial interpretations of them. I do not think that, when critically scrutinized, this argument appears to be sound, but even if I thought it more closely woven than I think it is, I should hold that there had been a misinterpretation of the Act of Parliament. There are certain authorities (one only of which has been quoted in support of the argument on behalf of the plaintiffs) which, I think, tell very much against it, but, whether that be so or not, no case has been quoted to us which, in my opinion, really supports the argument on behalf of the plaintiffs. The cases are all cases involving the consideration of a double capacity, that is to say, the position of a man who is in one relationship a tenant and in another relationship a landlord. This case is free from any such complication.

For these reasons I think that the county court Judge was right in law, and that this appeal must be dismissed.

The appeal was accordingly dismissed, with costs. Leave to appeal was refused.

[Solicitors—Messrs. Stephenson, Harwood and Tatham; Mr. H. A. Phillips.]

K.B. Div. (MacKinnon, J.) 1927. Nov. 21.

DE MONCHY AND OTHERS v. PHŒNIX INSURANCE COMPANY OF HARTFORD AND ANOTHER.*

Insurance (Leakage)—Certificate—Issue under alleged policies—Time limit for claim—Limit in policies—No limit in certificate—Volatility of thing insured—Bulk dependent on temperature—Whether "leakage" confined to loss of contents.

The plaintiffs had an interest in a certificate of insurance on 100 barrels of turpentine shipped from Florida to Rotterdam. This certificate had been issued under what were said to be policies of insurance subscribed by the defendants. The policies provided for payment for "leakage" in excess of 1 per cent., and, as the practice was to measure, but not to weigh, the amount shipped, and to weigh, but not to measure, the amount delivered, and as, owing to the volatility of turpentine, the weight of a gallon depended on the temperature, it was provided that the conversion of kilograms into American gallons should be on the basis of 3.25 kilograms to the gallon. The alleged policies contained a condition that no claim under them could be maintained unless brought within a year, but in the certificate there was no such condition. When the turpentine was discharged, the weight was short, as compared with the weight calculated from the number of gallons shipped, but the defendants declined to

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

pay in the absence of injury to the barrels or some clear sign of leakage. This action was brought on the certificate but not within the year.

Held, that the contract was to pay for loss of weight or bulk, even if this was caused by change of temperature and not by loss of some of the contents of the barrels, and that, as the alleged policies were not contracts of insurance at all, but the certificate was the actual insurance, and as, in the circumstances, the clause as to limitation of time could not be read into it, the plaintiffs were entitled to recover.

The plaintiffs in this action were the owners of a quantity of turpentine which had been shipped in barrels from the United States. They had insured the turpentine with the defendants, two insurance companies, for the voyage. The perils insured against included leakage, and the plaintiffs now claimed for loss alleged to have been caused by leakage.

Mr. Porter, K.C., and Mr. McNair appeared for the plaintiffs; Mr. Jowitt, K.C., and Mr. van den Berg for the defendants.

The plaintiffs were interested in a certificate of insurance, dated August 27, 1923, issued under an alleged policy of insurance subscribed by the first defendant company, and in another alleged policy subscribed by the second defendant company. Each of the defendant companies insured respectively for 50 per cent. of 14,925 florins on 100 barrels of turpentine shipped from Jacksonville, Florida, to Rotterdam, on a steamship, the Cape Town Maru.

The alleged policies contained, *inter alia,* a clause "to pay leakage from any cause in excess of 1 per cent. on each invoice . . . conversion of kilograms into American gallons shall be made on the basis of 3.25 kilograms to the gallon."

The practice in the trade appeared to be not to weigh, but to measure, the amount of turpentine shipped, and to weigh, not measure, the amount delivered.

On August 25, 1923, the plaintiffs shipped on the Cape Town Maru, at Jacksonville, 100 barrels of turpentine for carriage to Rotterdam. During the voyage the steamer met with heavy weather, and when the turpentine was discharged at Rotterdam it was alleged that 372.75 kilograms out of a total of 16,597.75 kilograms shipped had disappeared.

Mr. Porter said that as turpentine was a volatile substance and expanded when heated the weight of a gallon would depend on the actual temperature at the moment, and a conventional weight per gallon was, therefore, agreed on. Up to a loss of 1 per cent. no claim could be made, but where there was a greater loss the underwriters had been in the habit of paying on the basis of the conventional weight, taking the difference between the weight shipped and the weight delivered as the amount of the loss. But the underwriters in this case had taken up the attitude that they would not pay for leakage unless there was visible injury to the barrels or other clear sign of leakage.

Another point taken by the defence was that the insurance was subject to a condition that no claim under it could be maintained unless brought within a year. There was such a condition in the original policies, but not in the certificate under which the plaintiffs were suing, and the question was whether the plaintiffs were bound by that condition. The action had not been brought within a year, so that, if the condition applied, the claim would be barred. The certificate stated that it "represented and took the place of the policy." From that statement, he submitted, the plaintiffs were entitled to assume that there was in existence a policy insuring against the ordinary perils and containing the ordinary conditions, but not containing anything unusual, such as the limitation of the period for suing. It might be that such limitation would apply between original insurer and original insured, and yet would not apply against the holder of a certificate. The statement that the certificate represents and took the place of the policy did not imply that every clause of the policy was incorporated in the certificate.

Mr. Jowitt submitted that the method in which business in this trade was carried on was unsatisfactory. Instead of relying on intake measurement and outturn weight, a combination which could not give accurate results, the actual weight at each end should be taken. And more care should be taken to ascertain the tare weight of the barrels.

As to the condition requiring the claim to be made within a year, the underwriters had deliberately taken the point. The claim was stale, documents relating to it had been destroyed, and no definite evidence could be brought in support of the claim. The defendants were perfectly willing to pay for loss which was really caused by leakage, but they were not prepared to pay for apparent loss which was really only a contraction in bulk due to lowered temperature. The certificate must be read with the original policy to ascertain the real contract between the parties.

Mr. Justice MacKinnon, in giving judgment, stated the facts, and said that the first defence to the claim was that the insurance was only against leakage, and though, if the temperature fell, the contents of a barrel might occupy less space without any of the contents being lost, for such loss of bulk the underwriters would not be liable. The defence contended that "leakage" must be construed strictly, and that the word was applicable only where something which had been in a receptacle had accidentally got out of it and had been lost. But, reading the clauses of the contract as a whole, he thought that what the underwriters said was, "We will pay for any loss of weight or of bulk during this voyage if the loss exceeds 1 per cent." The plaintiffs were, therefore, entitled to find the arrival weight, turn the quantity shipped into kilograms by the conventional formula, and then, if the difference between those two weights exceeded 1 per cent., make a claim. On that part of the case, therefore, the claim succeeded.

As to the provision that the action must be brought within one year, the certificate was said to take the place of the policy, and it contained many clauses. His Lordship discussed the clauses of the certificate and of the policy, and said that in his view the document called a policy was not a contract of insurance at all. It did not state the port of shipment or of destination; it did not fix the premium; and, in fact, only recorded the general terms on which the underwriters were willing to make contracts of insurance if asked to do so. The certificate was the actual insurance, and the question was whether the limitation clause could be read into it. The clause was an unusual one, and the defendants themselves had apparently forgotten its existence; for they went on corresponding about the matter long after a year had passed. He thought that the defendants

had failed to make out that this clause must be considered as part of the contract, and there must, therefore, be judgment for the plaintiffs.

[Solicitors—Messrs. William A. Crump and Son ; Messrs. Windybank, Samuell, and Lawrence.]

Court of Appeal.
(Lord Hanworth, M.R., Atkin and Lawrence, L.JJ.)
1927. Nov. 18.

FORBES, ABBOTT, AND LENNARD, LIMITED v. GREAT WESTERN RAILWAY COMPANY.*

Negligence—Vessel in dock—Condition as to sole risk of owners of vessel—Injury in lock through negligence of dock-owners' servants—Whether dock-owners protected by condition—Whether lock included in "dock."

The defendants, who were the owners of Chelsea Dock and of a lock connecting it with the River Thames, received the plaintiffs' barge into the dock on the condition that "All barges or vessels while in Chelsea Dock are at the sole risk of owners or persons bringing or causing the same to be brought into the dock." While the barge was in the lock on its way out from the dock to the river, it was damaged through the negligence of the defendants' servants.

Held, (1) that the words of the condition were adequate to exempt the defendants from liability for the negligence of their servants, and (2) that the word "dock" in the above condition must be interpreted as including the lock, and therefore the defendants were exempt from liability.

Decision of Avory, J. (43 *The Times* L.R., 769), reversed.

This was an appeal by the defendants, the Great Western Railway Company, from a judgment of Mr. Justice Avory (43 *The Times* L.R., 769), in favour of the plaintiffs, Forbes, Abbott, and Lennard, Limited, who were the owners of a barge, and who claimed damages for injury thereto occasioned by the alleged negligence of the servants of the defendants while the barge was being passed from Chelsea Dock through the lock connecting the dock with the River Thames. Both the dock and the lock belonged to the defendants. The defendants denied negligence, and further said that the barge was in the lock at the plaintiffs' sole risk. They relied upon public notices affixed to the lock.

The jury found for the plaintiffs on the issue of negligence, and the damages were agreed at £175.

On behalf of the defendants it was then submitted that, notwithstanding that finding, the defendants were entitled to judgment on the ground that condition No. 1 of the terms and conditions on which the defendants received barges into Chelsea Dock, of which the plaintiffs were to be assumed to have had notice, exempted them from liability for such negligence. The condition was as follows :—

"All barges or vessels while in Chelsea Dock are at the sole risk of owners or persons bringing or causing the same to be brought into the dock."

The defendants contended that the word "dock" in the condition included the lock, and that the terms used were sufficient to exclude liability for damage caused by the negligence of the defendants' servants.

Mr. Justice Avory held that condition No. 1 did not clearly and unambiguously apply to the lock as distinguished from the dock, and he, therefore, came to the conclusion that the plaintiffs were entitled to £175 damages.

The defendants appealed.

Mr. Schiller, K.C., and Mr. Wilfrid Lewis appeared for the appellants ; Mr. Charles, K.C., Mr. Rowland Thomas, and Mr. Roland Champness for the respondents.

The Master of the Rolls, in the course of his considered judgment, said that on February 5, 1926, the plaintiffs' barge was brought into the dock for the purpose of loading a cargo of coal. It was in charge of Finch, their lighterman, who had been in the dock with barges before. On the morning of February 8, 1926, the barge was ready to leave about an hour after high water. Vessels entering or leaving the dock had to conform to the directions of the defendants' dockmaster Titcomb. The barge went into the lock, and when the water had dropped to the river level it was found that there was not sufficient water. The barge stranded on the lock sill and suffered strain and damage so that, ultimately, it became necessary to expend £175 on repairs.

The action was tried twice. At the first trial the jury disagreed, but on the second they found a verdict in favour of the plaintiffs for £175. Mr. Justice Avory held that the terms of the conditions did not afford a defence to the action and gave judgment for the plaintiffs.

Two points were taken on the appeal : (1) that there was no evidence of negligence by the defendants' servants ; and (2) that, even if they were negligent, the express terms and conditions under which the plaintiffs used the lock and the dock were binding on the plaintiffs and exempted the defendants from liability.

On the first point the Court had carefully examined the evidence and had come to the conclusion that, when Finch wanted to take the barge out of the dock Titcomb was quite conscious that the time available for the passage, owing to the fall in the tide, was short. It was admitted that he could prevent a barge from going out, if it were dangerous to take it out. It appeared that the defendants did owe a duty to the barge-owner, as they exercised a control over barges coming into and going out of the dock. The jury had found that sufficient care had not been exercised ; there was evidence upon which they could so find, and therefore the Court could not disturb their finding of fact on the question of negligence.

The second point, which had been argued more fully in this Court than before Mr. Justice Avory, was a more difficult one. The Chelsea Dock was constructed originally for the West London Railway under the West London Railway Extension Act, 1859, and had become vested in the Great Western Railway Company under the railway amalgamation scheme. That Act incorporated the Harbours, Docks, and Piers Clauses Act, 1847, under which power was given to make by-laws regulating docks. By section 2 of the Act of 1847

"the expression 'the harbour, dock, or pier,' shall mean the harbour, dock, or pier, and the works connected therewith, by the special Act authorized to be constructed."

* Reported by H. Langford Lewis and G. T. Whitfield-Hayes, Esqs., Barristers-at-Law.

The whole of the works, including the dock and the lock, were authorized to be constructed by the special Act of 1859. It was, therefore, impossible, for the purposes of the by-laws, to separate the lock from the dock. By section 83 of the Act of 1847 the authority was empowered to make by-laws :

" for regulating the admission of vessels into or near the harbour, dock, or pier, and their removal out of and from the same, and for the good order and government of such vessels, whilst within the harbour or dock, or at or near the pier."

The by-laws, therefore, applied to the whole system, comprising both the dock and the lock. In addition to that, there were certain terms and conditions made applicable by the by-laws. The terms and conditions referred in more than one place to the company's by-laws and fitted in with them, so that it was impossible to say that the terms and conditions applied to the dock, but not to the lock. The question then was whether condition No. 1 served to release the defendants from liability for accidents in the lock. He wished to adopt the statement of Lord Justice Scrutton in *Rutter v. Palmer* (38 *The Times* L.R., 555 ; [1922] 2 K.B., 87, at p. 92), where he said :—

" In construing an exemption clause, certain general rules may be applied : First, the defendant is not exempted from liability for the negligence of his servants, unless adequate words are used ; secondly, the liability of the defendant apart from the exempting words must be ascertained ; then the particular clause in question must be considered ; and if the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to exempt him."

In *Price and Co. v. Union Lighterage Company* (20 *The Times* L.R., 177 ; [1904] 1 K.B., 412), the exemption being in general terms, the barge-owner was held not to be exempt from liability for the negligence of his servants. In the present case the words were quite wide enough to include negligence. See *Reynolds v. Boston Deep Sea Fishing and Ice Company, Limited* (38 *The Times* L.R., 429).

The second rule was that the liability of the defendants must be ascertained. He was not at all sure that the words used would cover liability for pilferage from the cargo in the dock, as had been suggested. See *Shaw v. Great Western Railway Company* (10 *The Times* L.R., 176 ; [1894] 1 K.B., 373). After a careful examination of the points of liability, apart from negligence, it was difficult to suggest that there were any. It appeared to him that the words used in the condition were intended to cover negligence, and they were quite apt to do so. The condition dealt with " persons bringing or causing the same to be brought into the dock." That was just the point at which the greatest probability of danger, and injury to the vessel, might arise. The judgment of the Judge below must be set aside, the appeal allowed, with costs, and judgment entered for the defendants.

Lord Justice Atkin said that it was quite clear that in a case like the present the contracting party, the Great Western Railway Company, could be relieved from liability under the contract only if the language of the alleged exemption were clear and unambiguous. In the present case the language used was reasonably clear, and the intention to exclude liability arising from the negligence of servants was obvious. It was difficult to distinguish the liability of the defendants from that referred to by Lord Justice Scrutton in *Rutter v. Palmer* (38 *The Times* L.R., 555 ; [1922] 2 K.B., 87), and he (Lord Justice Atkin) would find it very difficult to say that the words used in the condition No. 1 were not plain and unambiguous, or that they did not plainly operate to exempt the defendants from liability for the negligence of their servants.

As to the point raised that " in the lock " was not " in the dock," that might be so in common parlance, where a dock might well be different from a lock ; but in this case, as soon as it was seen that the condition was intended to protect the railway company from any negligence on the part of their servants, it was easy to see that it was meant to apply to the lock also.

Lord Justice Lawrence thought that there was no doubt that the expression " Chelsea Dock " would cover also the site of the lock. As regards the other point raised, he thought that it was reasonably clear from the language of the exemption that negligence of the defendants' servants was intended to be covered. Had counsel for the plaintiffs shown that there was any other risk likely to be run in the dock he might have come nearer to succeeding, but it seemed on the face of things that negligence of the kind that actually happened was the risk against which the defendants had expressly desired to guard.

[Solicitors—Mr. A. G. Hubbard ; Messrs. Keen, Marsland, Bryden, and Besant.]

K.B. Div. (Scrutton and Sargant, L.JJ.) 1927. Nov. 24.

GLANVILLE v. SUTTON AND CO., LIMITED.*

Animals—Damage by—Liability of owner—*Scienter*—Horse accustomed to bite other horses—Whether owner liable for bite of human being.

The fact that the owner of a horse knew that it was accustomed to bite other horses is not sufficient to establish his liability for its biting a human being.

This was an appeal by the plaintiff, Mr. Glanville, from a judgment of his Honour Judge Sherwell Cooper in an action tried by him, with a jury, in the Mayor's and City of London Court.

The plaintiff's claim was for personal injuries caused by a horse, the property of the defendants. The facts as found were as follows :—The plaintiff was crossing from the south side of Ludgate-hill to the north side, where there was, by the kerb, a stationary one-horse van, the property of the defendants. It was unattended. The carman had gone to adjoining premises on his business, and the plaintiff, when crossing the road, passed a short distance in front of the horse. As he was passing, the horse, which was muzzled, stretched out its head and made for the head of the plaintiff, thereby injuring his face.

Evidence had been given that on a previous occasion the horse had bitten another horse, and that since the injury to the plaintiff it had attempted to bite other horses.

The questions which were put to the jury, together with their answers, were :—

" (1) Did the defendants know, or ought they to have known, that the horse was (*a*) dangerous to

* Reported by E. J. M. Chaplin, Esq., Barrister-at-Law.

other horses ?—Yes ; (*b*) dangerous to mankind ? —Yes. (2) Was the injury to the plaintiff caused by the dangerous nature of the horse ?—Yes. (3) Were the defendants in all the circumstances negligent in leaving the horse unattended ?—No."

On those findings the jury awarded £25 damages to the plaintiff.

In a considered judgment the Judge came to the conclusion that, notwithstanding the finding of the jury, the defendants were entitled to judgment, and he entered judgment accordingly.

The plaintiff appealed on the ground that, on the findings of the jury, the Judge was wrong in law in entering judgment for the defendants.

Mr. F. G. Paterson appeared for the plaintiff ; Mr. H. D. Samuels for the defendants.

Mr. Paterson submitted, on behalf of the plaintiff, that where anybody kept an animal with a vicious propensity which made it an exception to its class, and the owner was aware of that propensity, he was liable upon the analogy of *Fletcher v. Rylands* (L.R., 1 Ex., 265 ; L.R., 3 H.L., 330). The only question which should have been left to the jury was whether the horse had a vicious propensity. It was entirely a matter for them. Upon their findings, he submitted that the plaintiff was entitled to judgment. He referred to *Cox v. Burbidge* (13 C.B., N.S., 430) ; *Bradley v. Wallaces, Limited* (29 *The Times* L.R., 705 ; [1913] 3 K.B., 629) ; *Jones v. Perry* (2 Esp., 482) ; *Manton v. Brocklebank* (39 *The Times* L.R., 344 ; [1923] 2 K.B., 212).

The Court did not call upon counsel for the defendants.

Lord Justice Scrutton, in giving judgment, said that the case raised an interesting point. He referred to the facts and to the questions which had been left to the jury, and said that no objection had been taken to the finding that the horse, to the knowledge of the defendants, was dangerous to other horses. But as to the other finding, that it was dangerous to mankind, no evidence had been given to show that horses which bit other horses would bite mankind. He agreed with what had been said by Lord Sterndale, M.R., in *Manton v. Brocklebank* (39 *The Times* L.R., 344 ; [1923] 2 K.B., 212), that it was not safe for people to act upon what they believed to be common knowledge without evidence, and horses were subjects upon which people often disagreed. He (the Lord Justice) agreed that in this case no such evidence as was necessary had been given.

But then the case for the plaintiff had been put upon this line of thought. It was said that, when once it was known that the horse was in this one respect different from what horses ordinarily were, it was shown to be out of its class, and, therefore, must be kept by its owner at his own risk within the principle of *Fletcher v. Rylands* (L.R., 1 Ex., 265 ; L.R., 3 H.L., 330), so that the defendants would be liable for the damage. He was not aware of any case which justified the statement that when once the owner knew that an animal was dangerous in one particular way he became liable in respect of any other kind of damage caused by the animal, however unexpected or unusual. He could find no authority to support the view that it was to be assumed that an animal would do all sorts of things which its species did not generally do. In *Manton v. Brocklebank* (*supra*) Lord Justice Atkin had said, at page 231 : "The owner of a dog is not liable for its trespass and damage without proof of *scienter* of a special mischievous propensity to do such damage." The words to be emphasized were, "to do such damage," and not "to do some other damage."

It appeared to him that when there was a finding that the owner of the horse knew that it was accustomed to bite other horses, that was not sufficient to establish liability for damage of a different kind—namely, for biting, not animals, but human beings. The appeal, therefore, failed, and must be dismissed.

Lord Justice Sargant agreed.

[Solicitors—Mr. Malcolm A. Pritchard ; Messrs. Berrymans.]

Chan. Div. (Clauson, J.) 1927. Nov. 24.

MACAULAY v. GUARANTY TRUST COMPANY OF NEW YORK.*

International Law — Foreign receivers—*Chose in action*—Right by foreign law to sue—Right in this country.

Foreign receivers or assignees in bankruptcy, who have, according to the law of the country in which they have been appointed, a right to sue in their own names for a *chose in action* due to a person in respect of whose property they have been appointed, have a similar right of action here.

The plaintiffs in this action, who were duly appointed according to American law by the Court of Chancery in the State of Delaware as the receivers of the assets and property of the Parkhill Corporation, Limited, claimed to be entitled to be paid all moneys now standing or hereafter to stand to the credit of the corporation with the defendants. The defendants, the London branch of the Guaranty Trust Company of New York, carried on the business of bankers and had, as such, £2,065 4s. in their hands belonging to the corporation. In their defence they stated that they were willing to abide by an order of the Court.

By an order made by the Court of Chancery of the State of Delaware, dated June 13, 1927, the Parkhill Corporation, Limited, which had been incorporated under the laws of that State on January 15, 1924, were adjudged to be insolvent, and the plaintiffs were appointed receivers of the corporation to have sole control of all assets and solely to administer the affairs of the company.

Under that order this action was begun. On November 2, 1927, on motion in the proceedings in Delaware, an order was made vacating the order of June 13, 1927, and reappointing the plaintiffs *pendente lite* to have sole control and to take possession of all the assets and solely to administer the affairs of the company. The plaintiffs were further authorized to take all necessary proceedings to secure control and possession of the assets. The corporation, as a party to the cause, were ordered to deliver into the possession of the plaintiffs any assets in their control and possession.

Mr. Gover, K.C., and Mr. F. O. Langley appeared for the plaintiffs ; Mr. J. G. Strangman for the defendant company.

Mr. Gover, in opening the case, said that there was no question that the £2,065 4s. was due to the

* Reported by G. P. Langworthy, Esq., Barrister-at-Law.

Parkhill Corporation, but the defendant company thought that they were entitled to an order from this Court before paying over the money in their hands. By international comity Courts here gave effect to orders of foreign Courts.

MR. JUSTICE CLAUSON.—If I appointed a new trustee of a trust in New York, would effect be given in America to that order?

Mr. GOVER.—The American Court would have regard to your Lordship's order.

Continuing, counsel said that the domicile of the Parkhill Corporation was in the State of Delaware. The order there made was what we should call a winding-up order, but it was really a combination of a winding-up order and an administration order. Whereas the first order of June 13 was a final order, the order made on November 2 modified it by making it *pendente lite*. This case was analogous to cases in which the Courts in this country had been asked to hand over property here to a foreign curator.

MR. JUSTICE CLAUSON.—*Prima facie*, this order will have no effect against the Parkhill Corporation in this country. They are not joined as parties to the present proceedings.

Mr. GOVER referred to Westlake's Private International Law (7th Ed., p. 177); *Alivon v. Furnival* (1 Cr., M. and R., 277, at pp. 286, 294). In *Didisheim v. London and Westminster Bank* (16 *The Times* L.R., 311; [1900] 2 Ch., 15, at pp. 48, 50) the principle was adopted that a foreign curator could sue here in his own name for the goods and chattels of a person of unsound mind.

Mr. STRANGMAN said that the defendant company claimed no interest in the £2,065 4s., and set up no cross-claim against it.

Mr. Valentine Worthington, a member of the English Bar and of the Bar of New York, gave evidence that he was conversant with the laws of the State of Delaware and had considered the order made in that State appointing the plaintiffs as receivers, and he was of opinion that under that order the plaintiffs could sue in a Court in the State of Delaware to recover property or *choses in action*, belonging to the Parkhill Corporation, without joining the corporation as plaintiffs.

Mr. STRANGMAN admitted that his Lordship was entitled, according to the general rule of international law, to regard the order appointing the plaintiffs as an order to which this Court would give effect.

MR. JUSTICE CLAUSON said that he would give judgment that the plaintiffs should recover against the defendant company £2,065 4s., the plaintiffs to pay the defendant company's costs. He felt justified in making that order, having regard to the decision of Baron Parke in *Alivon v. Furnival* (1 Cr., M. and R., 277). That was an authority for the proposition that, if receivers or assignees in bankruptcy had, according to the law of the country in which they had been appointed, a right to sue in their own names for a *chose in action* due to a body or person in respect of whose property they had been appointed receivers or assignees, that gave them a right which this country, by the comity of nations, would treat as though it were a right of action at common law on evidence that in fact the operation of the orders appointing them gave them a right to recover *choses in action* in the country in which they were appointed.

[Solicitors—Messrs. Gedge, Fiske, and Gedge; Messrs. Slaughter and May.]

Court of Appeal.
(Lord Hanworth, M.R., Atkin and Lawrence, L.JJ.)
1927. Nov. 25.

MAXWELL v. KEUN, JOHN LANE, THE BODLEY HEAD, LIMITED, AND BUTLER AND TANNER.

MAXWELL v. KEUN, JONATHAN CAPE, LIMITED, AND BUTLER AND TANNER.*

Practice—Postponement of action—Application—Dismissal with costs—Appeal—Competency—Interference with Judge's discretion—Rules of the Supreme Court, Order XXXVI., r. 34—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 27 (1).

Where a Judge dismisses with costs an application under Order XXXVI., r. 34, to postpone a trial, his decision is, at all events by leave, subject to appeal under s. 27 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, and, though the Court of Appeal will be slow to interfere with the exercise of his discretion, it will do so if it comes to the conclusion that justice would not result from the decision appealed from.

This was an appeal, by leave of the Court of Appeal, from the refusal of an application by the plaintiff that two actions should stand out of the list during this term.

Sir Henry Maddocks, K.C., and Mr. Linton Thorp appeared for the plaintiff; Mr. Norman Birkett, K.C., and the Hon. S. O. Henn Collins, Mr. Croom-Johnson, K.C., Mr. Michael Hoare, and Mr. St. John Field for various defendants.

SIR HENRY MADDOCKS said that the plaintiff was an officer in the Army, and was at present serving in India. The first defendant, Miss Odette Keun, had written a book called "My Adventures in Bolshevik Russia," in which there were very grave libels upon the plaintiff, who had begun a libel action in respect thereof, No. 3,062 in the special jury list, which was at present about 106 out of the list. Miss Keun had also written a book called "Prince Tarièl," in which a Major Cassell, one of the characters, was, as the plaintiff alleged, a representation of, and a libel upon, him, his second Christian name being Cassell. There was another libel action in respect of that book, No. 3,063 in the same list, and that action was expected to be in the daily list almost immediately.

As it would be impossible to have a fair trial in the absence of the plaintiff in India, an application had been made to the Lord Chief Justice to allow both actions to be adjourned until a date to be fixed in the future, so that the plaintiff could get leave from the Army and return to England for the hearing. The Lord Chief Justice had refused that application, and the present application was by way of appeal from that refusal.

Miss Keun was not represented, but the other defendants were the printers and publishers of the two books.

Mr. BIRKETT took a preliminary objection that the discretion given to the Lord Chief Justice, by

* Reported by G. T. WHITFIELD-HAYES and H. LANGFORD LEWIS, Esqrs., Barristers-at-Law.

Order XXXVI., Rule 34, of the Rules of the Supreme Court—

"The Judge may, if he think it expedient for the interests of justice, postpone or adjourn a trial for such time, and to such place, and upon such terms, if any, as he shall think fit—"

was an absolute discretion and could not be questioned by any other Court.

The counsel for the defendants also contended that the plaintiff was not entitled to the indulgence asked for. The alleged libels had been published in 1923 and 1924, and the plaintiff had taken no action until 1926.

The MASTER OF THE ROLLS said that, with regard to action No. 3,063, the book, "Prince Tarièl," was said to have represented the plaintiff, under the name of Major Cassell, as being guilty of a gross piece of cruelty to a woman. It seemed essential that in an action like the present the plaintiff should be present and give evidence, and if he were unable to do so it seemed that judgment would probably be given for the defendants. A preliminary objection had been taken that the discretion of the Lord Chief Justice was not open to appeal; for, by section 27 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, it was said that the Court of Appeal had jurisdiction to determine appeals "from any judgment or order of the High Court" and the defendants contended that there was no "judgment or order" here, but simply a refusal to alter the cause list. But the Lord Chief Justice had made an order giving the costs of the application to the defendants, and the addition of an order as to costs brought the matter within the term "order" in section 27 (1).

He (the Master of the Rolls) fully agreed that the discretion given to a Judge by Order XXXVI., Rule 34, should be upheld. Sir Henry Maddocks had, however, referred to a case, *Sackville-West v. Attorney-General* (128 *Law Times* Newspaper, 265), which showed that, although it would only be upon rare occasions, yet now and again the Court of Appeal might interfere if it could see that justice would not result from the order made below. He (his Lordship) agreed with that decision. The facts in the present case were not in dispute. If the plaintiff were absent in India, his action would probably fail, judgment would be for the defendants and that would be the result in spite of any order which the Judge could make at the hearing. Could it be said that in the absence of the plaintiff justice would be done between the parties? The defendants' counsel had suggested that an application to adjourn might be made when the case was called on, but that course would be inconvenient and expensive.

The Court of Appeal had the deepest respect for the decision of the Lord Chief Justice, but they had had the opportunity of having the matter explained at much greater length and with more detail. The only right course was to say that action No. 3,063 would not be heard this term. It was not necessary to make any order as to action No. 3,062, as it would not be in the list this term in any event. The application as to that last action would, therefore, be dismissed. Action No. 3,063 would stand out of the list for the present.

LORD JUSTICE ATKIN said that he was of the same opinion, and but for the fact that the Court was differing from the view of the Lord Chief Justice, he would not have added anything. The Court ought to be very slow to interfere with the discretion of a Judge in such a matter as the time of the trial. If, however, it was clear to the Court of Appeal that the order appealed from would lead to what amounted to a denial of justice, they would not hesitate to reverse it. In *Jones v. S.R. Anthracite Collieries, Limited* (90 L.J.K.B., 1315) the Court allowed such an appeal. Lord Sterndale, M.R., said (at p. 1316): "I cannot remember any specific instance of this Court doing so, but my impression is that this Court has interfered with the decision of even High Court Judges in regard to 'adjournments,' although, as I say, I cannot remember any specific instance of that being done at the moment." And Lord Justice Scrutton said: "I should like to say, in regard to the point as to whether the Court has ever interfered with the decision of a County Court Judge as regards an adjournment, that my impression is the same as that of the Master of the Rolls. My impression is that this Court has frequently interfered with the decisions of County Court and High Court Judges in regard to the question of 'adjournment,' because the whole duty of this Court, and of every Court, should be to do justice between the parties without being prevented by technical objections." He (his Lordship), continuing, said that he was distinctly of the same impression. In order to determine the question it seemed relevant to dwell for a few moments on the facts of the case. The plaintiff complained of a libel upon himself contained in two different books, each written by the same author, Miss Keun, and printed by the same printers, but published by different publishers. In one case the book was entitled "My Adventures in Bolshevik Russia," and it referred to the plaintiff by his name and used words in reference to him which were plainly defamatory. In that action the defence was only a denial of liability with payment of a sum of money into Court, but it had been set down rather late, and was now about 106 cases down the list. In the second action the words complained of referred to one Major Cassell, of the British Mission in Georgia, and the plaintiff said that the reference was to him under his proper rank and his second name. Both writs were issued on the same day, but the proceedings did not quite synchronize, as one action was delayed by various interlocutory proceedings; the other action, however, proceeded rapidly, and had been brought into the list early by the act of the defendants, who gave notice of trial at a date when they knew that the plaintiff was in India. It was said that the plaintiff had been guilty of delay, but it was not disputed that if the action came on next week it would be impossible for him to succeed in it. It appeared to him (his Lordship) quite obvious that it was the duty of the defendants to provide that, if the plaintiff were abroad and were obliged to return home, he would be able to have both actions heard one after the other during the same period of leave. It was perfectly reasonable for the plaintiff to have waited until both actions had been set down for trial, and the second one had not been set down for trial until October of this year. He (his Lordship) did not take the view that the present application could have been made in May or June, or even in July. In the exercise of his judicial discretion no Judge ought to make any order that would defeat or destroy the rights of the parties, unless he was satisfied that by reason of the conduct of one of the parties he ought to do so. Here a very substantial injustice would have been done had the case come on for trial immediately. The case ought not to be heard this term, and therefore should be taken out of the weekly list. It would save considerable

expense to the plaintiff if it could be arranged that the two actions should come on, one immediately after the other. As to the other case it was unnecessary to apply for the postponement of an action which was now 106 cases off, and that appeal would therefore be dismissed.

LORD JUSTICE LAWRENCE agreed. No words of his, he thought, were needed to emphasize the reluctance of the Court of Appeal to interfere with the discretionary order of a Judge, unless it was clear that such an order must result in a denial of justice. On the facts in the present case he was convinced that if the case came on there would be such a denial. It was not suggested that the plaintiff was in any way reluctant to come to England to give evidence at the trial, and be cross-examined, but it was plain that if he was not present he must fail. He agreed with the order proposed to be made in the one case, and that in the other the appeal should be dismissed with costs.

[Solicitors—Messrs. Thorp, Saunders, and Thorp; Messrs. Field, Roscoe, and Co.; Messrs. Trower, Still, and Keeling; Messrs. Warwick Webb, Son, and Co., for Messrs. Collins, Moger, and Hughes, Bath.]

K.B. Div. (Rowlatt, J.) 1927. Nov. 28.

ATTORNEY-GENERAL v. STILL AND ANOTHER.*

Revenue — Betting duty—Returns—Default—Information by Attorney-General—Judgment for penalties—Whether a "conviction"—Order disqualifying from holding certificate—Finance Act, 1926 (16 and 17 Geo. V., c. 22), s. 17 (3).

By s. 17 (3) of the Finance Act, 1926, "Any Court before which a bookmaker is convicted of any offence under this Part of this Act or otherwise in connexion with his business as a bookmaker, may order him to be disqualified for holding a bookmaker's certificate for such period as the Court may think fit. . . ."

Held, that a judgment for penalties on an information by the Attorney-General in the High Court under s. 17 (1) for failure to make returns of bets is a "conviction" within the meaning of s. 17 (3).

This was the first motion in the High Court for an order to disqualify bookmakers from holding a bookmaker's certificate under section 17 (3) of the Finance Act, 1926, on the ground that they had been convicted of offences relating to betting duty. The respondents, Mr. Frederick Henry Still and Mr. John Bennett, carried on business in partnership at the time of the offences charged against them.

Mr. Bowstead moved on behalf of the Attorney-General; Mr. T. Carthew appeared for the respondents.

MR. BOWSTEAD read section 17 (3) of the Finance Act, 1926, which provided:—

"Any Court before which a bookmaker is convicted of any offence under this Part of this Act or otherwise in connexion with his business as a bookmaker, may order him to be disqualified for holding a bookmaker's certificate for such period as the Court may think fit, and any such certificate held by him shall, so long as the disqualification continues, be of no effect, and if any person applies for or obtains such a certificate while he is so disqualified he shall be liable to an excise penalty of one hundred pounds, and any certificate so obtained shall be of no effect."

The respondents, said counsel, had been convicted on an information by the Attorney-General in the High Court for failing, for 11 consecutive weeks, to make the return of bets required by the regulations made under the Act. Each separate offence rendered them liable to a penalty of £100, and they had been ordered to pay £1,100 in excise penalties. They were liable, in addition, to pay £1,700 for betting duty itself. The penalties might be recovered summarily, but in view of the large amount involved it was thought proper to proceed in the High Court. The respondents failed to enter appearance and were convicted in default.

MR. CARTHEW contended that this was a civil matter, and not a "conviction" which could be followed by disqualification. The word "conviction" referred to offences of a definitely criminal character, such as obstruction of an excise officer under section 16. In its ordinary sense "conviction" meant conviction before a criminal Court. On the civil nature of penalties he referred to *Attorney-General v. Bradlaugh* (14 Q.B.D., 667); Stroud's Judicial Dictionary, *s.v.* "Conviction"; *Todd v. Robinson* (12 Q.B.D., 530).

If his Lordship were against him on that, he submitted that this was not a case for disqualification. The betting duty, on its first introduction, placed a great deal of extra work on bookmakers, which was very heavy. The respondents did not, like many bookmakers, pass any of the duty on to their customers, and they sometimes found themselves unable to pay it owing to bad trade. In those cases they thought it useless to send the returns without the duty, but when they were in a position to pay they sent the returns up to date with the amount required. It was not a case of persons who had received the money and not handed it over.

MR. BOWSTEAD, in reply, referred to the forms of judgment for Crown debts and penalties respectively in the appendix to the Exchequer Rules, 1860. In the latter case the form was: "It is considered that the said A.B. be convicted of the offence charged."

MR. JUSTICE ROWLATT delivered the following considered judgment:—In this case the defendants have suffered judgment in default of appearance for Excise penalties under section 17 (1) of the Finance Act, 1926, and motion was made before me under subsection 3 of that section for an order disqualifying them from holding bookmakers' certificates. To this it was objected that they had not been convicted of any offence under this part of the Act within the meaning of that subsection on the ground that the recovery of those penalties was not a conviction.

The form of proceeding for recovery of penalties was well known when the Act was passed, and is to be found set out in the Exchequer Rules of 1860. It is there declared that the language of the judgment in a case of this kind is that the defendant be convicted of the offence giving rise to the penalty. In these circumstances it seems impossible to argue that a judgment for the penalty cannot be described as a conviction of the offence.

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* Reported by J. W. HALL and G. F. L. BRIDGMAN, Esqrs., Barristers-at-Law.

I was, however, pressed with the case of *Todd v. Robinson* (12 Q.B.D., 530). There the plaintiff sued as a common informer to recover as a debt a penalty provided by the Public Health Act, 1875, and he obtained judgment, whereupon the Treasury, purporting to act under the Remission of Penalties Act, 1859 (22 Vic., c. 32), section 1, made an order for remission of what was now a judgment debt due to the plaintiff as a "penalty or forfeiture on a convicted offender." It was held that this did not protect the debtor as the judgment was not a conviction within the meaning of that Act.

That case has no bearing on the present case. The purpose of penal provisions, such as the one in the former case, is to expose an offender to a pecuniary sacrifice in respect of his offence, from which the Crown cannot protect him, by making him liable to an informer for the penalty simply as a matter of private debt altogether outside the region of convictions, and on that ground the Court decided that case.

I therefore order disqualification for three months from the date of the judgment. The order will be endorsed on the certificates and notice will be sent to the Commissioners.

[Solicitors—The Solicitor of Customs and Excise ; Mr. W. Ewart Craigen.]

Court of Appeal.
(Lord Hanworth, M.R., Atkin and Lawrence, L.JJ.)
1927. Nov. 23.

JACOBSON v. FRACHON.*

International Law — Foreign judgments — Impeachability — Contrary to natural justice— Evidence required.

Observations on the evidence required to impeach a foreign judgment between the same parties where it is set up in answer to the plaintiff's claim.

This was an appeal from a decision of Mr. Justice Roche.

Jacobson, the plaintiff, carried on business in London. For the purposes of that business he purchased silk and crêpe de Chine goods from the defendant, a silk merchant of Lyons.

Disputes arose in connexion with the execution of those transactions, the plaintiff complaining, *inter alia*, that goods delivered to him were not of the contract quality and were not delivered within the time contracted for. A protest was made, and correspondence, and an interview at which an attempt was made to settle the case, took place. Ultimately an action was commenced in the Lyons Court by Frachon against Jacobson, and the Court appointed an expert, a M. Varenne, to examine the goods and report as to their quality. On receiving that report the French Court decided in favour of Frachon.

Jacobson brought this action against Frachon in England, and the defendant by his defence pleaded that as the matter had already been disposed of by the French Court the judgment of the French Court estopped the plaintiff from proceeding here. To that the plaintiff replied that the French judgment was not an estoppel because, in fact, the obtaining of it was "contrary to natural justice." He alleged that M. Varenne had been asked by him to examine the bulk samples which the defendant had sent him, but had refused point blank to do so ; that he also refused to examine other goods, and refused to hear witnesses whom the plaintiff presented to him ; that he was guilty of perversity and misconduct ; and that his position was similar to that of an official referee in the English Courts, and the refusal by an official of the Court to hear evidence was a denial of natural justice.

It was further alleged that M. Varenne ought not to have been appointed, as he was a brother-in-law of a partner of Frachon.

Since the action was begun in England Jacobson had applied to the French Court for the appointment of a fresh expert, but this was refused, and an appeal which had been lodged was withdrawn. The plaintiff, however, pursued his action here, contending that, unwilling as our Courts were to set aside the judgments of the Courts of a friendly country, they could and would do so in cases where those judgments had outraged natural justice.

Mr. Justice Roche expressed opinions unfavourable to the action of M. Varenne, and characterized his report on the quality of the goods shipped as an "uncandid document." He declined, however, to give a judgment which virtually would reverse that of the French Court and dismissed the action, but without costs.

The plaintiff appealed.

Mr. J. B. Matthews, K.C., Mr. Turner-Samuels, and Mr. C. F. Shoolbred for the appellant relied upon *Salvesen or von Lorang v. Administrator of Austrian Property* (43 *The Times* L.R., 609 ; [1927] A.C., 641) as showing that to prevent a failure of justice our Courts would set aside foreign judgments. In Westlake's International Law, 7th Edition, at p. 407, it was said that there was that exception to the respect which our Courts paid to the Courts of other countries.

Mr. Jowitt, K.C., and Mr. Stenham appeared for the respondent.

The Master of the Rolls, in the course of his judgment, referred to the contracts and said that complaints were made both as to the quality of goods and as to the time of delivery in the case of the first contract, and it was uncontested that no deliveries were made under the second contract. Protests were made, and correspondence took place, and an attempt was made, without result, to settle the dispute. There were undoubtedly breaches of contract by the defendant. The first step in the litigation was taken by the issue of a writ by Frachon in the French Court at Lyons claiming cancellation of the contract and damages. After various proceedings an expert, M. Varenne, was appointed by the Court on October 30, 1925. He was directed to come to London, inspect the goods in the plaintiff's possession, hear the statements of witnesses, inspect the contract, and report to the Commercial Court at Lyons. That order was made in accordance with chapter 14 of the Code Civil. On January 26, 1926, he made a preliminary examination at Lyons, and on February 5 he came over here to inspect and report. The plaintiff took exception to M. Varenne's report ; it was said that in one and a half hours he endeavoured to examine over 100 pieces of stuff, but would not hear any witnesses and made but a perfunctory examination of some of the pieces. On March 15, 1926, he made his report in favour of the view presented by the defendant, and said, in terms, that, even if there had been delay and if the goods were not in accordance with the contract, yet the facts

* Reported by G. T. Whitfield-Hayes and H. Langford Lewis, Esqrs., Barristers-at-Law.

were not such as to justify the plaintiff's attitude. The report was served on the parties. Mr. Jacobson appeared in the French Court, though an Englishman, and was represented by a French advocate, who took objections to the report. On May 17 an application was made to the Court to appoint another expert in place of M. Varenne, but the Court rejected it. On June 10 the case was argued in the Court at Lyons, on materials presented to the Court by counsel for Mr. Jacobson, but the Court accepted the report of M. Varenne and ordered the contract to be cancelled and Mr. Jacobson to pay £200.

It was plain from the judgment of Mr. Justice Roche that there was serious ground for thinking that M. Varenne did not exercise his functions in the manner that would be expected of an expert in this country. There was grave reason to suppose that the plaintiff's case had not been properly or adequately considered in the French Court.

In the English Court the defence was put in in December, 1925, and amended and redelivered on October 19, 1926, by pleading the estoppel created by the French judgment in favour of the defendant. A reply was filed by February 14, 1927, protesting against the action of M. Varenne, pleading that he did not make a proper examination of the goods or hear the plaintiff's witnesses, and that the whole procedure was contrary to the British idea of natural justice.

That issue, of course, raised the question whether the judgment which had been pleaded in answer to the claim was one that could be enforced by our Courts, or whether it ought to be ignored. Mr. Justice Roche came to certain conclusions, which the Court quite accepted, conclusions which were severe on M. Varenne's conduct. He described the report as the "uncandid production of a biased and prejudiced mind." That being so, the Court had to consider very carefully whether effect ought to be given to the judgment of the French Court.

The Courts had made it a rule of comity with foreign nations to accept the judgments of their Courts of competent jurisdiction. The passage accepted as the best authority on the point was that of the then Master of the Rolls, Lord Lindley, in *Pemberton v. Hughes* (15 *The Times* L.R., 211; [1899] 1 Ch., 781), where he said at p. 790 :—

"If a judgment is pronounced by a foreign Court over persons within its jurisdiction, and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice."

There were a number of cases in which it had been held that a foreign judgment could not be impeached on its merits, or on a mistake made in it, either of foreign or of English law. It must be assumed that the procedure of the foreign Court had been regular and rightly carried out. On those principles it was very difficult to set aside the foreign judgment, even if this Court came to the conclusion that M. Varenne's report was unfair.

It was then said that it was contrary to natural justice that the plaintiff should be compelled to pay damages, but the question of natural justice was almost entirely confined to the question whether there had been a proper hearing of the case (*Robinson v. Fenner*, [1913] 3 K.B., 835). It was quite plain from the article of the Code Civil, under which M. Varenne was appointed, that the Court was not bound to follow M. Varenne's report, which was simply evidence before the Court. The Court did consider the objections made to his report, and his refusal to examine witnesses, and came to the conclusion that they would accept the report.

It seemed, therefore, impossible to impeach the judgment on those grounds.

Then came another point. It was discovered that M. Varenne and a partner of M. Frachon in another business had married sisters. In May a private detective was instructed to find out what he could about the matter. In the result there was no evidence that connected M. Frachon with any sinister charge that could be preferred against M. Varenne. The French Appeal Court were asked to postpone the case until after the English action, but no application was made to the French Court to reconsider their attitude in view of the suggested bias of M. Varenne in favour of the defendant; at any rate, Mr. Jacobson had abandoned his appeal in the French Courts. The case could not be put higher on this point than that M. Varenne ought not to have been appointed an expert to report. It amounted to this, that the French Court might have been misled, but its judgment stood valid (*Abouloff v. Oppenheimer*, 10 Q.B.D., 295, at p. 301).

Dicey in his Conflict of Laws put the matter in this way: "A foreign judgment is invalid if obtained by fraud, either of the party or of the Court." A rather better statement of the very narrow rule was given by Lord Chief Justice Coleridge in *Abouloff v. Oppenheimer* (*supra*), where he said: "Although it is not permitted to show that the Court were mistaken, it may be shown that they were misled"; and Lord Justice Brett in the same case at p. 307 said: "It is immaterial to consider whether it"—*i.e.*, the judgment of the foreign Court—"was erroneous by reason of a wrong appreciation of the evidence or of the law, or by reason of frauds perpetrated on the Courts by witnesses other than the plaintiff and her husband; the only manner in which that foreign judgment can be rendered ineffective upon the ground of fraud is by proving that it was obtained by the fraud of the plaintiff, who now relies upon it."

To apply that standard to the present case, however indignant the plaintiff and his advisers might feel that their case was not properly handled by M. Varenne or the foreign Court, the evidence before the Court here fell far short of what was necessary to get over the judgment of the French Court. He (his Lordship) thought that the judgment of Mr. Justice Roche was right, and the appeal must be dismissed, with costs.

Lord Justice Atkin, having detailed the facts, said that the question was whether the judgment in the French action afforded a defence to the plaintiff's claim in the present case. *Prima facie* a foreign judgment would be a defence to an action brought on the same subject-matter, not that the debt was merged in the judgment, but it was a debt due from one party to the other, and the parties were estopped from again litigating the same subject-matter by reason of the decision of a Court of competent jurisdiction. The reply was that the foreign judgment was contrary to British views of natural justice, *per* Lord Lindley in *Pemberton v. Hughes* (15 *The Times* L.R., 211; [1899] 1 Ch., 781). But it was quite plain from the context that Lord Lindley was dealing not with the merits of the case or the actual decision, but with proceedings in the case offending against English views of natural justice, for in the same case he said ([1899] 1 Ch., at p. 792): "A judgment of a foreign Court having jurisdiction over the parties and subject-matter . . . cannot be impeached in this country on its merits."

It could only be impeached if the proceedings, the method by which the Court came to its final decision, were "contrary to the principles of natural justice"—principles which were not always easy to define, or to invite everybody to agree about. Those principles seemed to him (his Lordship) to involve, first, that the Court, being a Court of competent jurisdiction, had given notice to the litigant that they were about to proceed to determine the case, and, secondly, that he should be afforded an opportunity of substantially presenting his case before the Court. The rule had been expressed in Professor Dicey's Conflict of Laws (rule 107) somewhat too narrowly.

His Lordship then dealt with the facts as to the appointment and duties of M. Varenne as expert and the terms of the order appointing him. It was said that the Court had delegated to M. Varenne its duty of investigating the facts and hearing the witnesses, and that his finding was substantially the finding of the Court. As to what M. Varenne did, if that were the true position, the judgment could not stand for a moment. He had examined the goods in a hurry, and had absolutely refused to hear the evidence of Mr. Jacobson and others. He was invited to consider the evidence that the seller's representatives had admitted over and over again that the goods were not equal to sample. The learned Judge had found that the report was the erroneous and uncandid production of a biased and prejudiced mind, and he (his Lordship) had no reason to differ from that finding. Again, M. Varenne did not deal at all with any explanation of the circumstances of the second contract, as to which there appeared to be no defence in respect of the claim for non-delivery. But the question was whether M. Varenne's refusal to hear the evidence was the refusal of the Court to hear the evidence of the party, and it was in that respect that he thought the plaintiff's claim failed. The affidavit of the French expert M. Monsarrat showed that the report of an expert appointed by the Court was evidence only as to the matters set out therein, and the French Court was not in the least bound to accept and act on such a report. The party who had requested the Court to appoint the expert was not prevented from attacking his report and adducing such further evidence as the Court would admit, and certain certificates and a statement in writing as to the condition of some of the goods delivered under the first contract, sent in by the plaintiff, were evidence admissible in the French action, and the Court might accept and act thereon, and if satisfied thereby reject the report. The Tribunal of Commerce came to the conclusion that, notwithstanding those facts, they would accept the report of M. Varenne and they did accept it, and in those circumstances treated the contract as having been broken by Mr. Jacobson, and awarded £200 damages to M. Frachon with what appeared to be a very modest sum for costs. Therefore it was quite impossible to make out that the French Court refused to hear Mr. Jacobson's evidence or his case. He (his Lordship) failed to find that there was any violation of the ordinary principles of justice in accordance with our rules.

He assumed, in justice to the Tribunal, that they did not know that the expert whom they had appointed was connected by marriage with a partner of the defendant. No doubt on the facts elicited that created a likelihood of bias on the part of M. Varenne, and explained the bias which the learned Judge found to have existed. The question arose whether that fact in itself was sufficient to show that the decision had been arrived at in a way contrary to the principles of natural justice. He (his Lordship) was bound to say that he did not think the rules did permit such a fact to invalidate the judgment. It was only an attack on the merits of the decision, and not an attack on the procedure. It would be different if it could be shown that M. Frachon had himself procured a witness whom he knew to be a biased witness, and who would be likely to mislead the Court. That would be fraud on his part. But here the order of the Court nominated M. Varenne as though he were in fact appointed by the Court.

In those circumstances, seeing that there was no violation of the principles of substantial justice in regard to the proceedings, and no allegation of fraud against M. Frachon and indeed no evidence to lead to the conclusion that there was fraud, he (his Lordship) thought that the judgment was a valid foreign judgment, and if that were so it afforded a defence to the claim. The appeal must therefore be dismissed.

LORD JUSTICE LAWRENCE agreed.

[Solicitors—Messrs. C. Butcher and Simon Burns; Messrs. Russell and Arnholz.]

K.B. Div. (Salter and Talbot, JJ.) 1927. Nov. 17.

TURNER v. WATTS.*

Landlord and Tenant—Restrictions—Weekly tenancy — Determination — Agreement by tenant to purchase house—Position of tenant after rescission of agreement—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 12 (7).

By an agreement in writing dated August 28, 1926, the defendant, who was the weekly tenant of a house to which the Rent Restriction Acts applied, agreed to buy it from the plaintiff, the landlord, for £900. The agreement also provided that the defendant acknowledged owing the plaintiff £63 10s. arrears of rent and that the plaintiff would accept £50 in settlement; that, until certain mortgages had been transferred from the plaintiff to the defendant, the plaintiff should remain in absolute ownership of the premises; and that, until the completion of the conveyance, the defendant, who was to remain in possession, should pay to the plaintiff interest on the £950 at the rate of 6 per cent. with interest on interest dating from September 1, 1926. The defendant also agreed to pay certain deposits, the plaintiff, on failure of such payments, to be entitled to rescind the agreement and enter into possession of the house. The defendant agreed to maintain the house in a good state of repair and to pay rates, taxes, and insurance.

On February 27, 1927, the plaintiff rescinded the agreement under the powers reserved in it. The defendant refused to give him possession of the house and the plaintiff brought this action for recovery of possession, arrears of rent, and mesne profits.

* Reported by G. F. L. BRIDGMAN, Esq., Barrister-at-Law.

Held, that the effect of the agreement, as indicating the intention of the parties, was to determine the weekly tenancy and to substitute for it either a licence or a tenancy at will which, in its turn, was revoked or determined by the rescission of the purchase agreement. The defendant, therefore, had no contractual right to resist the claim for possession.

Dictum of Parke, B., in *Weddall v. Capes* (1 M. and W., 50, at p. 52) applied.

Doe d. Gray v. Stanion (1 M. and W., 695) distinguished.

Held, further, that the defendant was not protected by the Rent Restriction Acts. After August 28, 1926, the defendant remained in possession of the house by virtue of the contract of purchase and not as a statutory tenant. Under that contract she was either a licensee or a tenant at will. After its rescission, if she had been a licensee, she was not a tenant who had held over under the Acts ; if she had been a tenant at will her tenancy had been at no rent and, by section 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, it must be ignored, with the result that the house was to be treated as untenanted and the plaintiff had an unrestricted right to recover possession of it.

Bracey v. Pales (43 *The Times* L.R., 69 ; [1927] 1 K.B., 818) applied.

Held, further, that the rescission of the purchase agreement did not deprive the plaintiff of his right to the arrears of rent which had accrued due to him before the agreement was made. It did, however, destroy the defendant's right to enforce the agreement with the plaintiff to accept a less sum than that which was in fact owing.

This was an appeal by the defendant from a decision of the Bristol County Court. There was a cross-appeal by the plaintiff.

The facts and arguments appear fully in the judgments.

Mr. Cecil Havers appeared for the appellant ; Mr. J. B. Matthews, K.C., and Mr. W. G. H. Cook for the respondent.

After consideration the following judgments were read :—

Mr. Justice Salter.—This was an action in the Bristol County Court to recover possession of certain premises and for arrears of rent and mesne profits. The defendant counterclaimed money due under an agreement.

The premises—529, Fishponds-road, Bristol—are a dwelling house to which the Rent Restriction Acts apply. By an agreement in writing dated August 28, 1926, the defendant, who was a weekly tenant at a rent of £1 2s. 2d. a week, agreed to buy the house from the plaintiff for £900. She remained in possession pending the completion of the purchase. The agreement was in force from its date to February 27, 1927, and on that day it was rescinded by the plaintiff in pursuance of a power reserved in the agreement. During the currency of the agreement, on December 3, 1926, the parties made a parol agreement that the defendant should render certain services to the plaintiff and should be paid therefor £100. Having rescinded the purchase agreement, the plaintiff brought this action claiming possession, arrears of rent which had accrued before the purchase agreement and mesne profits. The defendant counterclaimed £100 for services alleged to have been rendered under the parol agreement. The plaintiff had judgment for possession and certain mesne profits but not for the arrears of rent. The defendant had judgment on her counterclaim for £100. The judgment is challenged on every point except mesne profits. The defendant appeals against the order for possession. The plaintiff makes a cross-appeal against the refusal of the arrears of rent and the judgment for the defendant on the counterclaim.

I will deal first with the plaintiff's claim to possession. As to this, the defendant submitted (1) that the Court had no jurisdiction, (2) that the weekly tenancy had not been determined, and (3) that she was protected by the Rent Restrictions Act.

As to jurisdiction, section 67 of the County Courts Act, 1888, was relied on, but this was not an action for the rescission of the purchase agreement. So far as this was an action of ejectment, section 59 of the Act (as amended by section 3 of the County Courts Act, 1903) applied, and the Court had jurisdiction.

On the question whether the weekly tenancy was determined before action, the plaintiff stated that he gave the defendant a week's notice to determine it. There was no evidence of when this notice was given, or whether it was valid, and the learned Judge did not rely on it. His view, with which I agree, was that the weekly tenancy was determined by the purchase agreement. Indeed, the validity of this defence, and also of the defence under the Rent Restriction Acts, depends on the construction of that agreement. It is inartificially drawn. The defendant acknowledges that she is indebted to the plaintiff in the sum of £63 10s., arrears of rent, and the plaintiff agrees to accept £50 in full settlement of the debt. The plaintiff agrees to sell and the defendant to buy the house for £900 "together with a further £50, arrears of rent due as aforesaid, making a total of £950." Clause 4 is as follows :—"That until suitable arrangements can be made for the transfer of the existing first and second mortgages from the vendor to the purchaser the vendor shall remain in absolute ownership of the premises and that until the completion of the conveyance the said Maud Watts will pay to the vendor interest on the aforesaid £950 at the rate of 6 per cent. per annum with interest on interest dating from the first day of September 1926." The defendant further agrees to increase, by monthly payments of £5, her present deposits in two companies which are said to be the second mortgagees of the house. If she is more than fourteen days in arrear with any of the deposits the plaintiff may forthwith rescind the purchase agreement and enter into vacant possession of the house. The defendant agrees to assign her dividends in these companies to the plaintiff as collateral security until the interest due to him under the agreement has been paid. The defendant agrees to pay all rates, taxes, insurance, repairs, and outgoings as from September 1, 1926, and to keep the house in good repair. The plaintiff undertakes to procure a transfer to the defendant of the second mortgage as soon as the deposits shall have been increased to £100, "after which the said Maud Watts shall enter into the unrestricted possession of the premises together with the conveyance subject only to any payments still due on mortgage or by way of interest under paragraph 4 hereof."

Some parts of this agreement are obscure, but the question to be considered is the nature of the right (if any) of occupation or possession which it gives to the defendant pending the completion of the purchase. In *Weddall v. Capes* (1 M. and W., 50, at p. 52), Baron Parke said : "No particular words are necessary to make a surrender, if it sufficiently appear to be the intention of both parties that the term should immediately cease." In *Doe d. Gray v. Stanion* (1 M. and W., 695) there was an agreement by a tenant from year to year to purchase the reversion. The purchase money was to lie at interest. No date was fixed from which interest was to be payable. It was held that the yearly tenancy was not surrendered by operation of law because there was an implied condition that the vendor should make a good title. Baron Parke said (at p. 700) : "Where the purchaser is already in possession as tenant from year to year, it must depend upon the intention of the parties, to be collected from the agreement, whether a new tenancy at will is created or not, and from what time. In this case, if the true construction of the agreement be, that from the date of it (or any other certain time), the defendant was to be absolutely a debtor for the purchase money, paying interest on it, and to cease to pay rent as tenant from year to year, a tenancy at will would probably be created after that time ; and the acceptance of such new demise at will would then operate as a surrender of the interest from year to year, by operation of law."

In the present case it is plain that the defendant is not to pay any rent and the plaintiff said that he so understood the agreement. On the other hand, the purchase money is to be paid by September 1, or interest becomes payable from that date. The defendant, in my opinion, has a right under the agreement, as purchaser, to use and occupy the house pending completion. She can call for a conveyance at any time on paying the purchase money and any arrears of interest. If she is more than a licensee and acquires any estate in the land, it is no more than a tenancy at will. The weekly tenancy is surrendered, either expressly or by operation of law. In either case, it is determined at the date of the agreement to buy. The letter of February 27, 1927, which rescinded the purchase agreement, revoked the licence, or determined the tenancy at will. From that time to the commencement of the action there is no evidence of any contract of tenancy between the parties. The defendant, therefore, had no contractual right to resist the claim to possession.

The defence set up under the Rent Restriction Acts raises the question whether the defendant was a statutory tenant of the house when the action was brought. The Acts were passed to protect tenants from increase of rent and eviction, not to protect mere trespassers. Section 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended and modified by the later legislation, protects only the statutory tenant from eviction. The statutory tenant (section 15 of the same Act) is an occupier who, on the determination of his contractual tenancy, holds over by virtue of the Act. If he holds over by virtue of a contract with the landlord he neither needs nor receives any statutory protection. It seems that a statutory tenant may have contractual rights against the statutory landlord, as, for example, an option of purchase : *William McIlroy, Limited v. Clements* ([1923] W.N., 81, 149) ; but it is impossible that he should have a contractual right to occupy. It is impossible that he should occupy on the terms imposed by the Acts and at the same time occupy on different terms imposed by a contract with the landlord. After August 28, 1926, the defendant remained in possession by virtue of the contract of purchase and not by virtue of any statute. Therefore, she was not a statutory tenant during the currency of the purchase agreement. Then, did she become a statutory tenant when the contract of purchase was rescinded ? If she was a mere licensee, she was not a "tenant" who held over under the Acts. If she was a tenant at will, then the rescission of the purchase agreement determined the tenancy and she would have become a statutory tenant, and been entitled to protection, but for the provisions of section 12 (7) of the Act of 1920. The tenancy at will, if any, having been a tenancy at no rent, the Rent Restriction Acts are to apply to this dwelling-house "as if no such tenancy existed or ever had existed." That is, the house must be treated for the purposes of the Acts as untenanted and there is nothing in the Acts to restrict the right of the owner of an untenanted house to recover his property : *Bracey v. Pales* (43 *The Times* L.R., 69 ; [1927] 1 K.B., 818). The judgment for possession was therefore right.

As to the claim for arrears of rent, the learned Judge has given no reason for ignoring it. It was argued before us, and perhaps before him, that the rescission of the purchase agreement destroyed the plaintiff's right to rent which accrued due to him before that agreement was made. I think the rescission put an end to the plaintiff's agreement to commute the arrears agreed at £63 10s. to £50, and to wait for payment until completion of the purchase, the debtor paying interest meanwhile. Strictly, I think the plaintiff is entitled to £63 10s., but, as he is willing to take £50, there should be judgment for that sum. It was vaguely suggested by the defendant that the plaintiff was indebted to her for wages. He denied that he ever employed her. She did not counterclaim for any wages and the learned Judge makes no reference to the matter. If she has any such right she can enforce it, but this suggestion ought not to prevent the plaintiff from having judgment for the arrears of rent.

It remains to consider the counterclaim, which is an entirely separate matter. The defendant made two monthly payments of £5 in accordance with clause 5 of the agreement and made default in paying the third, which was due on November 28, 1926. The days of grace would expire on December 12. On December 3 the parties met and, notwithstanding the plaintiff's denial, the learned Judge was satisfied that a parol agreement was made. It was an agreement that the defendant should render services to the plaintiff and should be paid £100 therefor. The questions are, what were the services to be rendered to entitle the defendant to payment, and were they rendered ? One agreement was pleaded, another was sought to be proved, and a third has been found by the learned Judge. The agreement pleaded was that the defendant should give vacant possession to Mrs. Walker on completion of a sale of the house by the plaintiff to Mrs. Walker. No evidence of such agreement was given. If it had been proved, the counterclaim must have failed, since the time for completion with Mrs. Walker had not arrived when the counterclaim was made. In fact, the defendant has never given possession either to Mrs. Walker or to the plaintiff. The agreement to which the evidence of the defendant and her witnesses was directed (and it was put to the plaintiff in cross-examination) was an agreement that the defendant should give vacant possession to the plaintiff to enable him to give

vacant possession to Mrs. Walker and that the plaintiff should pay her £100 for so doing. It is not clear that the learned Judge found this agreement proved. If he did, then it is said that it was unenforceable without writing under section 40 of the Law of Property Act, 1925. I doubt if the defendant had any interest to dispose of. I think that the contract was only a contract not to give trouble. But assuming the contract to be proved in fact and enforceable at law, it is plain that the service was not rendered. If, when the plaintiff brought his action, the defendant had admitted his right to immediate possession, she might perhaps have recovered the £100, subject to questions of costs. But she claimed to be paid the money while denying the right to possession. She has kept the plaintiff out of possession of his house on every possible pretext to this day and he has, therefore, been unable to complete the sale to Mrs. Walker. The learned Judge, in a supplementary note, states that he finds that the plaintiff agreed to pay the defendant £100 if she would default in making the deposits and so enable him to rescind the contract of sale. No doubt it was part of the arrangement that the contract of sale should be rescinded, but there was no evidence on which it could be held that the plaintiff promised to pay the defendant £100 while she withheld possession of the house. In my opinion, there was no evidence showing any right in the defendant to recover any money from the plaintiff for services rendered.

The defendant's appeal, therefore, fails, and the plaintiff's cross-appeal succeeds. The judgment on the claim must be amended by adding judgment for £50 arrears of rent. The judgment for the defendant on the counterclaim must be set aside and judgment entered for the plaintiff. The plaintiff must have the costs in the County Court and the costs of this appeal.

Mr. Justice Talbot.—I take first the contention that the Judge was wrong in holding that the agreement of August 28, 1926, operated as a surrender of the defendant's tenancy. The tenancy here was weekly and, therefore, it was not necessary that a surrender of it should be by deed. It is enough if it was in writing or by operation of law. No particular words are necessary to make a surrender. It is enough "if it sufficiently appear to be the intention of both parties that the term should immediately cease," *per* Baron Parke, in *Weddall v. Capes* (1 M. and W., 50, at p. 52).

In my opinion, that is the effect of the agreement of August 28, 1926. There is an agreement for sale by the landlord, the plaintiff, to the tenant, the defendant—an agreement that, till arrangements can be made for the transfer of certain mortgages to the defendant, the plaintiff is to "remain in absolute ownership of the premises," the defendant paying compound interest on the purchase money until completion of the purchase. There is also an agreement for the payment by the defendant monthly of certain "deposits" and a provision that, if these payments are in arrear for more than 14 days, the plaintiff may forthwith rescind the agreement for purchase of the premises and "enter into their possession" forthwith. It is clear, in my opinion, that the intention was to put an end to the weekly tenancy as from the date of the agreement, and to substitute for it a new relation defined by this agreement, namely, a contract for sale on certain conditions by the plaintiff to the defendant, the defendant remaining in actual occupation without tenancy or rent and paying interest on the purchase money until completion.

There was, therefore, a surrender by writing signed by the surrenderor, and it is unnecessary to resort to surrender by operation of law. This differentiates the case entirely from that of *Doe d. Gray v. Stanion* (1 M. and W., 695), in which it was sought to extract from a bare note of an agreement for purchase of the freehold by a tenant from year to year, the purchase money to lie unpaid at 4 per cent. interest, a surrender by operation of law. It was held that such an agreement for purchase cannot, without more, have that effect, because (apart from anything else) such an agreement is always conditional on the making of a good title by the vendor, and it requires plain words to show that a substantial interest is surrendered on the expectation of a purchase which it may never be possible to complete. But the judgment of the Court recognizes that there may be an agreement for purchase of which the terms prove that the parties intended an immediate end of the tenancy, and it is obvious that such an intention is much less unlikely in the case of a weekly tenancy than where the interest is greater. The weekly tenancy having, therefore, been surrendered, the right of the plaintiff to possession depends on, and is established by, clause 6 of the agreement of August 28, 1926.

The next question is whether the learned Judge was right in holding that the plaintiff was not prevented from recovering possession by the Rent Restriction Acts. On this point the defendant relied on *Barton v. Fincham* (37 *The Times* L.R., 386; [1921] 2 K.B., 291). That case decides that, by agreeing for consideration to give notice to quit for a particular day, the tenant of premises to which the Acts apply cannot enable a Court to make an order for possession after that day unless the conditions required by section 5 of the Act of 1920 (as modified by the Act of 1923) have been fulfilled. It does not decide, nor, so far as I know, does any other case, that where a contractual tenancy has actually been surrendered and the person who was tenant remains in possession, not at a rent nor under the Act, but under an agreement to purchase the freehold, an order for possession cannot be made. These are the facts, as I understand them, of the present case. In my opinion, *Barton v. Fincham* (*supra*) does not apply, and I know of no principle or authority showing that the learned Judge was wrong in holding that the Rent Restriction Acts do not protect the defendant.

As to the cross-appeal, the first point taken is that the Judge was wrong in refusing to give the plaintiff judgment for £63 10s. claimed as arrears of rent. The agreement of August 28, 1926, contains an express acknowledgment by the defendant that rent to that amount was then due from her to the plaintiff, and it was agreed that £50 in satisfaction of that debt should be paid by the defendant in addition to the purchase money (£900) for the freehold. The defendant does not say that the arrears are not due. She merely suggests that she, or her husband, has cross-claims for a much larger amount. She has, however, made no counterclaim in respect of them, and there was (so far as appears) nothing to justify the refusal by the Judge to give the plaintiff judgment for this part of his claim. Neither the £900 nor the other £50 has been paid and the agreement has been rescinded by the plaintiff under clause 6. The plaintiff's counsel being willing that judgment should be entered for £50 only, it is unnecessary to consider whether the full amount of £63 10s. is still due. I am of opinion that the judgment on this point cannot be supported.

The next point on the cross-appeal relates to a sum of £100 for which the Judge has given judgment on the defendant's counterclaim. This claim was based on an oral agreement alleged to have been made on December 3, 1926, between the plaintiff and the defendant whereby (*inter alia*) the plaintiff agreed to pay to the defendant £100 in consideration of the defendant agreeing to give vacant possession of the premises to the purchaser of them from the plaintiff on completion of the purchase. To this section 40 of the Law of Property Act, 1925 (which now takes the place of section 4 of the Statute of Frauds as to land or any interest in land), may (by leave of the Judge) be pleaded. What was proved at the trial was an agreement to pay £100 if the defendant would give vacant possession to the plaintiff. The Judge thus states his finding regarding this oral contract in a supplemental note : "I came to the conclusion . . . that, on December 3, 1926, the plaintiff induced the defendant to agree to discontinue [paying the deposits] in consideration of his undertaking to pay her £100 ; that he did this to bring about a breach of that agreement, enabling him to rescind it ; and that it was on the faith of such undertaking that the defendant discontinued the payments and lost her rights under the agreement. . . . I did not believe the plaintiff's statement that the agreement by him to pay £100 was merely 'voluntary' or 'as a gift.'" As to this the defendant appears to me to be in a dilemma. If the effect of this judgment is that the consideration for the agreement to pay £100 was an agreement to give vacant possession, it was conceded by counsel for the defendant that the contract is within section 40 and that, in the absence of a note in writing, it cannot be sued on. If, on the other hand, the Judge meant to find some different agreement, *e.g.*, to discontinue the payments under clause 5 of the agreement of August 28, 1926, no such agreement was proved. On the contrary, the evidence of the defendant's witnesses, which the Judge says he accepts, is clear that the consideration for the promise to pay £100 was the agreement to give vacant possession. I think that the plaintiff was entitled to assume, in the absence of distinct words to the contrary, that the Judge found the agreement to be that proved by the evidence which he accepted and that it was not necessary to include in his grounds of cross-appeal a contention that there was no evidence to support the finding. I do not think that the County Court Judge did really find that agreement to be other than that which the defendant's witnesses swore to. I think he only referred to the plaintiff's discontinuance of the payments under clause 5 of the agreement of August 28, 1926, to explain how it came about. It is, moreover, a fatal objection, in my opinion, to the defendant's claim for £100 that she has not proved, and apparently cannot prove, that she was at any time ready and willing to perform her part of the agreement, viz., to give vacant possession of the premises.

A point was taken in the defendant's notice of appeal with regard to the jurisdiction of the County Court. We understood in the course of the argument that this contention was misconceived and it was, I think, virtually abandoned, and very properly so, by the learned counsel for the defendant.

In my opinion, this appeal should be dismissed, but the cross-appeal should be allowed as to the £50 and the £100 in the counterclaim.

[Solicitors—Messrs. E. C. Rawlings, Butt and Co., for Mr. F. E. C. Habgood, Bristol ; Mr. Theodore Roberts.]

Court of Appeal. (Scrutton, Sargant, and Greer, L.JJ.) 1927. Nov. 15.

SMITH AND OTHERS v. SCHILLING.*

Practice—Payment into Court—Action for negligence by three plaintiffs—Separate causes of action—General payment into Court by defendant — Validity — Verdict against one plaintiff—Verdict for two plaintiffs—Damages —Inadequacy—R.S.C. Order XVI., r. 1, Order XXII., r. 1.

A general payment into Court by a defendant with a denial of liability, under Order XXII., is not a good payment in, in the case of an action brought against the defendant by several plaintiffs each having a separate cause of action.

Benning v. Ilford Gas Company (23 *The Times* L.R., 485 ; [1907] 2 K.B., 290) overruled.

This was an appeal by the plaintiffs from a judgment and verdict on the trial of an action before Mr. Justice Swift and a common jury.

The action was brought by three plaintiffs, the male plaintiff, Mr. Shed Smith, the female plaintiff, Mrs. Fanny Mary Leah Smith (the male plaintiff's wife), and the infant plaintiff, Miss Dorothy Smith (the daughter), to recover damages from the defendant for negligence in the driving and management of a Ford motor-van in the Lewisham High-road on March 15, 1926, whereby a collision occurred between the defendant's motor-van and a motor-cycle combination owned and driven by the male plaintiff, in which the other two plaintiffs were being carried as passengers.

The defendant, by his amended defence, denied liability and alleged that the accident was caused solely by the negligence of the male plaintiff in and about the riding of the motor-cycle combination referred to. As an alternative defence, the defendant paid into Court the sum of £150 and said that that was sufficient to satisfy the whole of the claims of the three plaintiffs.

The jury found that the defendant had been negligent, but that the male plaintiff had been guilty of contributory negligence. They awarded the female plaintiff £15 damages and the infant plaintiff £5 damages.

After legal arguments on the findings of the jury, Mr. Justice Swift said : The jury have found that there was negligence on the part of Mr. George Schilling, and that there was negligence which contributed to the accident on the part of Mr. Shed Smith, and it is clear that upon that part of the case Mr. Schilling is entitled to judgment against Mr. Shed Smith. It is equally clear that as the accident was caused by the combined negligence of the two, both the plaintiff (Mr. Shed Smith) and the defendant, the other plaintiffs, Fanny Mary Leah Smith and Dorothy Smith, are entitled to the damages the jury have awarded, namely, Mrs. Smith, £15, and Dorothy Smith, £5. I say nothing about the damages awarded to Dorothy Smith, except that they certainly do not err on the side of generosity. With regard to the damages awarded to Mrs. Smith, in my opinion they are totally inadequate. She sustained a fractured shoulder-blade, she was rendered unconscious, she was kept in hospital and was for three months under

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

the care of her own doctor, and she was prevented for a considerable time from following her occupation, and even now she still suffers as a consequence of the accident. I have no doubt whatever that the figure of £15, which is quite inadequate, was arrived at by a compromise, and a compromise which is distinctly unfair to the plaintiff Mrs. Fanny Mary Leah Smith. But I do not know what I can do in regard to the matter. If this is to be set right, as indeed it ought to be set right, it must be done by the Court of Appeal. It appears that the defendant amended his defence and paid £150 into Court in satisfaction of the claims of the three plaintiffs. I should have thought that any payment into Court of that sort was a bad payment in. I do not see how any one of the three plaintiffs, who are quite independent plaintiffs, could have taken out any of the sum which was in Court. If Dorothy Smith had said, "I am quite satisfied, I will take that £150 out," then the other two could have objected. It is suggested that there was some sort of arrangement between them as to the bringing of the action, and therefore they must arrange between themselves as to the apportionment of the £150. I should have thought myself, had I been free in the matter, that that was a bad payment in and that the defendant could not take any advantage of it. But there is the authority of the case of *Benning v. Ilford Gas Company* (23 *The Times* L.R., 485 ; [1907] 2 K.B., 290), which I am unable to distinguish from the present case and which I think is binding upon me, and there is, therefore, no course open to me except to enter judgment for the defendant against all three of the plaintiffs, with costs as against the male plaintiff of the whole action, and with costs as against the other two plaintiffs from the time of the payment into Court.

The plaintiffs appealed.

Mr. W. Elliott Batt appeared for the appellants ; and Mr. Melville, K.C., and Mr. R. O. Mobbs for the respondent.

Lord Justice Scrutton, in delivering judgment, referred to the facts and read a passage from the judgment of Mr. Justice Swift, as follows : "With regard to the damages awarded to Mrs. Smith, in my opinion they are totally inadequate. She sustained a fractured shoulder-blade, she was rendered unconscious, she was kept in hospital and was for three months under the care of her own doctor, and she was prevented for a considerable time from following her occupation, and even now she still suffers as a consequence of the accident. I have no doubt whatever that the figure of £15, which is quite inadequate, was arrived at by a compromise, and a compromise which is distinctly unfair to the plaintiff Mrs. Fanny Mary Leah Smith. But I do not know what I can do in regard to the matter. If this is to be set right, as indeed it ought to be set right, it must be done by the Court of Appeal."

The Court of Appeal always paid great attention to the views expressed by the Judge who tried the action. Such views were, of course, not conclusive, but they constituted a very important element to be considered by the Court in arriving at its decision. In the present case the amount of damages awarded was not generous and one could understand that the jury might easily have thought that the female plaintiff was in some way identified with the male plaintiff's negligence. The Court would be slow to interfere with the amount found by the jury and would not interfere merely because they themselves would have awarded a different amount from that awarded by the jury. They must be satisfied, with the assistance of the report of the trial Judge, that the jury must have taken into consideration something which they ought not to have considered or have disregarded something which they ought to have considered.

He (Lord Justice Scrutton) came to the conclusion that the jury in this case must have taken into account something that they ought not to have considered or they must have disregarded something which they ought to have taken into consideration in arriving at their award of £15 damages for the wife. In these circumstances the Court would interfere, but, instead of sending the case back for a new trial, the Court, with the consent of the parties, would themselves assess damages.

Then a question arose with regard to payment into Court. A sum of £150 had been paid into Court, with a denial of liability, by the defendant in satisfaction of all the plaintiffs' claims. The learned Judge was faced with the authority of the case of *Benning v. Ilford Gas Company* (23 *The Times* L.R., 485 ; [1907] 2 K.B., 290), where the Divisional Court held that such a payment into Court as was made in this case was a good payment in. Accordingly, having regard to the fact that the jury in this case had only awarded the plaintiffs £20 damages, judgment was entered for the defendant against the male plaintiff with costs, and as against the other two plaintiffs the defendant got his costs from the date of payment into Court. That raised the question whether, in a case where there were several plaintiffs each having a cause of action against the defendant, a general payment into Court by the defendant of one sum was a good payment into Court. The authorities on that point were not very satisfactory.

There were conflicting decisions of the Court of Appeal, and in view of such conflicting decisions the Court was free to put its own construction on the rule with regard to payment into Court and to decide whether *Benning v. Ilford Gas Company* (*supra*) was good law. He (Lord Justice Scrutton) was of opinion that that decision was not good law and that a general payment into Court in respect of several plaintiffs and several causes of action was a bad payment in, and had no effect on costs. The present case was an instance of the extreme inconvenience of treating such a payment in as a good payment in, where there were different causes of action, and a plea of payment into Court of a lump sum generally was not a good plea.

In the result, the judgment against the male plaintiff must stand. The jury's finding of £15 damages in favour of the wife would be set aside and the Court assessed the damages of the wife at £60. As the payment into Court was not a good payment in, there must be judgment for the wife for £60 damages, with full costs on the High Court scale and for the infant daughter for £5 damages with full costs on the High Court scale.

Lord Justice Sargant agreed. It was unnecessary to say anything about the authorities except to say that he agreed with Lord Justice Scrutton in saying that they left the point at large. The balance of authority was in favour of the proposition that a payment into Court such as had been made in this case was a bad payment in, and therefore the Court was at liberty to put its own construction on the matter. In a case like the present, where there were three separate plaintiffs having three separate causes of action, the terms of the rule would be avoided if it were held that a general payment into Court, such

as the one made in this case, was a good payment into Court. He agreed that *Benning v. Ilford Gas Company* (23 *The Times* L.R., 485 ; [1907] 2 K.B., 290) was bad law. He also agreed with the judgment of Lord Justice Scrutton with regard to the damages.

Lord Justice Greer agreed. On the question of the power of the Court of Appeal to interfere on the question of the amount of the damages, the rule was that a verdict could be set aside by the Court of Appeal if it was of opinion that the jury had considered something which they were not entitled to consider or had failed to consider something which they ought to have considered. From either point of view, this was a case in which the Court of Appeal was entitled to set aside the verdict of £15 damages awarded to the wife. The sum was so small that, in the circumstances, 12 reasonable men could not have awarded such a sum, or the jury must have taken into consideration something which they were not entitled to consider. He agreed that a payment into Court such as had been made in this case was a bad payment in.

[Solicitors—Mr. J. Albert Davis ; Messrs. A. E. Hewitt and Crane.]

K.B. Div. } 1927.
(Sankey and Talbot, JJ.) } Nov. 30.

HEWITT v. ESSEX COUNTY COUNCIL.*

Practice—Arbitration—Acquisition of land—Injurious affection—Award of official arbitrator—Statement in form of special case—Whether to be entered in the Crown Paper or in the Special Paper—Acquisition of Land (Assessment of Compensation) Act, 1919 (9 and 10 Geo. V., c. 57), s. 6.

An award made by an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919, in the form of a special case, is rightly entered in the Crown Paper.

This was an application by the claimants that an award stated by the official arbitrator in the form of a special case under the Acquisition of Land (Assessment of Compensation) Act, 1919, might be transferred from the Crown Paper to the Special Paper.

Mr. Tristram Beresford appeared for the claimants ; Mr. W. Bowstead for the Minister of Transport. The Essex County Council were not separately represented.

Mr. Beresford said that the claim was for injurious affection of land, not for compulsory acquisition, and he suggested that the proper person to decide it was not the official arbitrator, but a private one. The county council took the opposite view, and to avoid delay his clients submitted to the jurisdiction of the official arbitrator, who stated his award in the form of a special case, as he was empowered to do under section 6 of the Acquisition of Land (Assessment of Compensation) Act, 1919, which provides :—

"(1) The decision of an official arbitrator upon any question of fact shall be final and binding on the parties and the persons claiming under them respectively, but the official arbitrator may, and shall, if the High Court so directs, state at any stage of the proceedings, in the form of a special case for the opinion of the High Court, any question of law arising in the course of the proceedings, and may state his award as to the whole or part thereof in the form of a special case for the opinion of the High Court.

"(2) The decision of the High Court upon any case so stated shall be final and conclusive, and shall not be subject to appeal to any other Court."

The Act was silent as to the procedure to be followed on the hearing of a special case, and therefore in counsel's submission it should follow the practice under the Arbitration Act, 1889. This was not a consultative case, but a final award. Section 7 of the Arbitration Act, 1889, therefore applied, and the case should be set down in the Special Paper for hearing before a Judge alone, but the respondents, after consulting the Master of the Crown Office, had set it down in the Crown Paper.

Mr. Justice Sankey.—Where there is no appeal is it not better that your clients should have the accumulated wisdom of three Judges, rather than the wisdom of one Judge ?

Mr. Beresford.—It might be so, but my clients do not desire it, and submit that they are entitled to be heard in the Special Paper. The case of *Thurrock, Grays and Tilbury Joint Sewerage Board v. Thames Land Company, Limited* (23 L.G.R., 648) was entered in the Special Paper without objection and tried by Mr. Justice Roche. On the other hand, *Northwood v. London County Council* (42 *The Times* L.R., 508 ; [1926] 2 K.B., 411) was entered in the Crown Paper without objection and tried before three Judges. In neither of those cases was the point discussed, but he had the support of a well-known text-book, and the advantage that the learned editor of it now appeared to oppose this motion. In Russell on Arbitration (11th ed., by Mr. W. Bowstead) it was stated at page 151 :—

"An arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919, may state his award as to the whole or part thereof in the form of a special case for the opinion of the High Court, whose decision thereon is final and conclusive and not subject to appeal.

"Practice.—In the King's Bench Division a special case under this section is set down for hearing in the Crown Office. It is entered in the Special Paper and heard by one Judge."

Mr. Justice Sankey.—Your opponent has written a book ?

Mr. Beresford.—Yes, my Lord, and I hope to use it against him. Perhaps my learned friend, with the assistance of the book which I have handed to him, will explain presently why he wrote that.

Counsel cited the opening passage of the judgment of Lord Justice Bowen in *In re Knight and the Tabernacle Permanent Building Society* (8 *The Times* L.R., 783 ; [1892] 2 Q.B., 613).

Mr. Bowstead referred to Order LIX., Rule 1, of the rules of the Supreme Court :—

"The following proceedings and matters shall continue to be heard and determined before Divisional Courts . . . (*e*) Proceedings directed by any Act of Parliament to be taken before the Court, and in which the decision of the Court is final."

Mr. Beresford said that that rule when closely examined did not apply ; it was dealing with appeals from inferior tribunals.

Mr. Bowstead was not called upon to argue.

Mr. Justice Sankey, in giving judgment, said that this was an application on a matter of procedure as to which Court should consider the award. In fact,

* Reported by J. W. Hall, Esq., Barrister-at-Law.

it had been set down in the Crown Paper for which a Divisional Court of three Judges were accustomed to sit. But Mr. Beresford asked them to say that that was wrong and that it ought to be set down in the Special Paper for one Judge. In his (his Lordship's) view no question of principle, as usually understood, arose ; it was a question of practice and procedure. After reading section 6 of the Acquisition of Land (Assessment of Compensation) Act, 1919, his Lordship said that Mr. Beresford had rightly drawn attention to the two different forms of special case under section 7 and section 19 of the Arbitration Act, 1889.

The history of the Special Paper was this : Originally, the cases went to the Divisional Court, but an Order was made some years ago by the then Lord Chief Justice, for the relief of the Divisional Court list, that certain cases in which there was an appeal should go into a Special Paper before one Judge, and if he went wrong there was an appeal from his decision. That was merely an order as to practice.

But both the Divisional Court and the single Judge were sitting as "the High Court." He did not see anything which gave the right to a litigant to say that his case should go to one or the other. In this case the Act said that the decision of the High Court should be final, and it seemed desirable in these important matters, as they undoubtedly were, that the party should have the advantage of three Judges.

Attention had been drawn to Order LIX., Rule 1 (*e*), but he did not rest his judgment on that. He thought that it was rather a matter of discretion, and that it was advisable where the decision was final that three Judges should sit. It was true that the practice had varied, but the point had not been taken. Now that it was taken they had to decide it, and he thought that the case was rightly entered in the Crown Paper.

MR. JUSTICE TALBOT agreed.

[Solicitors—Messrs. Wilson and Co. ; the Treasury Solicitor.]

K.B. Div. } 1927.
(Rowlatt, J.) } Nov. 30.

HEASLIP v. HASEMER.*

Revenue — Income-tax — Deduction — Child receiving full time instruction — Educational establishment — Finance Act, 1920 (10 and 11 Geo. V., c. 18), s. 21 (1).

A teacher's house, where he gives to individual pupils private lessons and directions for home study and practice, is not an educational establishment where a pupil receives full-time instruction, so as to entitle the father to a deduction from income-tax under s. 21 (1) of the Finance Act, 1920.

This was an appeal by the Crown against a decision of the General Commissioners of Income Tax for the division of Tower Hamlets, by which it was held that a taxpayer, in estimating his taxable income, was entitled to a deduction in respect of his daughter, who was being taught musical subjects by a private teacher.

* Reported by G. F. L. BRIDGMAN, Esq., Barrister-at-Law.

At a meeting of the General Commissioners the respondent, Mr. George Henry Hasemer, appealed against an assessment made on him under Schedule E of the Income Tax Acts in the sum of £382 for the year ending April 5, 1926. The assessable income charged under the assessment was in accordance with the return made by him, and there was no dispute about its amount, but the respondent claimed that under section 17 and section 21 (1) of the Finance Act, 1920, he was entitled, for the purpose of estimating his taxable income, to a deduction of £36 in respect of his daughter, Doris Gertrude Hasemer, aged 19. The claim, which was resisted by the appellant (an inspector of taxes), was the only subject of the appeal.

During the year 1925-26 Miss Hasemer was receiving instruction in musical subjects from a teacher at the teacher's dwelling-house at Edmonton, N., and she was being prepared for the examinations of the Trinity College of Music, with a view to her obtaining such diplomas or other qualifications as would enable her to earn her livelihood as a teacher of music. The examinations held by the Trinity College of Music were open to all comers, wherever they were taught, but the College maintained an establishment of its own where students could obtain instruction and training in any branch of music. Miss Hasemer, however, was not at any time a student at that establishment of the Trinity College of Music.

The Trinity College examinations were simultaneously held at various centres, and there was a centre in Tottenham where Miss Hasemer attended for examination.

The teacher had numerous pupils, the bulk of whom were engaged in preparing for Trinity College examinations. He taught his pupils privately and individually, and at his own house in all cases. He conducted no classes and had no assistants. He was not a member of the staff of the Trinity College of Music, but was a Fellow of the College and also a Fellow of the Royal College of Organists.

The subjects in which Miss Hasemer received tuition were four in number—namely, pianoforte (practical), pianoforte (theory), harmony and the art of teaching, and her weekly attendances at the teacher's house were four periods of three-quarters of an hour each—one period for each subject—amounting in the aggregate to three hours per week.

Miss Hasemer spent the whole of her time (apart from necessary recreation) on her musical training. When not receiving instruction she was practising or reading at home in musical studies supervised and directed by her teacher. Miss Hasemer was not entitled to any income in her own right.

Mr. Hasemer contended before the General Commissioners, (*a*) that the instruction given to his daughter was full-time instruction and was of the nature required by section 21 (1) of the Finance Act, 1920 ; (*b*) that the system of personal instruction in music, co-ordinated with the practising and studying at home, when applied to the number of pupils taught by the teacher and prepared for the examinations of the Trinity College of Music, afforded ample evidence that his establishment was a "school" or "educational establishment" within the meaning of the subsection, and that it was in fact such a school or educational establishment ; (*c*) that the system of personal individual instruction by a master to one pupil at a time without classes or assistants was acknowledged by the musical profession to be the best and most suitable for imparting musical knowledge and technique, and this was adopted in musical

colleges; and (*d*) that he was entitled to the deduction claimed.

The appellant contended, (*a*) that Miss Hasemer was not receiving full-time instruction; (*b*) that what instruction was received was not received at any university, college, school, or other educational establishment; (*c*) that the teacher's house, even if it could be called an establishment at all, was not one for education, but was for professional or vocational training; and (*d*) that the deduction claimed was not allowable.

The General Commissioners found that the teacher's establishment and his arrangements for giving instruction in musical subjects in conjunction with home practice and study supervised and directed by him were a school or educational establishment, and that Miss Hasemer received full-time instruction at that school or educational establishment during the year of assessment. They, therefore, allowed the deduction of £36 from the respondent's assessment.

The Crown appealed.

Section 21 (1) of the Finance Act, 1920, provides:—

"If the claimant proves that he has living at the commencement of the year of assessment any child who is either under the age of 16 years or who, if over the age of 16 years at the commencement of that year, is receiving full-time instruction at any university, college, school, or other educational establishment, he shall . . . be entitled in respect of [each] child to a deduction. . . ."

The Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills appeared for the appellant; Mr. Cyril King for the respondent.

MR. JUSTICE ROWLATT, in giving judgment, said that he accepted that Miss Hasemer had done all that she could to work hard at her music and fit herself for a musical career, but it did not follow that section 21 (1) of the Act of Parliament had been complied with. For the requirements of that subsection to be satisfied she must have been receiving full-time instruction at an educational establishment, and in the subsection "educational establishment" was used in connexion with "university," "college," and "school."

The General Commissioners had said that the establishment of Miss Hasemer's teacher—that was to say, his house—and his arrangements for giving instruction in conjunction with home practice and study supervised and directed by him, were a school or educational establishment, and that Miss Hasemer had received full-time instruction at that school or educational establishment. That meant that the fact that the teacher told his pupils how to work after they had gone away at the end of their lessons made his establishment an "educational establishment" within the meaning of the subsection. He also gathered that the General Commissioners had found that Miss Hasemer had received full-time instruction because, when she was working at home, she was still constructively receiving instruction from her teacher.

In his opinion it was perfectly clear that the teacher's house was not an educational establishment at which Miss Hasemer received full-time instruction within the subsection. What she did was to take her turn with other pupils to have private lessons from a teacher at his own house.

The appeal was accordingly allowed, judgment being entered for the Crown, with costs.

[Solicitors—The Solicitor of Inland Revenue; Messrs. Godden, Holme, and Ward.]

K.B. Div. (Rowlatt, J.) 1927. Nov. 28.

WHITE v. WHITCHER.*

Revenue—Income-tax—Exemption, abatement and relief—Will—Direction to trustees to accumulate fund—Payment to beneficiary 20 years after death of testatrix—"Benefit . . . contingently on his attaining some specified age"—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 25.

Section 25 of the Income Tax Act, 1918, provides that: "Where in pursuance of the provisions of any will or settlement any income arising from any fund is accumulated for the benefit of any person contingently on his attaining some specified age or marrying, and the aggregate amount in any year of assessment of that income and the income from any other fund subject to the like trusts for accumulation and of the total income of that person from all sources (hereinafter referred to as 'the aggregate yearly income') is of such an amount only as would entitle an individual either to total exemption from tax or to relief from tax, that person shall . . . be entitled . . . to have repaid to him on account of the tax which has been paid in respect of the income during the period of accumulation a sum equal to the aggregate amount of relief to which he would have been entitled if his total income from all sources for each of the several years of the said period had been equal to the aggregate yearly income for that year. . . ."

"Specified age" in this section means an age expressed by a definite number of years and not an age which can be ascertained only by reference to some other occurrence as, for instance, the death of a testatrix who has directed that an accumulated fund shall be paid to a beneficiary 20 years after her death.

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the division of Brighton held at Brighton on January 13, 1927, the respondent, Edgar Balland Laurence Cuff Greenhill Whitcher, of 58, Lansdowne-place, Hove, appealed to the Commissioners against an objection made by the appellant (an inspector of taxes for the Brighton second district) to a claim made by Mr. Whitcher under section 25 of the Income Tax Act, 1918.

The following facts were found or admitted.

By her will dated May 24, 1904, the Baroness Ublagger directed her executors to transfer to the Trustees Executors and Securities Corporation £4,659 Milford Docks "A" debenture stock to be held upon trust to invest the income thereof and to accumulate the income of the investments so made in the way of compound interest by from time to time similarly investing such income and the resulting income of investments and directed that the trustees should stand possessed of the said debenture stock and the accumulated fund arising from the income thereof upon trust after the expiration of 20 years from the date of her death to transfer or pay the same to the

* Reported by G. F. L. BRIDGMAN, Esq., Barrister-at-Law.

children of Ethel and Charles Edgar Whitcher, the sum being equally divided, and, if there should be only one such child, then the whole to such child. Mr. E. B. L. Whitcher was the son of Ethel and Charles Edgar Whitcher and was born on January 11, 1901. The Baroness Ublagger died on November 2, 1905, and Mr. E. B. L. Whitcher received the legacy on November 2, 1925, and he claimed repayment of tax for the period of 20 years to April 5, 1925, under section 25 of the Income Tax Act, 1918.

Counsel for the appellant contended:—(1) that, the point being of some doubt, the interpretation of the Act must be in favour of the subject; (2) that the words "specified age" contained in section 25 of the Act of 1918 did not necessarily mean an age which at the time when the disposition was made could be precisely ascertained and he instanced the law of landlord and tenant where it had been held that distraint could be made for "specified rent" even where the rent was specified by reference to a formula and not to a fixed quantum; and (3) that the will became actively operative only when the testatrix died, at which moment the age at which the contingency might occur was precisely known, namely, the age of the appellant on that day, plus 20 years.

The Inspector of Taxes contended:—(1) that, for the purpose of the construction of a taxing Act, no subject must be charged unless the subject of charge was within the exact words of the taxing Act, and that, conversely, no relief from an admittedly correct charge should be given unless the relief could be granted under the exact words of some relieving section; (2) that the appellant must, therefore, show that the contingency was the attainment of a "specified age" and, not only was no age mentioned in the will, but, even if an age were contemplated, it could only have been an age relative to the beneficiary's age at the death of the testatrix; (3) that all contingencies occurred at some age or other and, if that particular contingency, which had no reference to age, was within section 25, then so were all contingencies and the mention in the section of two particular contingencies was superfluous; and (4) that, to establish the claim, it must be proved that in the mind of the testatrix there was a precise age at which the beneficiary was to inherit and that it was impossible for this to have been the case since the date of inheritance was only fixed relatively to the death of the testatrix which could not have been known to her.

The General Commissioners, after consideration of the above facts and arguments, decided that the period of 20 years mentioned in the will of the testatrix constituted a direction to accumulate for the benefit of the appellant contingently on his attaining a "specified age" and that the appellant was therefore entitled to the payment asked for.

The Inspector of Taxes, being dissatisfied with the decision of the General Commissioners as being erroneous in point of law, required them to state a case for the opinion of the High Court of Justice.

The Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills appeared for the appellant; Mr. Eric Neve for the respondent.

Mr. Justice Rowlatt read the following considered judgment:—In this case a fund was by will directed to be accumulated for 20 years from the death of the testatrix when it was to be divided among the then living children of a certain marriage. There was one such child living at the date of the will, and no more were ever born, although the parents survived the testatrix. The 20 years having expired, the above-mentioned child became entitled to the whole fund and the question is whether, within the meaning of section 25 of the Income Tax Act, 1918, it was accumulated for his benefit "contingently on his attaining some specified age or marrying." It may be a question whether, accurately read, the statute does not apply only to cases where there are these alternative contingencies, so that the respondent here, whose interest would not vest on marriage, is outside it on that ground. The common trust is for issue who, being sons, attain 21 years or, being daughters, attain that age or marry. If the statute only applies to the daughters in such cases, such a result is very remarkable. I express no opinion on this point, although I have thought it best to mention it.

In my view, the words "attaining some specified age" are not satisfied. I think that they mean living to a point of time defined by reference to the then age of the person and not to a point of time fixed by reference to other occurrences, although, of course, when the necessary data are ascertained, it will be known how old any given person will be at a given date. Age under the statute is of the essence. In connexion with the gift in the present case it is, as such, immaterial. The appeal must be allowed, with costs.

[Solicitors—Solicitor of Inland Revenue; Messrs. Cockburn, Gostling and Co., Hove.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) } 1927. Dec. 1.

P. v. P.*

Divorce — Application to expedite — Wife's petition—Expected birth of child of woman named in petition—Public policy—Refusal.

The Court, on the ground of public policy, refused an application by a wife, petitioning for a divorce on the ground of her husband's adultery, that the trial of the suit in the undefended list might be expedited so that the decree might be made absolute, and the respondent might marry the woman named in the petition, before the birth of a child expected to be born as the result of the respondent's relations with that woman.

This was a summons by which a wife, petitioning for divorce, asked that an early date be fixed for the trial of the suit in the undefended list, so that the decree might be made absolute in time for her husband and the woman named to marry, and thus save their expected child from being illegitimate. The summons was adjourned into Court.

Mr. Noel Middleton appeared for the applicant.

The President.—This application has given a good deal of difficulty and a proportionate amount of concern. The facts are very remarkable. The parties in the case were young people at the time of the marriage in 1921. The husband was a man of some means and considerable expectations. A child was born in 1924. Last year the wife became aware of the relations between her husband and another young woman, who is the woman named in the petition. In November last year the husband left his wife, and there is no doubt that he had relations with the woman named. The wife did not know the full

* Reported by William Latey, Esq., Barrister-at-Law.

story until October of this year, when the husband wrote to her, giving her information for the purpose of a divorce. On October 25 she filed a petition for the dissolution of her marriage, and a solicitor's letter was written intimating that the husband had no intention of defending the case. This was a foregone conclusion, because the proceedings had been begun at the instance of the husband. There followed a petition for alimony *pendente lite*, which set out the husband's means. On November 10, when the case was pending, a summons was issued on the wife's behalf, asking that the hearing should be expedited. She stated that she desired the petition to be heard forthwith as an undefended suit, because a child was expected to be born some time this year as the result of her husband's relations with the other woman, and that on a decree *nisi* being granted she might make a further application in regard to expediting the decree absolute.

Anyone familiar with the administration of the divorce law and the procedure of this division will appreciate what an astounding proposition that was. It was, in fact, a proposal, at the instance of the wife, that this Court should take extraordinary steps by decreeing on a certain day that this man should cease to be the lawful husband of his lawful wife and be in a position to take another woman as his wife.

This summons was really taken out on behalf of the unborn child of this illicit alliance. It was quite clear that there would be most mischievous consequences if such an order were made *in camera*. I have to consider if such an order can be made at all. This application is one which cuts deep into the interests of the parties and affects matters of the very gravest public concern, and I came to the conclusion that the decision should be a public one. Very moving circumstances were presented to the Court by the petitioner in her compassion for the unborn child, and I hope that I have not been insensible to the arguments raised. It was pointed out that unless the present marriage were dissolved there would be no chance of applying the terms of the Legitimacy Act, 1926, as the child would be begotten of an adulterous association. I have considered the matter anxiously and have come to the conclusion that to grant the application would be against public policy and would impair all the safeguards with which administration of divorce is at present surrounded. The application will be refused.

His Lordship, in granting the petitioner the costs of the application, said that he did not suggest that there was any reflection upon the wife, who had taken this step as an act of compassion.

[Solicitors—Messrs. Holloway, Blount, and Duke.]

K.B. Div. (Rowlatt, J.) 1927. Nov. 25.

MONKS v. FOX'S EXECUTORS.*

Revenue—Income-tax—Estate duty—Payment—Surrender of Victory Bonds—Valuation—Accrued but unpaid interest taken into account—Whether interest subject to income-tax—Finance Act, 1917 (7 and 8 Geo. V., c. 31), s. 34 (4)—Finance Act, 1918 (8 and 9 Geo. V., c. 15), s. 42.

Where Victory Bonds are surrendered in payment of estate duty and the accrued but still unpaid interest is taken into account in the valuation of the bonds, the interest is not subject to income-tax.

This was an appeal by the Crown against a decision of the Special Commissioners of Income Tax by which it was held that interest accruing due in respect of Victory Bonds surrendered in payment of estate duty, and taken into account in the valuation of the bonds, was not income in the hands of executors subject to assessment to income-tax.

At a meeting of the Special Commissioners of Income Tax held on February 15, 1927, to hear appeals, the respondents, the executors of Sir Gilbert Wheaton Fox, sugar merchant, of London and Liverpool, who died on February 21, 1925, appealed against an assessment to income-tax in the sum of £704 for the year ending April 5, 1926, made on them under the provisions of the Income Tax Acts.

The appropriate amount of estate duty payable in respect of Sir Gilbert Fox's estate was £257,126 9s. 2d. A portion of his estate consisted of £100,000 Four per Cent. Victory Bonds. The prospectus relating to the issue of Four per Cent. Victory Bonds provided :—

"Bonds of this issue will be accepted at their face value by the Commissioners of Inland Revenue as the equivalent of cash, with due adjustment on account of interest, in satisfaction of amounts due on account of death duties, provided that the bonds surrendered have formed part of the estate passing on death of the deceased continuously up to the date of death from the date of the original subscription or for a period of not less than six months immediately preceding the date of death. Bonds surrendered under these provisions will be held for account of his Majesty's Government until drawn for redemption as provided in the preceding paragraph."

Section 34 of the Finance Act, 1917, provided for the acceptance by the Commissioners of Inland Revenue of any stock or bonds issued in connexion with the war in satisfaction or part satisfaction of any death duty and for the method of valuing such bonds. Subsection (4) enacted :—

"Stock or bonds so transferred shall for the purposes of this section be valued at the price of issue with the addition of any interest accrued due at the date of transfer but then remaining unpaid, after deducting the amount of any interest which may be receivable by the transferor after that date. . . ."

Subsection 5 of section 34 enacted :—

"For the purposes of this section interest shall be deemed to accrue from day to day."

Section 42 of the Finance Act, 1918, enacted :—

"Section 34 of the Finance Act, 1917, shall have effect as though there were inserted therein after the words "price of issue," in subsection (3) and subsection (4) thereof, the words "or such other price as was specified in the conditions subject to which the stock or bonds were issued as the price at which the stock or bonds were to be valued for the purposes of this section."

Victory Bonds fell within the above provisions. The transfer of the £100,000 Four per Cent. Victory Bonds in part satisfaction of estate duty on the estate of Sir Gilbert Fox took place on May 13, 1925, and at that date a sum of £800 had accrued due, but remained unpaid in respect of interest on the bonds. The £800 was added to the sum of £100,000, the face value of the bonds, and the bonds were accepted by

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

the Commissioners of Inland Revenue at a total value of £100,800 in part satisfaction of the estate duty.

The assessment appealed against was made under Case III. of Schedule D of the Income Tax Act, 1918, on the respondents in the sum of £704, arrived at as follows :—

Victory Bond interest	£800
War Loan interest	2
	£802
Less bank interest on overdraft ..	98
	£704

The sole question for the opinion of the Court was whether the said £800 had been correctly included in the assessment.

Counsel for the respondents contended that subsection (4) of section 34 of the Finance Act, 1917, read in conjunction with section 42 of the Finance Act, 1918, provided the method of arriving at the value of the bonds transferred, and that, the value having been arrived at, nothing in the subsection made any part of that value income.

On behalf of the Crown it was contended (1) that by virtue of section 34, subsections 4 and 5, of the Finance Act, 1917, as amended by section 42 of the Finance Act, 1918, the £800 interest had been credited to the respondents and was by the terms of the section interest accrued due on Victory Bonds ; (2) that the respondents were liable to income-tax in respect of such interest and the fact that it had been credited to them as part of a statutory scheme for the surrender of Victory Bonds in satisfaction of death duties did not affect such liability ; and (3) that the assessment was correctly made and should be confirmed.

The Special Commissioners held that the £800 interest, which had accrued at the date of the transfer of the bonds but was then remaining unpaid, and which was included in and formed part of the valuation, was not income subject to income-tax in the hands of the respondents, and they accordingly discharged the assessment.

The Crown appealed.

Mr. R. P. Hills appeared for the Crown ; Mr. Cyril King for the respondents.

Mr. Justice Rowlatt delivered the following judgment :—This is a curious and an interesting point, but I agree with the Special Commissioners. When a man owns a sum in the funds it increases in value from the day when interest is paid until the next interest day, apart altogether from its rise and fall in the market. The element of the value of the accruing interest is always there, adding to the value of the stock as the interest time wears on, and the holder does not pay income-tax on the interest until it has been paid. If the holder dies and holdings in the funds form part of his estate and his representatives realize them in the market to pay his death duties, they will get more or less for them according as they realize them at the beginning, or at the end, or in the middle, of the period which intervenes between the dates of the payment of interest. It is quite clear that, if they went into the market, they would incur no liability for income-tax in respect of interest accrued but not paid at the date of the sale.

The scheme contained in section 34 of the Finance Act, 1917, was brought forward during the war to make stock available to pay death duties at its face value. But if nothing more is said than that and if the stock is transferred immediately after an interest day, the whole difference between what the stock could have been sold for and the face value is saved to the taxpayer. If, on the other hand, the stock is tendered in payment of death duties at the end of the interest time then there is less, because part of its value is interest. It has gone up in value.

It seems to me that this machinery was designed to put the transaction on a basis comparable to that on which it would have stood if the executors had sold the stock in the market. If you sell the stock, you sell it for what the principal is worth and what the accrued interest, if any, is worth. You get more, as I have pointed out, if you sell late in the period during which interest is accruing than if you sell earlier. For what you get for the principal in the market, substitute in the present case the face value which the Government allows you. Therefore, the Government says that you can use the stock to pay your death duties to an amount consisting of the face value *plus* the accrued interest, bringing it into line with what would happen if the stock had been taken to the market and realized, in which case the accrued interest would, of course, have been allowed for in the price.

It is said, however, that that allowance in the value given by the Government for interest is taxable interest. I do not think that it is. I have endeavoured to show that I do not think that, on principle, it ought to be so, and I now turn to the Act. Section 34 (1) provides that the subject may pay death duties by means of the transfer of an appropriate amount of war stock "ascertained as hereinafter mentioned." Subsection (4) provides :—"Stock or bonds so transferred shall for the purposes of this section be valued at the price of issue with the addition of any interest accrued due at the date of the transfer but then remaining unpaid. . . ." I think that that means that the value of the stock is to be its face value *plus* the accrued interest. What is the accrued interest ? There is no way of ascertaining what that is unless you calculate it from day to day, so in subsection (5) it is provided that : "For the purposes of this section interest shall be deemed to accrue from day to day." Therefore, instead of going into the market and selling the stock there at a price which represents principal *plus* accrued interest, it is transferred at a value which is the sum of the face value representing the principal value of the stock and of the accrued interest representing the interest value. That is how I read the section. It seems to be in accordance with the principle of the thing.

When I look at the prospectus on which these bonds were issued, so far from its supporting the appellant here, I think that it supports the respondents, because it says : "Bonds of this issue will be accepted *at their face value* by the Commissioners of Inland Revenue as the equivalent of cash, with due adjustment on account of interest." "Adjustment" seems to me just to describe the process which I have endeavoured to indicate. It is : "with due adjustment." That is, the value is to be altered so as not to make it the face value but to make it the face value as modified by the accrual of interest, which modification would have taken place if the bonds had been offered on the market and had realized the market price.

In my opinion, the Special Commissioners were right in this case and this appeal must be dismissed, with costs.

Judgment was accordingly entered for the respondents, with costs.

[Solicitors—The Solicitor of Inland Revenue ; Messrs. Pritchard, Englefield, and Co., for Messrs. Simpson, North, Harley, and Co., Liverpool.]

K.B. Div. (Rowlatt, J.) 1927. Nov. 30.

GENERAL MEDICAL COUNCIL v. COMMISSIONERS OF INLAND REVENUE.

ENGLISH BRANCH COUNCIL OF THE GENERAL MEDICAL COUNCIL v. COMMISSIONERS OF INLAND REVENUE.*

Revenue — Income-tax — Charity — General Medical Council—Whether entitled to exemption—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 37.

The General Medical Council is not a body established for charitable purposes only, and therefore is not entitled, under s. 37 of the Income Tax Act, 1918, to exemption from income-tax on the income from its funds.

These were appeals by the General Medical Council and the English Branch Council of the General Medical Council against decisions by the Special Commissioners of Income Tax, who had held that the councils were not "established for charitable purposes only" within section 37 of the Income Tax Act, 1918, and were, therefore, liable to assessment to income-tax in respect of income from funds belonging to them.

At a meeting of the Special Commissioners of Income Tax held on October 25, 1926, the General Medical Council claimed exemption from income-tax for the four years ending April 5, 1924, under section 37 of the Income Tax Act, 1918, on the ground that they were a charity within the meaning of the Income Tax Acts.

The Council, whose full name was the General Council of Medical Education and Registration of the United Kingdom, was first established under the Medical Act, 1858, and was incorporated by section 1 of the Medical Council Act, 1862. Its composition had been altered from time to time, and it now consisted of 38 members, of whom 18 were appointed by universities in the United Kingdom, nine by the medical corporations, and five by his Majesty in Council, while six were elected by members of the medical profession. From the establishment of the Council until April 5, 1924, all the members of the Council were members of the medical profession, but after April 5, 1924, a lay member was appointed by his Majesty in Council.

The preamble of the Medical Act, 1858, was as follows:—"Whereas it is expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners: Be it therefore enacted," &c. Section 3 of the Act established the Council, and section 6 set up branch councils for England, Scotland, and Ireland, to which branch councils the Council was empowered to delegate powers and duties, and through which the Council did a great deal of its work.

The chief duties imposed by the Act upon the Council were, (*a*) to keep and publish a register of qualified practitioners; (*b*) to exercise oversight of medical studies and examinations; and (*c*) to publish the "British Pharmacopœia."

Every person who possessed the required medical qualification was entitled on payment of certain fees to have his name entered on the Medical Register, which was published by the Council. The name of a practitioner might be struck off the register in certain circumstances.

By section 31 of the Act of 1858 and by section 6 of the Medical Act, 1886, it was provided that any person registered under the Act should be entitled, according to his qualifications, to practise medicine or surgery and to demand and recover in any Court of law reasonable charges for professional aid, advice, or visits, and for any medicines or medical or surgical appliance.

By section 34 of the Act "The words 'legally qualified medical practitioner' or 'duly qualified medical practitioner,' or any words importing a person recognized by law as a medical practitioner or member of the medical profession, when used in any Act of Parliament, shall be construed to mean a person registered under this Act."

An unregistered person was not prohibited from practising medicine, but he suffered certain disabilities. For example, he could not recover fees by legal process, he could not give a valid certificate, he was debarred from certain appointments, and he was unable to join in practice with a registered practitioner in such a way as to lead the public to believe that he was "covered" by the qualifications of the latter. By section 35 of the Act a registered person was, if he so desired, exempt from service on juries and at inquests.

Sections 18 to 21 of the Act gave power to the Council to require information from medical teaching and examining bodies regarding the courses of study and examinations to be gone through to obtain the qualifications granted by them and empowered a representative of the Council to be present at examinations. If it appeared to the Council that the course of study and examinations for any qualification were not such as to secure that the persons obtaining the qualification possessed the requisite knowledge and skill for the efficient practice of their profession, the Council was empowered to make representations to the Privy Council, and the Privy Council might order that the possession of the qualification in question should no longer confer a right on its holder to be registered under the Act. The powers given by the Act of 1858 to the Council in the matter of supervising medical examinations were expanded by sections 2, 3, and 4 of the Medical Act, 1886.

Mr. Norman Carew King, the registrar of the Council, gave evidence before the Special Commissioners regarding the activities of the Council. He said that the Council carried out their statutory duties of supervising and inspecting medical studies and examinations and reporting thereon; of preparing, revising, and issuing the "British Pharmacopœia," which was the statutory standard of reference for medicinal preparations throughout the Empire; of registering qualified practitioners and of sitting as a judicial body to hear complaints against practitioners in respect of alleged "infamous conduct in a professional respect," a phrase regarding the meaning of which the Council were the sole judges. A good deal of the time of the Council was taken up in hearing such complaints.

The expenditure of the Council consisted mainly of (*a*) fees and expenses paid to members of the Council and its committees; (*b*) the cost of inspecting examinations for medical qualifications; (*c*) printing (including the cost of printing the Medical Register); and (*d*) office expenses and sundries. The Council's income from registration fees in connexion with colonial and foreign qualifications, from interest on its investments, and from the sale of publications, fell far short of its expenditure, and that deficit was annually made up, and the account exactly balanced,

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

by contributions from the English, Scottish, and Irish Branch Councils calculated on a basis proportionate to the incomes of these branch councils. The branch councils had ordinarily a considerable surplus of income over expenditure, because registration fees paid by English, Scottish, and Irish practitioners were paid directly to the respective branch councils and not to the General Council.

Counsel for the Council contended :—(*a*) That the purpose for which the Council was established as expressed by Parliament in the preamble to the Medical Act, 1858, viz., "to enable persons requiring medical aid to distinguish qualified from unqualified practitioners," was a charitable purpose and that there was nothing in that Act, or in any other Act, or otherwise, which had any effect other than to carry out the overriding object expressed in the preamble ; (*b*) that the Council was a body of persons established for charitable purposes only ; (*c*) that the income of the Council was applicable and had been applied to charitable purposes only ; and (*d*) that the Council was entitled to exemption from income-tax.

On behalf of the Crown it was contended :—(*a*) That the Council was a professional institution whose objects, aims, and activities were directed mainly to the interests of the medical profession ; (*b*) that the Council was not established for charitable purposes only ; and (*c*) that the income of the Council was not applicable to charitable purposes only and was not so applied.

The Special Commissioners held that the Council was not established for charitable purposes only, and they refused the claim.

The Special Commissioners also refused a claim for exemption, under section 37 of the Income Tax Act, 1918, by the English Branch Council of the General Medical Council.

The duties of a branch council were principally concerned with keeping registers of qualified practitioners. The councils also nominated members to serve on various committees of the General Council, conducted the election of direct representatives of the profession to serve on the General Council, and appointed assistant examiners to certain bodies in connexion with examinations for medical qualifications under section 5 of the Medical Act, 1896.

The contentions on behalf of the parties were substantially the same as those in the claim by the General Council.

Both the General Council and the English Branch Council appealed against the decisions of the Special Commissioners.

Mr. Vaisey, K.C., and Mr. Raymond Needham appeared for the councils ; the Solicitor-General (Sir Thomas Inskip, K.C.), Mr. J. H. Stamp, and Mr. R. P. Hills for the Crown.

Mr. Justice Rowlatt, in delivering judgment, said that the question which he had to decide was whether the councils were bodies or persons "established for charitable purposes only," or whether the income which it was sought to tax was "applicable to charitable purposes only," and was so applied. The income which was the subject of the appeals was derived from the investment of a fund which had been formed as the result of an excess of income over expenditure. No provision was made by the Medical Act, 1858, for the holding by the councils of any capital funds, but by section 43 of the Act all moneys received by the treasurer were to be applied for the expenses of registration and of the execution of the Act.

It had been argued that the income of the invested fund had been "applied to charitable purposes only," since it had been applied in payment of the expenses of the execution of the Medical Acts. A body, to be a charitable body, must come within the analogy of the statute 43 Eliz., c. 4, which supplied the test. The contention of the appellants was that the objects which the General Medical Council had been constituted by Parliament to achieve were for the good of the public. It was clear on the cases that a mere statement of that kind would not bring a case within the Act. It was conceded that in the present case there was no trust for the improvement of the practice of medicine, but it was said that it was for the specific benefit of the public that there should be an authoritative list of good doctors and an authoritative list of drugs, and that that sufficed to make the Council a body which was "established for charitable purposes only."

He (his Lordship) did not take that view. It had been held in a number of cases which dealt with corporation duty, and in *Miley v. Attorney-General for Ireland and Rooney* ([1918] 1 I.R., 455), that societies for the benefit of professions or trades were not societies with charitable objects. These cases did not cover the present case, because in each of them the society was primarily for the benefit of the profession or trade and only secondarily for the benefit of the public, whereas in the present case the main object of the General Medical Council was to protect the public, and it was only because the public knew that they were protected against bad doctors that good doctors were benefited.

But what was the position of the Council ? What had occurred was nothing more than that the Legislature had thought that it was for the public advantage—as every Act of Parliament must be taken to be—that doctors should be registered, and that there should be an authoritative list of drugs, and that everything incidental to these things should be carried out, and they directed the Council to perform these functions. If that legislation had been passed nowadays the matter would probably have been put into the hands of a Government Department. Parliament might require all sorts of bodies to perform functions which were beneficial to the public, but they could not all be charities. There was no authority that a body such as the General Medical Council fell within the Act of Elizabeth, and the appeal, therefore, failed.

Judgment for the Crown was entered accordingly, with costs.

[Solicitors—Mr. C. J. S. Harper ; the Solicitor of Inland Revenue.]

K.B. Div. (Avory and Salter, JJ.) 1927. Nov. 11.

IN RE F. AND E. STANTON, LIMITED—HOGG v. MAULE AND ANOTHER.*

Company — Winding-up—Debenture—Fraudulent preference—Jurisdiction of County Court—Companies (Consolidation) Act, 1908 (8 Edw. VII., c. 69), ss. 131 (2), (3), and (6), 210, 212.

Less than three months before the commencement of its compulsory winding-up in a County Court, a company having a paid-up capital of less than £10,000 issued debentures to the extent of £4,500 in favour of two persons. The

* Reported by J. W. Hall, Esq., Barrister-at-Law.

liquidator moved in the County Court for a declaration that the debentures were invalid either as a fraudulent preference under s. 210 or as a floating charge created otherwise than for cash under s. 212 of the Companies (Consolidation) Act, 1908, and that the persons named in the debentures had no rights in respect of the sums expressed to be secured thereby except as unsecured creditors.

Held, that the deputy County Court Judge had jurisdiction to entertain the liquidator's application, and, as he had done so, his discretion could not be interfered with

In re Ilkley Hotel Company ([1893] 1 Q.B., 248) and *In re Centrifugal Butter Company, Limited* ([1913] 1 Ch., 188) distinguished.

This was an appeal by debenture holders from the decision of the deputy Judge of the Greenwich County Court, on a motion by the liquidator in the winding-up of F. and E. Stanton, Limited, in that Court, under an order dated February 19, 1926.

The capital of the company was less than £10,000. The motion asked that debentures for a nominal amount of £4,500 might be declared to be invalid under either section 210 or section 212 of the Companies (Consolidation) Act, 1908. It was admitted that the winding-up was properly within the jurisdiction, but the debenture-holders took a preliminary objection to the motion on the ground that questions arising either under section 210 or under section 212 of the Act, where the amount involved exceeded £100, could not be, or alternatively ought not to be, tried in a County Court. The deputy Judge overruled the preliminary objection, but ordered that the hearing of the motion on its merits should stand over until this appeal from that decision had been disposed of. The other material facts appear from the judgments.

Mr. E. Clayton, K.C., and Mr. A. de W. Mulligan appeared for the debenture-holders, the appellants; Mr. H. B. Vaisey, K.C., and Mr. Oscar Kean for the liquidator, the respondent.

Mr. Justice Avory.—This was a motion in the County Court of Greenwich asking that it might be declared that debentures purporting to have been created by a company in favour of two persons, Harris and Maule, on January 20, 1926, for an aggregate sum of £4,500 were invalid either under section 212 of the Companies (Consolidation) Act, 1908, or alternatively under subsections 1 and 2 of section 210 thereof, and that Harris and Maule had respectively no rights in the sum of £4,500 or any part thereof except as unsecured creditors in the winding-up of the company. The company in question was, at the time when the motion was made, being compulsorily wound up in the Greenwich County Court, and there is no dispute that the winding-up of this particular company was within the jurisdiction of the county court. The case was within subsections 2 and 3 of section 131 of the Companies (Consolidation) Act, 1908. Subsection 6 of section 131 provides: "Every Court in England having jurisdiction under this Act to wind up a company shall for the purposes of that jurisdiction have all the powers of the High Court. . . ." The winding-up, therefore, was admittedly within the jurisdiction of the County Court in question, but upon this motion coming before the learned deputy County Court Judge objection was taken that he had no jurisdiction to entertain this application relating to these debentures. After hearing argument, he held that he had jurisdiction and this appeal arises upon this decision. A further point has been taken by Mr. Clayton and fully argued—namely that, even if the deputy County Court Judge has jurisdiction, he ought not, in the circumstances of this case, to exercise it, or, in other words, that he ought in the exercise of a judicial discretion to decline to exercise his jurisdiction. With all respect to the argument addressed to us, I am unable to follow how that proposition can be maintained. If in law a County Court Judge had jurisdiction in this matter, and if he were to say that in the exercise of his discretion he ought not to exercise that jurisdiction, it would be open to the liquidator to come to this Court and ask for a *mandamus* ordering the County Court Judge to exercise his jurisdiction, and to such an application there would be no answer. In my view, therefore, this question ought to be treated as the question whether in law the deputy County Court Judge had jurisdiction on this application.

The appeal is based upon section 210 and section 212 of the Companies (Consolidation) Act, 1908. Section 210 (1) provides: "Any conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property which would, if made or done by or against an individual, be deemed in his bankruptcy a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly." Section 212 provides: "Where a company is being wound up, a floating charge on the undertaking or property of the company created within three months of the commencement of the winding-up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of 5 per cent. per annum." Now it is quite true, as Mr. Clayton has pointed out, that neither of these sections confers any express or particular power either on the County Court or on the High Court; all that they do is to declare that certain acts done by a company shall be invalid in law in certain circumstances. While that is true, it is also equally true that both of the matters dealt with in these sections are matters which arise and can arise only in the winding-up of a company; they are matters which cannot arise as a dispute between parties before a winding-up, but must arise and be dealt with in the course of a winding-up. The question, then, resolves itself into this, whether, when an allegation has been made that there has been an infringement either of section 210 or of section 212 of the Companies (Consolidation) Act, 1908, a county court Judge has jurisdiction in the winding-up of a company to deal with such an allegation. It appears to me that in view of section 131, subsection 6, of the Act—I am speaking now apart from any decided cases and am looking only at the statute—unless it can be said that the High Court would have had no power and no jurisdiction to deal with this motion made in the County Court, the County Court also has jurisdiction.

Mr. Clayton has, however, invited us to hold, substantially on the strength of two decisions, either that the High Court had no jurisdiction or if it had, in view of the decision of Mr. Justice Neville in *In re Centrifugal Butter Company, Limited* ([1913]

1 Ch., 188), that Court ought not to exercise it. I confess that for some time during the argument I was inclined to the view that the decision of Mr. Justice Cave and Lord Chief Justice Coleridge in *In re Ilkley Hotel Company* ([1893] 1 Q.B., 248) did amount to a decision in favour of the appellants here, on the ground, to put it shortly, that the result would be, if the respondent were right, that the County Court Judge in such a case would be assuming jurisdiction to make orders without limit as to amount and in many cases without appeal, but upon closer consideration of this decision and the sections of the Companies (Consolidation) Act, 1908, I have come to the conclusion that this decision does not govern the present matter. It is perhaps to be regretted that the report of *In re Ilkley Hotel Company* (*supra*) does not state in what way exactly the question arose between the parties there, but it is abundantly clear that, in whatever way the transfer of the wine by the manager of the company came about, there was no decision by the Court on any matter of fraudulent preference or floating charge on the assets of the company, and Mr. Justice Cave expressly declined to express any opinion whether the County Court Judge had jurisdiction to declare the transaction to be a fraudulent preference. In other words, it appears to me that this decision is not a decision that a matter which arises and can only arise in the course of a winding-up and which ought to be dealt with by the tribunal that has charge of the winding-up is not within the jurisdiction of the County Court. It is quite true that Mr. Justice Cave founded his judgment to a great extent on the fact that there was in the Bankruptcy Act then in force a section giving certain powers to the County Court, but limiting the jurisdiction to a case where the amount in dispute did not exceed in value £200, and on the fact that there was no similar provision in the Companies Act then in force. I am unable, for myself, to say that the fact that there is no such provision in the Companies Act is of itself in any degree sufficient to take away the jurisdiction of the County Court expressly conferred by section 131, subsection 6, of the Companies (Consolidation) Act, 1908.

But it is necessary that I should now say a word about the other case, *In re Centrifugal Butter Company, Limited* (*supra*), in which Mr. Justice Neville was dealing with a case which arose under section 193 (1) of the Companies (Consolidation) Act, which provides: "Where a company is being wound up voluntarily the liquidator or any contributory or creditor may apply to the Court to determine any question arising in the winding-up, or to exercise, as respects the enforcing of calls, or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court. . . ." The section is, therefore, one which gives to the Court the same power in the case of a voluntary liquidation as exists where the liquidation is compulsory. In that case there undoubtedly was a question arising between the company and its directors, and the learned Judge said: "The real question in this case is whether the Court ought to allow section 193 of the Companies (Consolidation) Act, 1908, to be used for the purpose of setting aside a contract between the company and third parties. I am not sure whether it is a question of jurisdiction or only one of discretion. I cannot in this case make any distinction between a contract with directors and a contract with other persons, because the original contract was clearly in order having regard to the constitution of the company. I cannot find the directors guilty of misfeasance until the contract is set aside, and I am doubtful whether I have jurisdiction to set aside the contract on this summons. In the case of *In re Oakwell Collieries Co.* ([1879] W.N., 65), which was relied on, the application was for delivery up to the company of possession of an estate to which they were *prima facie* entitled; that is quite a different case from the one before me. But if I have jurisdiction I am clearly of opinion that I ought not to exercise it. Before coming here for relief the applicants must bring an action for rescission of contract and succeed in it." That appears to me to be a decision that in the present case the deputy County Court Judge might, if he had been so advised, have said as Mr. Justice Neville did that this was a matter upon which there would be so much dispute of fact that it was one which ought not to be determined upon affidavit and that he ought not to determine it but ought to leave the parties to bring an action. I cannot hold that this decision made it imperative on the deputy County Court Judge to follow the same course as Mr. Justice Neville did, and therefore it does not appear to me to be an authority in support of the proposition that the deputy County Court Judge had here no jurisdiction to hear the application.

Reference has been made to certain rules of practice laid down by learned Judges having charge of the winding-up of companies for the convenience of the Court in dealing with disputed questions of fact. So far as I know, it is open to County Court Judges to lay down rules for their own guidance and convenience in such matters. If that be not so, that might form a ground for an application to remove a case from the County Court into the High Court; but, in my opinion, on this appeal we have simply to determine the bald question whether the deputy County Court Judge has jurisdiction to entertain the application. In my opinion he has, and we ought not upon this appeal to make an order for the transfer of the case to the High Court.

I am of opinion, therefore, for the reasons which I have stated, that this appeal ought to be dismissed.

MR. JUSTICE SALTER.—I am entirely of the same opinion, but as this case appears to me to involve a question of some importance I will give my reasons. The County Court in question has undoubtedly jurisdiction under section 131 of the Companies (Consolidation) Act, 1908, to wind up this company. Subsection 6 of section 131 of the same Act provides: "Every Court in England having jurisdiction under this Act to wind up a company shall for the purposes of that jurisdiction have all the powers of the High Court. . . ." We have to construe those words, and especially the words "for the purposes of that jurisdiction." The construction of this subsection seems to be almost entirely free from authority, and we have, therefore, first to construe the subsection for ourselves, and then to refer to such authorities as can assist us on the question. The section confers very wide powers on inferior Courts in the matter of the winding-up of a particular company, if the Court has jurisdiction to wind up. With regard to the particular company, the inferior Court is to have all the powers of the High Court for the purposes of winding-up jurisdiction. I think that means that the inferior Court is in that case clothed with all the powers of the High Court which are necessary for the purpose of winding up that particular company. Those would be powers to decide matters of administration and disputes, the power to decide

disputes being limited to disputes which arise in and in consequence of the winding-up and which come into existence because the company is being wound up and which must be decided in order that the winding-up may be complete. That, I think, is the meaning of the subsection.

In this case the deputy County Court Judge was invited by the liquidator on motion to decide two disputes between himself and persons outside the company. One was that certain debentures issued by the company were alleged to be a fraudulent preference, and, in the other case, a certain charge was said to be a floating charge created on the eve of the winding-up in violation of section 212 of the Companies (Consolidation) Act, 1908. The real question for us to decide is whether the determination of those matters is a thing necessary to be determined for the purpose of winding-up the company. I think the dispute is one necessary to be determined in order that the company may be wound up and, so far as we are free to construe the words of the subsection apart from authority, I think that the deputy County Court Judge was right.

We have, however, been referred to authority on both sides. On behalf of the appellants we were referred to the cases of *In re New Par Consols, Limited* ([1898] 1 Q.B., 573) and *In re New Par Consols, Limited* (*No.* 2) (14 *The Times* L.R., 287 ; [1898] 1 Q.B., 669). With regard to the first report, a Divisional Court had to construe subsection 6 of section 1 of the Companies (Winding-up) Act, 1890, the words of which are practically identical with the words now in question ; but it was a case where the County Court had acted under an express power, and I do not think the observations of Lord Russell, C.J., are of any assistance in this case. In the second case, which came before the Court of Appeal, the question was one of prohibition. The County Court Judge had made a committal for disobedience to an order by him, and the Court of Appeal held that the County Court Judge was for the purposes of the winding-up a Court of co-ordinate jurisdiction, and therefore a prohibition to him could not be granted. The words in question were considered both by Lord Justice A. L. Smith and by Lord Justice Chitty. Lord Justice A. L. Smith said (14 *The Times* L.R., at p. 288 ; [1898] 1 K.B., at p. 672) : "By that enactment the County Court Judge is, for the purpose of winding-up companies, invested with all the powers possessed by the High Court in relation to a winding-up." Lord Justice Chitty said at the same page : "In this case the County Court Judge had jurisdiction to wind up the company in question under the Companies (Winding-up) Act, 1890, and the effect of section 1, subsection 6, of that Act is that he has conferred upon him for the purposes of such a winding-up all the powers of the High Court. . . ." Lord Justice Chitty, therefore, keeps more closely to the actual words of the subsection than does Lord Justice A. L. Smith, but I do not think those judgments throw any real light on the question whether matters of fraudulent preference and floating charges are matters in which the County Court has the powers of the High Court as matters necessary for decision for the purposes of winding-up jurisdiction.

Both sides have availed themselves of the analogy of bankruptcy, and reference has been made to the case of *Ex parte Brown—In re Yates* (11 Ch. D., 148). The headnote is as follows : "Where a trustee in bankruptcy claims only the same right as the bankrupt himself would have had, the Court of Bankruptcy ought not to assume jurisdiction, but ought to leave the matter to be dealt with by the ordinary tribunals. But where, by the operation of the law of bankruptcy, the trustee has a higher and better title than the bankrupt (where, for instance, a transaction is impeached as a fraudulent preference or an act of bankruptcy), the Court of Bankruptcy ought to decide the matter itself." There the order appealed against was made on the application of the trustee in bankruptcy and it directed that a mortgage executed by the bankrupt should be delivered up to be cancelled, on the ground that the deed was a contrivance to defeat the creditors of the bankrupt, and also that it was a conveyance of substantially the whole of his available assets to secure a pre-existing debt. It was argued that the Court of Bankruptcy ought not to exercise jurisdiction, the appellants being mere strangers to the bankruptcy. Lord Justice James said : "This point is really not arguable. Questions of fraudulent preference and acts of bankruptcy are the very things which were intended to be dealt with by the Court of Bankruptcy." So far as there can be any help from the analogy of bankruptcy, this case assists the respondent rather than the appellants : in both matters submitted to the deputy County Court Judge the liquidator was seeking to enforce rights which existed only by reason of the winding-up.

We were referred on behalf of the appellants to *In re Ilkley Hotel Company* ([1893] 1 Q.B., 248) and the judgment of Mr. Justice Cave therein. In that case the County Court Judge had been asked to rule on the question of fraudulent preference. He held that there was none, but had made an order that certain property transferred by the manager of the company to particular persons should be given back again, on the ground that the manager had no authority from the company to make the transfer. On appeal Mr. Justice Cave said ([1893] 1 Q.B., at p. 249) : "It appears to me to be quite clear that the County Court Judge had no jurisdiction to make the order which he has made in this case. An application was made to him to declare the transfer of certain wine to the appellant to be a fraudulent preference. The question was raised in argument whether he had any jurisdiction to accede to that application and declare the transaction to be a fraudulent preference. As to that question, I give no opinion. It is unnecessary to decide the point, because the County Court Judge came to the conclusion that there had been no fraudulent preference by the company, on the ground that what was done was done by the manager acting without authority, and therefore there had been no valid transfer of the wine ; and he thereupon ordered the delivery of the wine to the liquidator. The question to be decided is whether he had authority to make that order." So in that case Mr. Justice Cave expressly left open the matter which we have to consider. There is in that judgment nothing inconsistent with the view that we are expressing. The learned County Court Judge there decided a matter between the company and some other persons which had nothing to do with a winding-up.

We were referred also to *In re Centrifugal Butter Company, Limited* ([1913] 1 Ch., 188). There, after the company had gone into voluntary liquidation, the liquidators took out a summons to set aside an agreement between the company and third parties, and were not exercising any right created by the winding-up. The application was made under section 193 of the Companies (Consolidation) Act, 1908, and the judgment of Mr. Justice Neville has been already quoted by my brother Avory. The decision appears

to me to be in no way inconsistent with the view which we are expressing here.

Mr. Clayton then referred us to Buckley on Companies, 10th Edition, section 193 (p. 449) and section 215 (p. 504). We are not concerned to deal with those sections, but I do not think that the observations there to be found conflict with our view. Mr. Clayton also referred us to sections 163 to 172 of the Companies (Consolidation) Act, 1908, which set out a series of powers for the purpose of winding-up, and he argued that, because those express powers were given, it therefore followed that not only had the County Court no power, but also the High Court had no power, to deal with questions of fraudulent preference or floating charge by way of motion in a winding-up. He admitted that it was often the practice for the High Court to do so, but agreed that it was essential to his argument that, if the point were taken, it must be decided that the High Court had no power. I think that we ought not to accede to an argument based upon what is inconsistent with ordinary practice.

For these reasons I am satisfied that the deputy County Court Judge has jurisdiction to deal with this matter. It was said, however, that, even if he had jurisdiction, he ought not to exercise it, in view of the large sum involved and the inadequacy of County Court procedure. If the County Court deals with the matter at all, it must be by motion. The comparative magnitude of this case and the inadequacy of County Court procedure might support an application to transfer the matter to the High Court, but we do not think that such a transfer can be made on this appeal, and that matter has been already dealt with by my brother Avory. On the question whether the deputy County Court Judge ought to exercise his jurisdiction, the difficulty is that, if the matter is within his jurisdiction, he has the right to deal with it and we cannot interfere.

For these reasons I agree that this appeal fails.

[Solicitors—Messrs. Leader, Plunkett, and Leader; Messrs. Dalston, Sons, and Elliman.]

K.B. Div. (Rowlatt, J.) } 1927. Nov. 25.

GRAND COUNCIL OF THE ROYAL ANTEDILUVIAN ORDER OF BUFFALOES v. OWENS.*

Revenue — Income-tax—Exemption—Hospital —Convalescent home — Maintained by unregistered friendly society for its members— No payment by patients — Accommodation for small proportion of total membership— Eleemosynary character — Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. A, No. VI., Rule 1 (c).

Rule 1 of No. VI. of Schedule A of the Income Tax Act, 1918, provides :—"The following further allowances shall be made under this Schedule :— . . . (c) the amount of the tax charged on any hospital, public school, or almshouse, in respect of the public buildings, offices, and premises belonging thereto. . . ."

An unregistered friendly society, of which there were over two million members, had for its principal objects the relief of distressed members and the widows and orphans of members and the promotion of social intercourse and recreation in its lodges. Members of the society paid a small subscription, which was divided and allocated to various benevolent funds.

A house and grounds were bought by the society for use as a convalescent home by its members. The purchase price was paid partly by the society and partly by contributions by its members. The home was maintained by the society and was furnished to accommodate 20 or 30 members. No expense was incurred by a member during his residence at the home, and medical men gave their services to it gratuitously.

Held, that the home was a hospital within Rule 1 (c) of No. VI. of Schedule A, and the society was, therefore, entitled to be allowed the amount of tax charged in respect of the premises of which the home was composed.

This was an appeal by the Grand Council of the Royal Antediluvian Order of Buffaloes against a decision of the General Commissioners of Income Tax for the Droitwich Division by which a convalescent home maintained for its members by the Order at Redditch was held to be assessable to income-tax under Schedule A.

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the division of Droitwich held at the Court House, Bromsgrove, on December 21, 1926, the Grand Council of the Royal Antediluvian Order of Buffaloes appealed against an assessment under Schedule A of the Income Tax Act, 1918, for the year ending April 5, 1924, in the sum of £180 gross (£146 10s. net) in respect of premises called "Holmwood" owned and occupied by the Grand Council. The appeal was on the ground that the premises, which were used as a convalescent home, were a "hospital" within the meaning of Rule 1 (c) of No. VI. of Schedule A. At the hearing of the appeal the following facts were admitted or proved :—

(a) The Royal Antediluvian Order of Buffaloes was an unregistered friendly society which had for its principal objects the relief of distressed members and of the widows and orphans of members and the promotion of social intercourse and recreation in the lodges.

The Order comprised minor lodges, grand lodges, and a Grand Council. The minor lodges were required to hold meetings at least once weekly. There were nearly 2,000 minor lodges and the membership of the Order (which was confined to men) was estimated at over two million persons. A man wishing to join the Order was proposed by a brother of the Order who vouched for his character and, after being duly proposed and seconded and a short period having elapsed during which the credentials of the proposed member were inquired into, initiation took place into a minor lodge. When the initiate had remained a member of the Order for 12 months and had attended 26 times in his minor lodge he was then entitled to participate in the full benefits of the Order.

The administration of the Order was vested in grand lodges and a Grand Council. The grand lodges

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

met once monthly in the district to which they were allocated, and each minor lodge sent two delegates to the grand lodges. Each grand lodge in turn sent one delegate to the Grand Council, which was the supreme governing authority, meeting once quarterly.

(*b*) A brother of the Order on attending his lodge paid a registration fee of not less than 3d. unless his means were such as to make it impossible for this fee to be paid. Out of this fee the minor lodge contributed to the funds of the Order for each member as follows : ½d. for the Central Benevolent Fund ; ½d. for the Central Widows and Orphans' Fund ; ½d. for the Orphanage Fund ; and 1d. for the Fund of the Convalescent Home at Holmwood. These contributions were placed by the Grand Council in each separate fund and applied solely for the benefit for which each fund was established.

(*c*) In August, 1921, at a meeting of the Grand Council at Southampton, it was decided to negotiate for the purchase of certain premises at Redditch, called "Holmwood," then vacant, for the purposes of the institution of a convalescent home there for the use of members of the Order. Fully 90 per cent. of the members of the Order were working men and in case of sickness had little or no means to enable them to enter into a convalescent home for recuperation.

Negotiations were entered into, and as a result the mansion house of "Holmwood" and the grounds belonging to it were bought for the sum of £5,000. In addition, certain fixtures and fittings of the mansion house were bought for a further sum of £1,375. The completion of the purchase of the mansion house and grounds took place on December 27, 1921, and by a deed of conveyance of that date the premises were conveyed to trustees upon trust for the Order. £3,000 of the purchase money was allowed to remain on mortgage, and it was subsequently paid off by the Order. Further parcels of land were bought by the Order for the purposes of the convalescent home for the sum of £1,800, and by a deed of conveyance dated August 31, 1922, these parcels were conveyed to trustees, who, by declaration of trust dated August 31, 1922, covenanted to hold them upon trust for the Order.

To enable the Order to find the balance of the purchase money a general appeal was made by the Grand Council to all the members of the Order, and up to June 30, 1923, the sum of £5,242 2s. was voluntarily contributed, the donations being for the most part made up of small sums.

(*d*) A considerable amount of money was spent on the home before its opening and the Grand Council lent to the Holmwood account from time to time various sums to enable the home to be opened and carried on. Up to June 30, 1926, the sums so lent amounted to £4,750. The home was furnished with 20 beds to admit 20 patients. There was room for another ten beds as occasion required. The home was opened on August 6, 1923, and patients were immediately admitted and continued to be admitted from that date.

The method by which a brother of the Order was admitted into the convalescent home was as follows :—

(*e*) Application was made by the brother through his minor lodge to the Grand Lodge for admission to the home and a medical certificate was submitted. The Grand Lodge formed a local committee, and if the local committee sanctioned the application it was sent on to the general secretary of the Order, who notified the local committee on what date the brother could enter the home. After admission, the brother was allowed to remain at the home for one month. The local committee paid half the railway fare of the admitted brother and the Grand Council paid the other half of the railway fare. No charge or expense was incurred by the brother during his residence at the home.

The staff at the home consisted of a matron, who was a trained nurse, a master, four indoor servants, and certain outdoor servants. There were attached to the home two local medical men who gave their services gratuitously, and a qualified dentist who also gave his services gratuitously.

The Urban District Council of Redditch treated the home for the purpose of rating as being on a hospital basis and reduced the assessment from £138 per year to £67 per year.

The appellants contended that at all material times the home was a hospital within the meaning of Schedule A, No. VI., Rule 1 (*c*). They pointed out that the word "hospital" had a large meaning and was intended to exempt anything practically of the character of a hospital which was of an eleemosynary character. In that regard they relied in particular on the case of *Cawse v. Nottingham Lunatic Hospital Committee* ([1891] 1 Q.B., 585).

They further contended that a hospital had the following meanings :—(*a*) A house or hospital for the reception and entertainment of travellers and strangers ; (*b*) a charitable institution for the housing and maintenance of the needy or an asylum for the destitute, infirm, or aged ; (*c*) an institution or establishment for the care of the sick or wounded, or of those requiring medical treatment.

The appellants contended that a convalescent home was a home where an individual recovered from sickness, regained his health, and got better from ill health ; that the word "convalescent" connoted a gradual recovery of health and strength after illness ; that any institution which provided means for the reception and entertainment and care of a convalescent individual was a hospital ; and that, having regard to the fact that this hospital was maintained solely by the voluntary contributions of members of the Order, and that no contribution whatever was made to its upkeep by those received therein as patients, this convalescent home was a hospital within the meaning of the Rule in respect of the allowances referred to.

The following cases were referred to by the appellants :—*Cawse v. Nottingham Lunatic Hospital Committee* (*supra*) ; *Needham v. Bowers* (21 Q.B.D., 436) ; *Trustees of Mary Clark Home v. Anderson* (20 *The Times* L.R., 626 ; [1904] 2 K.B., 645).

Mr. P. D. Owens (H.M. Inspector of Taxes) contended (*inter alia*) :—(*a*) That "Holmwood" was not a hospital within the meaning of Rule 1 (*c*) ; and (*b*) that the assessment appealed against had been rightfully made and should be confirmed.

The General Commissioners were of opinion that the home was not a hospital within the meaning of Rule 1 (*c*), and they dismissed the appeal accordingly.

The appellants accordingly required them to state this case for the opinion of the Court whether that decision was right.

Mr. Latter, K.C., Mr. Neville Laski, and Mr. P. R. Barry appeared for the appellants ; the Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills for the respondent.

Mr. Justice Rowlatt delivered the following judgment :—The question which I have to consider in this case is whether the establishment maintained by the Grand Council of the Order of Buffaloes is entitled to exemption from tax on its premises under Schedule A as being a "hospital" within Rule 1 (*c*)

of No. VI. of the Schedule. The establishment consists of a private house and its grounds which have been adapted for use as a convalescent home—that is to say, there are received there persons who are no longer in the grip of actual disease but require rest and treatment to restore them to full health and vigour. The Solicitor-General has admitted that, although the institution covers only a small field of hospital work, it is not prevented from being a "hospital" within the Rule. Of course, if it covered a wider field and was more strictly speaking a general hospital where persons could be treated for all sorts of ailments, or for illness of any particular kind, during the crisis of their complaints, it would present a different picture to the mind, but I can regard it as a hospital so far as the medical point of view is concerned and I have to say whether it has lost the benefit of the Rule by reason of the nature of its support or of the class of persons who are benefited by it. I have to decide whether there is any limitation which the Court must apply to the word "hospital" and which covers this case.

There is one limitation which appears established by authority, and that is that there must be some charitable—or, as I prefer it—eleemosynary element about the maintenance of an institution to constitute it a hospital within the Rule. If, as a whole, it is maintained by the payments of patients (whether some pay less than their cost and others more, or however it is) it is not entitled to exemption under the Rule. In the present case the premises constituting the home were bought by subscription which was very largely, if not entirely, inside the Order. The home is supported by the general funds of the Order and the patients at it must be members of the Order. Very few patients—about 20 or 30—compared with the total membership of the Order can be accommodated in the home.

The Solicitor-General argued that the home was really a private institution owned by the Order for the benefit of their members and that, in substance, it possessed no element of public charity in the technical sense of the word "public." On the whole, I do not think that I am justified in holding that the circumstances of the work and management of this home prevent its obtaining exemption under the Rule. I confess that I approach the matter from the angle that in the Rule there is a perfectly general word—"hospital"—and I must justify excluding this establishment from it. I do not think that, for an institution to fall within the Rule, it must possess a particularly charitable element. It is enough if it has an eleemosynary character in the sense that the patients get its benefits as the result of eleemosynary help by others.

The point has also been taken that no trust has been created under which the perpetual user of the premises as a home has been secured. That is true, but at the same time, as a practical matter, I fancy that it would be rather difficult, the funds to buy the premises having been obtained by subscription for a definite object, for the Order to wind up the activities of the home, dispose of the property, and to throw the proceeds into their general funds. The home will continue for an indefinite time to be used for hospital purposes.

Am I to regard the matter as if the opportunity of enjoying the amenities of this home was bought by a person who became a member of the Order? It cannot be said that the enjoyment of these amenities is to be regarded as something in the nature of an insurance benefit which the members of the Order obtain entirely by contract. In my opinion the true position is that the Order are able, by reason of their possession of the premises and sufficient funds, to confer an advantage on a few of their members who suffer from the kind of misfortune that the home has been established to alleviate. The home can be regarded as an eleemosynary establishment maintained by the Order for the benefit of a few members out of many. The patients enjoy the amenities of the home by the charity of the Order or of their fellow members. The mere circumstance that the recipients of the benefits of the home are limited to members of the Order makes no difference. An institution is not prevented from being a hospital within the Rule because it has been established for the members of a profession or trade or for some such large section of the community.

For these reasons—although the case is very near the line—I think that the appellants are entitled to succeed, with costs.

[Solicitors—Messrs. Mawby and Barrie, for Messrs. Walker and Goldstraw, Stockport; the Solicitor of Inland Revenue.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) 1927. Nov. 7.

GREENWAY v. ATTORNEY-GENERAL (GREENWAY AND OTHERS CITED).*

Legitimacy—Petition—Application for hearing *in camera*—Jurisdiction—Legitimacy Declaration Act, 1858 (21 and 22 Vict., c. 93)—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 188—Legitimacy Act, 1926 (16 and 17 Geo. V., c. 60).

A petition filed under the Legitimacy Act, 1926, for the legitimation of a person who was born illegitimate, but whose parents were married subsequently to his birth, is not a proceeding which entitles the petitioner to a hearing *in camera*. There is no ground for departing from the general rule of judicial administration, specifically recognized in *Scott v. Scott* (29 *The Times* L.R., 520; [1913] A.C., 417), that justice in this country is to be administered publicly unless the Legislature shall otherwise direct.

This was the first petition heard in this Division under the Legitimacy Act, 1926, and the Legitimacy Declaration Act, 1858, for a declaration that the petitioner had become legitimated by reason of the marriage of his parents subsequently to his birth. In his petition, dated February 14, 1927, J. D. Greenway said that he was born on March 28, 1896, at Melbourne, and that his parents, who were then unmarried, were married at St. Bride's Church, Fleet-street, on October 7, 1899; that there were three children of the marriage; and that the petitioner's father died on May 29, 1915. Paragraph 8 said: "That other than the said issue of the said marriage there are no persons affected and there is no property involved by the legitimation of your petitioner under the provisions of the Legitimacy Act, 1926." Further paragraphs set out that there was no collusion or connivance between the parties, that there had been no previous legitimacy proceedings, and that the petitioner was a natural-born subject of the King.

* Reported by WILLIAM LATEY, Esq., Barrister-at-Law.

The prayer asked for a declaration that the parents were lawfully married at the place and on the date mentioned above, "and that by such marriage and under and by virtue of the Legitimacy Act, 1926, your petitioner has been since January 1, 1927, the legitimate son of his said parents."

In his answer dated June 23, 1927, the Attorney-General said :—

"(1) That he leaves the petitioner to make such proof of the matters set forth in the said petition as the said petitioner shall be enabled.

"(2) That he claims on behalf of his Majesty all such right and interest as he on behalf of his Majesty shall appear to have in the premises, and in any matter arising out of the proceedings upon the said petition, and submits the same to the judgment, order, and direction of this Honourable Court."

Mr. F. R. Evershed appeared for the petitioner and other parties interested ; the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. Gervais Rentoul for the Crown.

Mr. Evershed raised a preliminary objection to the petition being heard publicly in open Court, and said that it was not the kind of proceeding to which *Scott v. Scott* (29 *The Times* L.R., 520 ; [1913] A.C., 417) applied. The petition was actually brought under the Supreme Court of Judicature (Consolidation) Act, 1925, which re-enacted the Legitimacy Declaration Act, 1858. Rules had been issued under the Legitimacy Act, 1926, for applications to the County Court, but not in regard to those in the High Court. Only private rights were in question here.

Lord Merrivale.—It had been thought that a practice that was growing up in nullity suits to hear them *in camera* was a proper one, and perhaps in regard to other classes of cases, but in *Scott v. Scott* (*supra*) it was decided that it could not be done. It is very important in questions of status that it should not be done.

Mr. Evershed.—This is not a question of public interest.

Lord Merrivale.—This is similar to a suit in which there are plaintiffs and defendants, and the Attorney-General represents the public interest.

Sir Douglas Hogg.—I do not propose to agree to this or to any other proceeding under this Act being heard *in camera*.

Mr. Evershed read passages from the speeches in *Scott v. Scott* (*supra*) to show that the decision did not cover this case, and he said that if it were not possible in many of these legitimacy suits to hear them *in camera* there would be a denial of justice because illegitimate people would refrain from exercising their rights under the law owing to the fear of publicity. He referred to proceedings which were held *in camera*.

Sir Douglas Hogg said that the question of status as well as the interests of other people were involved. Section 2 (1) of the Legitimacy Act, 1926, said : "A person claiming that he or his parent or any remoter ancestor became or has become a legitimated person may, whether domiciled in England or elsewhere and whether a natural-born British subject or not, present a petition under the Legitimacy Declaration Act, 1858, and that Act, subject to such necessary modifications as may be prescribed by rules of Court, shall apply accordingly."

Section 8 of the 1858 Act said : "The decree . . . shall not in any case prejudice any person, unless such person has been cited or made a party to the proceedings, or is the heir-at-law or next of kin, or other real or personal representative of or derives title under or through a person so cited or made a party ; nor shall such sentence or decree of the Court prejudice any person if subsequently proved to have been obtained by fraud or collusion."

The Attorney-General said that *Scott v. Scott* (*supra*) required his Majesty's Courts to be open to the public and laid it down that publicity was necessary to the proper administration of justice. There were exceptions in regard to cases in which publicity would prevent the proper administration of justice, as for example in the case of an injunction to prevent the exploitation of a secret process the object of which would be defeated by publicity. Again, there was the case of particular evidence not being available if heard in open Court, and in this Division Sir Samuel Evans, President, in the case of *Moosbrugger v. Moosbrugger* (29 *The Times* L.R., 658), directed only that a particular matter should be the subject of evidence given *in camera*. He recalled cases of evidence being given in private at courts-martial following the Irish rebellion the embers of which were then still smouldering. If the names of any of the witnesses had become known they might have been assassinated. In such cases it was impossible to do justice unless the case were heard *in camera*. He cited passages from the speeches of Lord Halsbury and Lord Shaw in *Scott v. Scott* (*supra*) in support of his argument and said : "I am not here merely for the protection of property on behalf of the Crown. In legitimacy cases the Attorney-General represents the public to ensure that the purposes of the law and the interests of the public at large shall be observed. The fact that a case like this is heard in public is the best protection that the public can have. It would be a very serious thing if these cases were heard *in camera* and so those ends were defeated which only publicity can carry out. Your Lordship cannot make this order."

Lord Merrivale.—This is an application under the Legitimacy Act of 1926, whereby what has been for time whereof the memory of man, I suppose, runs not to the contrary the law of Scotland became the law of England—namely, that children begotten before marriage between parents who are capable of marriage at the time became legitimated by the subsequent marriage of their parents. It has been a matter of controversy for generations, and one might almost say for ages, in this country. At a very remote period in the legal history of the country those who exercised the powers of Parliament declared that in that matter they would not depart from the ancient law of England. The ancient law of England was that illegitimacy, when once it existed, remained permanently the status of the person concerned. The statute of 1926 has altered that, and it is said that it has created the status of legitimacy dependent upon the capacity of the parents to marry at the time of procreation and subsequent marriage. I am not concerned to examine that with any accurate minuteness.

So far as I know, speaking generally, it is true, but the statute has done something more. It has directed that a person claiming to be legitimated, or to have become legitimated, by the operation of this statute may proceed by a suit in one of his Majesty's Courts to obtain a declaration of his legitimacy, and the statute which confers that faculty upon a person asserting legitimacy directs that the provisions of the Legitimacy Declaration Act of 1858 shall apply to any proceeding which takes place under this power. I suppose there could not be a doubt in the mind of any man who had any familiarity with proceedings under the Legitimacy

Declaration Act of 1858 that these proceedings took place invariably in open Court. It never occurred to any person, so far as I am aware, that the jurisdiction of the Court could be exercised otherwise than upon a public trial of the cause. Such public trials took place from time to time, and sometimes in them matters involving great pain to the parties and to witnesses were the subjects of discussion. That is the situation of the matter upon the Act of Parliament.

The general law of England was long ago declared to be that the Courts of this land exercised their powers in public, unless by some means they are directed to exercise them otherwise. The passage was cited by Lord Halsbury in *Scott v. Scott* (29 *The Times* L.R., 520; [1913] A.C., 417) from the judgment of very learned Judges long years before that case was heard in which three learned Judges determined that the Divorce Court had no power to sit otherwise than with open doors. That was founded upon an ancient principle of law. I think that ancient principle is hardly contested on the part of the present litigant, but the application is made that this case shall be heard *in camera* upon grounds founded on passages in the speeches in *Scott v. Scott* (*supra*) which are supposed to limit the generality of the rule that they recognize.

As to the generality of the rule there can be no question, and the House of Lords decided that an Ecclesiastical Court could not proceed *in camera*. But the noble and learned Lords who decided the case of *Scott v. Scott* (*supra*) had sundry matters brought to their attention, and they made very guarded limitations. It was said to them that in certain proceedings in respect of infants and in respect of the property of lunatics the High Court exercised its discretion *in camera*. That is quite true. Their Lordships justify that procedure, but it has nothing to do with this case.

Their Lordships said that where a question of mere status was concerned it was essential that there should be publicity as a general rule. That does not weaken the authority of the Court as a general proposition. It is said that there is no question of status in this case, and therefore in this particular case the rule could be relaxed on other grounds. The other grounds were grounds which were much discussed. There is the class of cases in which property, which it is the object of the litigation to protect, would be destroyed by public inquiry, and the noble and learned Lords withheld any declaration which would preclude a proceeding *in camera* in such a case. This is not such a case.

But Lord Loreburn also instanced a possible ground of limiting the operation of the general rule which required publicity, in cases in which, as that noble and learned Lord said, publicity would in the circumstances reasonably deter a party from seeking redress, and he guardedly refrained from excluding the power to sit *in camera* if such circumstances were found to operate. In the judgments of the general body of the Lords, and more particularly in the judgment of Lord Halsbury and in the judgment of Lord Shaw, it is made abundantly apparent that the grounds on which it could be held as a reason for the private sitting of a Court that publicity would in the circumstances reasonably deter a party from seeking redress are so difficult to define safely as a matter of general rule that the question must be left to be dealt with as it arises.

I myself do not regard it as part of the law laid down by *Scott v. Scott* (*supra*) that if publicity will deter a litigant from proceeding to obtain redress he should be allowed to bring his suit *in camera*. I do not believe that that is the law, and I know no ground for supposing that there is any such general principle of law.

It was said that no question of status arises, and that, therefore, many of the observations in *Scott v. Scott* (*supra*) do not apply with their full effect. Undoubtedly a question of status arises. Legitimacy is status. Illegitimacy is status. The question here is as between legitimacy and illegitimacy.

As to the other matters, it seems to me that, apart from *Scott v. Scott* (*supra*), it must be recognized here that the general rule of judicial administration in this country is that justice is to be administered publicly unless the Legislature shall otherwise direct.

The Attorney-General in the few observations which he addressed to the Court withheld his assent to the suggestion that he is a party to these proceedings merely to protect the proprietary interests of the Crown in case of escheat. I endorse these observations fully. The Attorney-General is here representing the Crown in a matter in which the judgment has effects of some public consequence—a consequence beyond the effect which it has between the actual litigants, and of the class bearing upon the interests of the community which were recognized in the Legitimacy Declaration Act of 1858, and reinforced by the consideration peculiar to the Act of 1926 in which the procedure of the Legitimacy Declaration Act of 1858 is preserved.

I think there is no ground in this case upon which a Judge would be warranted in saying that he may proceed *in camera*. Some observations were founded upon remarks of learned Judges with regard to cases in which the parties had referred the matter to an arbitrator agreed upon by the parties and were bound by his award. It was said that in these cases it was at the option of the parties and their agreed arbitrator to proceed without publicity. This is not a case of that kind, and I can only say that for my own part I should not dream of resigning to an arbitrator functions which the statute has directed that I should exercise, if at all, judicially. The application for a hearing *in camera* fails.

The suit then proceeded, and his Lordship granted the declaration asked for, subject to its being prefaced by a recital correcting an error in the petition concerning a detail in the property affected.

Mr. RENTOUL said that the Attorney-General did not ask for costs, and no order was made as to costs.

[Solicitors—Messrs. Pritchard, Englefield, and Co.; the Treasury Solicitor.]

K.B. Div. (MacKinnon, J.) } 1927. Dec. 1.

FRANCE v. J. COOMBES AND CO.*

Master and Servant—Minimum wage—Trade board — Employment both on work of "specified trade" and on other work—Claim for wages at minimum rate during whole time of employment—Trade Boards Act, 1918 (8 and 9 Geo. V., c. 32), s. 8.

The plaintiff was employed by the defendants as "working manager" of a branch shop. During about half of the business hours he was employed in working at a trade for which minimum rates of wages had been fixed under the Trade Boards Acts, 1909 and 1918. During

* Reported by G. F. L. BRIDGMAN, Esq., Barrister-at-Law.

the rest of those hours he was engaged in cleaning the shop, keeping the books, selling goods by retail and performing other duties under his contract of service for which no minimum wage had been fixed.

Held, that the plaintiff was not, by s. 8 of the Trade Boards Act, 1918, to be deemed to have been employed during all the business hours on work for which a minimum rate of wages had been fixed, since the defendants had proved that he was present on their premises during those hours for some purpose, (*a*) unconnected with the work for which a minimum rate of wages had been fixed, and (*b*) other than that of waiting for work to be given to him to perform.

This action raised the question what rate of wages employers were liable to pay to workers employed by them partly on work for which minimum rates of wages had been fixed under the Trade Boards Acts and partly on work which did not come within those enactments. It was stated that it was a test case.

Mr. Herbert France, a Manchester boot and shoe repairer, claimed from Messrs. J. Coombes and Co., boot and shoe repairers, of Harrogate, Yorkshire, £363 odd which he said was owing to him as wages.

For about three years the plaintiff was employed by the defendants as "working manager" of a branch shop at Openshaw, Manchester, under an agreement by which he agreed "to do all kinds of boot repairing and other work" required by the defendants; to be responsible for all moneys and goods at the branch; to render to the defendants all accounts as required; to account for and pay over all moneys of the employers; to keep all books and documents; and to keep open the branch shop and remain in attendance at it during business hours. The parties also signed a document headed "Rules for Managers of Branch Shops," which specified the business hours and provided that the shop must be cleaned before 10 o'clock, that cash must be balanced and the day-book entered up nightly, and that a balance-sheet must be completed every week.

During the currency of the agreement the defendants paid to the plaintiff the full amount of the wages provided for in it. After he had left their employment, however, he brought the present action, alleging that the amount of wages due to him was regulated by the Trade Boards Acts, that he had not received the sums provided by those Acts in respect of all the time during which he was present on, and therefore was by section 8 of the Trade Boards Act, 1918, to be deemed to be employed at, the defendants' premises, and that the defendants were liable to pay him the balance.

The primary purpose of the branch shop of which the plaintiff was manager was to repair boots and shoes brought there for that purpose by customers, but there was also a retail trade of selling blacking, laces, and other "sundries." The plaintiff was employed, on the average, during about half the business hours in actually repairing boots and shoes. During the rest of the time he served in the shop, attended to it, kept the books and accounts, and performed his other duties under the contract.

The boot and shoe repairing trade was a trade for which minimum piece rates and time rates had been fixed by the trade board for the industry under the Trade Boards Acts.

Section 8 of the Trade Boards Act, 1918, provides:—

"For the purpose of calculating the amount of the wages payable in the case of a worker employed on any work for which a minimum rate of wages has been fixed under the principal Act [the Trade Boards Act, 1909] the worker shall be deemed to have been employed during all the time during which he was present on the premises of the employer, unless the employer proves . . . that he was so present for some purpose unconnected with his work and other than that of waiting for work to be given to him to perform. . . ."

The plaintiff contended that, in view of that section, during the whole time that he was in the defendants' shop he was to be "deemed to have been employed" there in repairing boots and shoes, and that he was entitled to time and overtime minimum rates in respect of all the business hours which he spent at the shop.

The defendants contended that the plaintiff was not to be deemed to have been acting as a boot and shoe repairer during all the time when he was at the shop, but that he was only employed on that work during the actual periods in which he was repairing boots and shoes, and for that he had been paid the minimum rates fixed for workers of his class by the trade board.

Mr. Schiller, K.C., and Mr. Malcolm Hilbery appeared for the plaintiff; Mr. Stuart Bevan, K.C., and Sir Robert Aske for the defendants.

Mr. Justice MacKinnon.—The question which I have to decide is whether the plaintiff can say with truth that he was employed in the trade of boot and shoe repairing during the whole time during which he was in the defendants' shop, or whether the defendants can say with truth that he was only so employed during that part of the day in which he was actually repairing boots and shoes. I should not have had very much difficulty in coming to the conclusion that the defendants were right in that but for the provisions of section 8 of the Trade Boards Act, 1918.

All the time-rates and piece-rates of wages laid down by the Orders of the Minister of Labour are subject to the proviso that they are "based on a week of 48 hours and are subject to a proportionate reduction according as the number of hours of employment in any week is less than 48." If a man is employed partly in repairing boots and shoes in a small shop like that in the present case and partly in selling articles by retail, partly in keeping the shop in order, and partly in making up the accounts, I should have thought that he was employed in various tasks and that only part of his time—in the present case less than 48 hours a week—was actually occupied in repairing boots and shoes. But I have to take into account section 8 of the Act of 1918, which, in my opinion, supplies the most difficult and important point in the case. It is obvious that the plaintiff was present on the defendants' premises for more than 60 hours each week. He is, therefore, to be "deemed to have been employed" on the work of boot and shoe repairing during all that time, "unless the employer proves . . . that he was so present for some purpose unconnected with his work and other than that of waiting for work to be given to him to perform."

Several questions arise on the section. Do the words in it "his work" mean in this case the plaintiff's work of boot and shoe repairing, or his work for the defendants whatever it might be. Having regard to the whole purpose of these Acts,

I think that "his work" means here "his work of boot and shoe repairing." Considering only that part of the section which says, "unless the employer proves . . . that he was so present for some purpose unconnected with his work," the defendants have, in my opinion, shown that the plaintiff was present at their shop for some purpose unconnected with the work of boot and shoe repairing, because he was only repairing boots and shoes during about one-half of the business hours and during the rest of that time he was cleaning the shop, selling "sundries," making up the books, eating his meals, and, possibly, during a considerable number of hours, doing nothing at all.

But the defendants, to succeed, have to do something more. They have also to show that the plaintiff was present "for some purpose . . . other than that of waiting for work to be given to him to perform." Can the defendants say that the plaintiff, when not repairing boots and shoes, was in the shop for some purpose other than that of waiting for work to be given to him to perform. He was undoubtedly waiting there for work to be given to him to perform in the sense that if, while he was either doing nothing or was performing some of his other duties, a customer came in with a pair of boots or shoes for repair, he would be given work to perform. I do not think, however, that it would be proper to construe this section in favour of the plaintiff in the present case. In my opinion, the section contemplates the case of a time-worker who is definitely employed during the whole of his time to do work for which minimum rates of wages have been fixed. If, through no fault of his, but owing to the delay of some fellow-worker employed in bringing him the raw material, or owing to the absence of raw material on which he can work, he is unable to work for a given period, he is not to be prejudiced in his right to payment in respect of that period. I think that the defendants here can say that the plaintiff was at their shop for a purpose other than that of waiting for work to be given to him to perform, that purpose being to look after the shop and so on. Doubtless it is true that the main purpose of the business and of his employment was the repairing of boots and shoes, but other things were involved in his employment. He was employed, not only as manager in the sense of the definition of "manager" by the trade board, but also as the manager of all the business carried on at the shop, in which capacity he had to do a number of things.

Taking a more general view of this legislation and these Orders, I do not think that their purpose was to entitle a man who has become a member of a privileged class, for which minimum rates of wages have been fixed under the Trade Boards Acts, to be paid the minimum rate applicable to him whatever may be the work on which he is employed. Their whole purpose is to ensure that any man, during the time that he is doing work for which minimum rates of wages have been fixed, is paid the minimum rate applicable to him. It is necessary to take that view in the present matter if the case is considered of a man in an ordinary boot shop part of whose time is spent in repairing leather footwear and the rest of whose time is spent in retailing boots and shoes.

In my view, therefore, section 8 is not decisive of this case in favour of the plaintiff. The defendants have proved that during about half the time when he was employed at the shop he was "present for some purpose unconnected with 'his work' [of boot and shoe repairing] and other than that of waiting for work to be given to him to perform." During the time when he was actually repairing boots and shoes he was paid the proper minimum rate and, therefore, his claim fails.

Had I decided otherwise I should have held that the meal-times enjoyed by the plaintiff must be deducted from the total number of hours a week during which he was present at the defendants' shop, because proviso (*b*) in section 8 enacts that "a worker while present during normal meal times in a room or place in which no work is being done shall be deemed to be present for a purpose unconnected with his work." It is, however, unnecessary to discuss that.

The claim fails, and there must be judgment for the defendants, with costs.

[Solicitors—Messrs. Church, Adams, and Co., for Messrs. Cobbett, Wheeler, and Cobbett, Manchester; Messrs. T. D. Jones and Co., for Messrs. Topham and Phillips, Harrogate.]

K.B. Div. (Rowlatt, J.) 1927. Dec. 2.

JONES v. WRIGHT.*

Revenue—Income-tax—Profits and earnings of employment — Solicitor-trustee — Power to charge — Remuneration by percentage of trust funds — Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. D, Case II.

Case II. of Schedule D of the Income Tax Act, 1918, provides that income-tax "shall extend to every employment by retainer in any character whatever, whether such retainer shall be annual or for a longer or shorter period, and to all profits and earnings of whatever value arising from employments, and shall be computed on the full amount of the balance of the profits, gains, and emoluments of the professions, employments or vocations upon a fair and just average of three years. . . ."

A solicitor-trustee was empowered by clauses in the instruments creating the trusts to charge for work done by him in connexion with the trusts. By agreement between himself, his co-trustees, and the beneficiaries his remuneration was calculated as a percentage of the annual income of the trust funds, which income had already been brought into charge to tax.

Held, that this remuneration was chargeable to income-tax on the solicitor under Sched. D, Case II., of the Income Tax Act, 1918, as his profits or earnings arising from an employment and was not constituted of annual payments payable wholly out of profits or gains brought into charge to tax within Rule 19 of the General Rules applicable to All Schedules of the Income Tax Act, 1918.

In re White (14 *The Times* L.R., 503; [1898] 2 Ch., 217); *In re Brown* ([1918] W.N., 118); and *Baxendale v. Murphy* (40 *The Times* L.R., 784; [1924] 2 K.B., 494) distinguished.

This was an appeal by the Crown in a case which raised the question of the liability of a solicitor-trustee

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

to pay income-tax on his remuneration for professional services, that remuneration being calculated as a percentage of the annual trust income.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on July 12, 1926, to hear appeals, the respondent, Mr. Charles Hadfield Wright, a solicitor, of 34, Clement's-lane, E.C.4, appealed against an assessment to income-tax for the year ending April 5, 1926, made on him under Case II. of Schedule D of the Income Tax Act, 1918, in respect of the profits arising from his profession.

In the computation of the assessment there were included sums purporting to represent charges of the respondent in respect of work done in relation to three trusts created by instruments under which the respondent had been appointed a trustee, with power to charge under two of the instruments as follows :—

"Provided also and it is hereby agreed and declared that any trustee for the time being under these presents being a solicitor or other person engaged in any profession or business shall be entitled to charge and be paid all usual or professional charges for business done by him or his firm in relation to the execution of the trusts of these presents whether in the ordinary course of his profession or business or not and although not of a nature requiring the employment of a solicitor or other professional person."

The power to charge in the third instrument was as follows :—

"The said Charles Hadfield Wright or any other executor or trustee hereunder being a solicitor or other person engaged in any profession or business may be so employed or being a sole executor or trustee may so act and shall be entitled to charge and be paid for all work done and time expended by him or his firm in relation to the executorship or trust including acts which a trustee not being in any profession or business could have done personally."

The respondent acted as trustee under the three instruments, and, in addition to his ordinary duties as executor and trustee, he kept the books and accounts of the trusts and supervised the receipt of the income from the trust funds and the distribution of that income to the persons entitled under the trusts. In respect of the work done by him he did not charge his usual or proper professional fees, but, by arrangement with the other trustees and the beneficiaries, received or retained a small sum a year calculated as a percentage of the amount of income received on the investments representing the trust funds.

During the years ending April 5, 1923, 1924, and 1925, that is to say, during the years falling into the average for the purposes of the assessment under appeal, the respondent received or retained sums amounting in all in each of those years to about £26, £30, and £28, resulting in an average of £28 over those years. All those sums were paid to or retained by him out of the income of the trust funds which had already been brought into charge to income-tax.

No deductions in respect of income-tax were made from the sums paid to the respondent, but, in the event of his contentions being upheld, he was prepared to make all necessary adjustments by way of repayment to the executors and trustees of the appropriate sums in respect of income-tax.

In the foregoing circumstances the respondent claimed that the sums in question should be excluded from the computation of the assessment. It was contended on his behalf that :—(*a*) the sums paid to him were annual payments, payable wholly out of profits or gains brought into charge within the meaning of Rule 19 of the General Rules applicable to Schedules A, B, C, D, and E of the Income Tax Act, 1918 ; (*b*) in making the payments the executors or trustees should have deducted therefrom income-tax at the rate of tax in force during each of the years in question ; and (*c*) the sums were not chargeable under Case II. of Schedule D as profits or gains arising to the respondent from his profession as a solicitor.

It was contended on behalf of the appellant that the sums paid to the respondent were properly chargeable on him under Case II. of Schedule D of the Income Tax Act, 1918, and that the assessment under appeal should accordingly be confirmed.

The Special Commissioners held that the sums in question were annual payments payable wholly out of profits or gains brought into charge within Rule 19 of the General Rules applicable to Schedules A, B, C, D, and E of the Income Tax Act, 1918, and that they were not chargeable on the respondent under Case II. of Schedule D of the Income Tax Act, 1918. They, accordingly, reduced the assessment under appeal.

The Crown appealed.

The Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills appeared for the Crown ; Mr. Raymond Needham for the respondent.

Mr. Justice Rowlatt.—In this case the question for my decision is whether a solicitor is bound to include for income-tax purposes among the receipts from the exercise by him of his profession three sums which he has arranged with the trustees of three trusts and with the beneficiaries, he himself being one of the trustees, to receive by way of commutation of his charges for work done by him as a solicitor which he was entitled to make under the clauses giving him power to charge in the several instruments creating the trusts. Is he so bound, or are the sums in question to be treated as annual payments payable out of profits or gains which belong to the *cestuis-que-trust* and are therefore liable to suffer deduction in their hands under Rule 19 of the All Schedules Rules under the Income Tax Act, 1918 ?

I do not think that it makes any difference that we have here to deal with sums resulting from a commutation calculated as a percentage on the annual incomes received by the trusts instead of payments on a *quantum meruit* or sums made up according to a scale of charges which would vary from year to year according to the work done.

Clearly a payment out of profits or gains does not suffer deduction of income-tax unless it is by way of division of profits. If it is a payment by way of spending it is not a division of profits, but a spending which creates a new profit taxable in the hands of the recipient. The Special Commissioners decided this case on the authority of my own decision in *Baxendale v. Murphy* (40 *The Times* L.R., 784 ; [1924] 2 K.B., 494). In that case a trust had been created by a separation deed and two trustees were appointed, the settlement providing that each of them should be entitled to remuneration for his services at the rate of £100 a year. I held that they took the money under the trust as an "annual payment . . . payable wholly out of profits or gains brought into charge to tax" within Rule 19 and that it was not a payment in respect of an employment so as to be the subject of direct assessment under Schedule D, Case II. I decided that on the authority of *In re Thorley* (7 *The Times* L.R., 479 ; [1891] 2 Ch., 613) and other cases, although it arose under a settlement and not under a will. The view which I took in *Baxendale v. Murphy* (*supra*) was that there was no employment available at £100 a year to anyone to do the work in question. Either the trustees named in the settlement acted as trustees

or they did not. If they acted as trustees they received the £100 a year each; if they did not so act they did not receive the money.

The Attorney-General has reserved the point whether *Baxendale v. Murphy* (*supra*) should have been decided the other way on the ground that the trustees came in quite voluntarily. It may be that that is so. But, in any case, I do not think that *Baxendale v. Murphy* (*supra*) covers the present matter. Here there is simply a common clause in each of the instruments creating the trusts and that clause empowers any trustee who happens to be a solicitor to make his ordinary charges for the professional services rendered in respect of the trust. Although he is a trustee he need not act as a solicitor. If he refuses to do so another solicitor is employed. The respondent came into this matter because he was willing to act as solicitor and because the other trustees were agreeable that he should do so. Therefore, there seem to me to be the elements of a contract between the trustees and the solicitor-trustee. All that the latter gets under the clauses which give him power to charge is the removal of a disability which would otherwise prevent him from entering into an ordinary contract of service with the trustees in consideration of remuneration.

I think that he did enter into such a contract, subject to the difficulty of pleading at common law a contract to which he was a party as his own employer. I do not think, however, that, for income-tax purposes, a man can be absolved from including in the profits and gains of his profession that which he has undoubtedly earned in the course of his professional employment—perhaps by serving a firm in another line of business in which he is a partner as solicitor or accountant—because of a technical difficulty in a matter of common law pleading. It is true that Lord Justice Lindley, in his judgment in *In re Thorley* (*supra*)—where there was a bequest by will of an annual sum to trustees while they carried on the testator's business—said (at p. 624) that the trustees could not frame declarations to recover their annuities based on implied contracts of payment because they were both "paymasters and payees." But *In re Thorley* (*supra*) was extremely like *Baxendale v. Murphy* (*supra*) except that the trust was created by a will and not by a settlement. In neither case was there any question of anyone getting the annual sum—£250 in one case and £100 in the other—unless he was a trustee of the will or of the settlement. No employment was generally available. Here, as I have said, the respondent need not act as solicitor to any of these trusts. If he wishes to do so he finds himself free to enter into a bargain. If he does not do so another solicitor can be employed.

So far I should have thought that it was clear—for income-tax purposes and I am not concerned with anything else—that the sums received by the respondent from the trusts in the present case were profits and earnings arising from his employment as a solicitor and that it could not be said that those sums, or his share of them if he had been acting in partnership with another solicitor, were annual payments "payable wholly out of profits or gains brought into charge to tax." But I was pressed with, and impressed by, the cases of *In re White* (14 *The Times* L.R., 503; [1898] 2 Ch., 217) and *In re Brown* ([1918] W.N., 118). Nothing could be clearer and more helpful than the argument which was founded on those authorities, but I do not think that they cover the present case. In *In re White* (*supra*) a will contained a clause empowering a solicitor-trustee to charge for professional work. The estate proved to be insolvent and the solicitor-trustee sought to claim profit costs against it. It was held that he could not do so on the ground that a trustee must give his services gratuitously and that anything given to him is given as a bounty by the testator, and that that bounty cannot give the object of it an advantage which he would possess if he were a creditor. In *In re Brown* (*supra*) the testatrix made a number of bequests and declared that every trustee of her will who might happen to be a solicitor should be entitled to be paid all usual professional charges for advice given and business done with reference to her will. The total estate amounted to a less sum than the legacies so that an abatement became necessary. It was held that the power to charge in the will was in effect a bequest to the solicitor-trustee of a legacy conditional on his doing certain work, the amount of the legacy to be ascertained when the work had been done and the profit costs arrived at, and that, therefore, the amount of it must be abated proportionally. I do not know whether a solicitor-trustee who is empowered to charge is charged with legacy duty. There must be great difficulties in doing so. If, for instance, the solicitor-trustee is a partner he has to be charged on his share under the partnership agreement. Or, if another solicitor-trustee comes in, then the legacy must be treated as springing up again in his favour.

But, however that may be, I do not think that those cases cover the present matter, because I do not think that they mean that a bequest of profit costs is a bequest of a bounty which is not earned. Profit costs are earned in such a case as the present and it is right to charge them with income-tax under Schedule D, Case II. They remain remuneration and must be treated as profits and earnings arising from employment. This appeal must, therefore, be allowed, with costs.

[Solicitors—The Solicitor of Inland Revenue; Mr. S. Thornhill Tracey.]

Chan. Div. (Clauson, J.) 1927. Dec. 2.

CATTON v. ASHWELL AND NESBIT, LIMITED.*

Master and Servant—Compensation for injury by accident — Weekly payments — Alleged recovery of workman—Stoppage—Application by employers for review — Denial of liability—Payment into Court of amount up to date fixed for hearing—Alleged breach of statutory duty—Tribunal to determine question of incapacity—Workmen's Compensation Act, 1925 (15 and 16 Geo. V., c. 84), ss. 12, 21.

The plaintiff, a workman in the employment of the defendants, was injured by an accident, and the defendants admitted liability and made a weekly payment of compensation. Ultimately a doctor reported that the plaintiff had recovered, and the defendants stopped the weekly payments and applied to the county court for a review thereof, and, when a date had been fixed for the hearing, they paid into Court, with a denial of liability, the amount of the weekly payments up to that date. While the county court proceedings were still pending, the plain-

* Reported by G. P. Langworthy, Esq., Barrister-at-Law.

tiff brought this action, alleging that he had not recovered from his injury, and claiming (1) a declaration that under section 12 of the Workmen's Compensation Act, 1925, the defendants had committed a breach of their duty by stopping the payments otherwise than in pursuance of an agreement or arbitration, and (2) an injunction restraining a continuance of the breach.

Held, that under section 21 of the Act the only tribunal to determine the question of incapacity was the county court, and as that question had not yet been determined by that tribunal the plaintiff could not show that his incapacity was continuing since the date when the defendants stopped the weekly payments, and therefore the action failed.

This action raised the question whether a workman, who was in receipt of weekly payments as compensation for an injury sustained during his employment, could claim that the payments must be continued until the issue whether he had recovered was decided, and that the money could not be paid into Court pending the decision.

The plaintiff, Mr. Joseph Catton, a pipe fitter, was injured on August 1, 1925, while in the employment of the defendants, Ashwell and Nesbit, Limited, engineers, who carried on business at Leicester. He was paid £1 10s. a week as compensation. By this action he claimed a declaration that the defendants, by stopping the weekly payments of compensation on June 24, 1927, otherwise than in pursuance of an agreement, or arbitration, had committed a breach of their statutory duty under the Workmen's Compensation Act, 1925. He also claimed an injunction restraining the defendants from continuing the breach, and damages.

The plaintiff injured his heel by falling from a platform 3ft. high. The defendants admitted liability. In May, 1927, the plaintiff was examined by a doctor, who reported that he had recovered from the injury.

On June 24 the defendants filed an application in the Greenwich County Court, in pursuance of section 11 of the Workmen's Compensation Act, 1925, for a review of the weekly payments which they were making to the plaintiff, asking that they should be terminated or diminished. On June 27 the Registrar gave notice that the application would be heard on October 14, 1927. The defendants thereupon paid into Court £24, the amount of the weekly payments up to October 14, 1927. That payment was made with a denial of liability, on the ground that the plaintiff, having entirely recovered, could no longer claim to be paid compensation up to the time when an award should be made in the county court, in view of the recent decision of the House of Lords in *Ocean Coal Company, Limited v. Davies* (43 *The Times* L.R., 108; [1927] A.C., 271).

The plaintiff pleaded that he had not recovered from his injury. He said that in *Ocean Coal Company, Limited v. Davies* (*supra*) the workman admitted that he had entirely recovered from his injury, but claimed, nevertheless, that under section 14 of the Workmen's Compensation Act, 1923, now section 12 of the Workmen's Compensation Act, 1925, the payment of compensation could not be ended until the county court judge had made an award on the application to review.

Section 21 of the Act of 1925 provided that any question arising in any proceedings under that Act should be settled by an arbitrator or by a county court judge. Section 12 provided that an employer should not be entitled otherwise than in pursuance of an agreement or arbitration to end or diminish a weekly payment except in certain cases, which did not apply here.

Sir Henry Slesser, K.C., and Mr. C. S. Rewcastle appeared for the plaintiff; Mr. Edgar T. Dale and Mr. J. Alun Pugh for the defendants.

Sir Henry Slesser, in opening the plaintiff's case, said that the principle was well established that a right of action for damages for a breach of a statutory duty would lie where, as here, there existed no alternative remedy and the right attached to a particular class of persons, such as workmen. See *Phillips v. Britannia Hygienic Laundry Company, Limited* (39 *The Times* L.R., 530; [1923] 2 K.B., 832, at p. 837).

Before the Act of 1923 was passed if employers applied for a review of weekly payments, they could immediately and without waiting for the decision of the county court stop the payments, thereby leaving the workman for some weeks without compensation and without employment. To remedy that state of affairs, section 14 of the Act of 1923, now section 12 of the Consolidating Act of 1925, provided that the payments could not be so stopped, and could only be ended in the events therein set out. The defendants had attempted to evade section 12 by a payment into Court. The defendants relied upon section 21 of the Act of 1925, but, in fact, there had been no proceedings under that Act, as the weekly payments were made voluntarily without proceeding to arbitration. The plaintiff was not here asking for compensation. The House of Lords, in *Ocean Coal Company, Limited v. Davies* (*supra*), held that if a workman admitted that he had recovered he was not entitled to receive any further compensation from the time of that admission. Here the workman denied that he was no longer incapacitated.

Mr. Justice Clauson.—The only damages which you can recover, if any, are confined to the interest on the weekly payments which have been withheld. That is clear from the decision in *Graham v. Campbell* (7 Ch. D., 490), and that sum would be trivial, something like 27s.

Sir Henry Slesser.—That is so; but this is a question of principle whether it is lawful to do what has been done, and it is desired to know the position in law. If the workman here shows that he is receiving weekly payments, he can claim, under the provisions of section 12 of the Act of 1925, that they can only be ended in accordance with the manner provided by the section. The whole of my contention in this case is contained in what Lord Wrenbury said in the *Ocean Coal Company* case (*supra*), that section 12 "may be nothing more than an enactment that until the question whether his liability to pay is a continuing liability or not is decided he shall go on paying *de facto*, and that if it shall be decided that he was not under a continuing liability he shall be left entitled to recover. In my opinion, this is the effect of the section."

Mr. Justice Clauson.—You read section 12 as though the words were "during the period during which capacity to work has not been proved"?—Yes.

Sir Henry Slesser referred to *Niddrie and Benhar Coal Company, Limited v. Dee* ([1927] A.C., 299) which, he contended, did not touch the point as to the right *de facto* to the weekly payments. In the *Ocean Coal Company* case (*supra*) Viscount Dunedin,

who dissented, held that though the workman had admitted that he was capable of working, still the terms of the section required that the employers must continue the weekly payments up to the time of the award by the county court judge.

Mr. DALE, for the defendants, said that this was an attempt to get the weekly payments by way of a dole, but that had been tried in the *Ocean Coal Company* case (*supra*), and had been disallowed. The defendants were entitled to stop the weekly payments and pay the money into Court on the authority of the decision in that case, as interpreted by the decision in *Niddrie and Benhar Coal Company, Limited, v. Dee* (*supra*).

SIR HENRY SLESSER replied.

MR. JUSTICE CLAUSON, in giving judgment, stated the facts, and said that the application to review the weekly payments which was made by the defendants on the footing that the plaintiff's incapacity in fact ceased on May 30, 1927, was still pending. On his view of section 21 of the Workmen's Compensation Act, 1925, it was clear that the only tribunal to determine the question of fact whether on May 30 the plaintiff was incapacitated was the county court. The plaintiff could not, and did not, say that the question of his incapacity on May 30 had been determined.

The question now for determination was the true construction of section 12 of the Act of 1925. The plaintiff contended that, although the issue whether there was continuing incapacity was *sub judice*, there was a duty on the defendants under section 12 to continue to make the weekly payments to him. The difficulty was that it had been determined by the House of Lords in *Ocean Coal Company, Limited v. Davies* (43 *The Times* L.R., 108; [1927] A.C., 271) that, from the date when incapacity was found to have ceased, there was no liability on the employers to pay the workman compensation under the Act. But the plaintiff contended that the employers must still continue payments pending the determination of the question of incapacity.

There appeared to be three constructions which could be put upon section 12. First, there was that which Lord Dunedin, who dissented from the decision of the majority in the *Ocean Coal Company* case (*supra*) placed on it—namely, that until it was determined whether the incapacity had ceased the employers must continue the weekly payments. On that construction the plaintiff would have been right, but that construction could not be upheld, as the majority of the House of Lords decided the other way. The second possible construction was that the employers were bound to continue the weekly payments until an award was made, provided that it was ultimately found, in fact, that the incapacity continued. There was at present no cause of action which the plaintiff could maintain in that Court, because, before he could prove a breach of statutory duty by the defendants, he must prove that incapacity during the relevant period existed. That issue that Court had no jurisdiction to try. The third possible construction was that the defendants were bound to pay the plaintiff the weekly sums, though they were to be made on the footing that, if the issue as to incapacity were decided against the plaintiff, he would have to return the money. Two of the Lords in the above case were for the second construction and two were for the third.

But there was a case recently decided by the House of Lords, *Niddrie and Benhar Coal Company, Limited v. Dee* ([1927] A.C., 299), which was an appeal from Scotch decisions. Their Lordships' decision in that case was inconsistent with any other construction of section 12 than what he (his Lordship) had called the second construction, which was founded on the opinions of Lord Atkinson and Lord Shaw in the *Ocean Coal Company* case (*supra*). Therefore he (his Lordship) on that construction held that it was not established that the defendants had committed any breach of statutory duty, as it had not been shown that the plaintiff's incapacity was a continuing incapacity since the defendants had ceased the weekly payments.

The plaintiff's claim for a declaration therefore failed, and the action must be dismissed, with costs. Section 115 of the County Courts Act, 1888, did not apply.

[Solicitors—Messrs. Mills, Lockyer, Church and Evill; Messrs. Carpenters.]

Chan. Div. (Russell, J.) } 1927. Dec. 7.

CAERPHILLY URBAN DISTRICT COUNCIL v. GRIFFIN.*

Electricity — Local authority — Monopoly in area — Exception — Supply by person not having primary business of supplying electricity — Application of the expression "primary business" to the particular facts — Electric Lighting Act, 1909 (9 Edw. VII., c. 34), s. 23.

The plaintiffs, a local authority empowered to supply electricity within a certain area, sought an injunction under s. 23 of the Electric Lighting Act, 1909, to restrain the defendant from supplying electricity to certain consumers in the area. By that section the plaintiffs had a monopoly in the area, subject to the proviso that "this section shall not prevent any company or person from affording a supply of electrical energy to any other company or person where the business of the company or person affording the supply is not primarily that of the supply of electrical energy to consumers."

Held, on the facts, that as the supply of electrical energy was not the defendant's primary business, the action failed.

This was an action by which the plaintiffs, the Caerphilly Urban District Council, sought an injunction to restrain the defendant, Mr. Victor George Griffin, from supplying electricity to certain consumers. The plaintiffs, as undertakers for the purposes of the Caerphilly Electricity Special Order, 1922, were authorized to supply electricity for all public and private purposes as defined by the Electric Lighting Acts, 1882 to 1909, in the area of supply mentioned in the first Schedule to the Order. The defendant was the owner of the premises 75 and 77, Cardiff-road, Caerphilly, within the said area, where he formerly lived and carried on business as a draper.

On those premises the defendant erected an electric generating plant and used it to light his shop and residence. He then acquired a plot of land in Pentrebane-street, adjoining his old premises, and

* Reported by J. B. B. MACMAHON, Esq., Barrister-at-Law.

proceeded to develop it. He erected a number of buildings and a covered market, transferred his shop and residence from Cardiff-street to 1 and 3, Pentrebane-street, leased another shop to F. W. Woolworth and Co., Limited, and made an agreement to supply them with electric light. F. W. Woolworth and Co., Limited, had refused to become customers of the council. In the market the defendant erected 60 stalls which he let to tenants. The market, the stalls, his own premises, and Messrs. Woolworth's premises were lighted by electricity from new plant which the defendant erected on his new premises.

The plaintiffs alleged that in supplying electric current the defendant had infringed section 23 of the Electric Lighting Act, 1909, and they asked for an injunction to restrain him from supplying electricity within their area. The defendant contended that the section did not apply "where the business of the person affording the supply was not primarily that of the supply of electrical energy to consumers," and that his business was that of a draper.

Mr. Bennett, K.C., and Mr. R. W. Turnbull appeared for the plaintiffs; Mr. Gavin Simonds, K.C., and Mr. A. P. Vanneck for the defendant.

Mr. Justice Russell, in giving judgment, said that the case depended entirely on the application of section 23 of the Electric Lighting Act, 1909, to the particular facts. The section provided:—

"Where in any area a local authority, company, or person is authorized to supply electricity under Act of Parliament or under licence or Provisional Order granted under the Electric Lighting Acts it shall not, after the passing of this Act, be lawful for any other local authority, company, or person to commence to supply or distribute electricity within the same area unless such supply or distribution is authorized by Act of Parliament, or by licence or Provisional Order granted in terms of the Electric Lighting Acts: Provided that this section shall not prevent any company or person from affording a supply of electrical energy to any other company or person where the business of the company or person affording the supply is not primarily that of the supply of electrical energy to consumers. . . ."

The question was whether on the facts of the case the defendant came within the proviso. There was no authority on the point. In *Southport Corporation v. Attorney-General* (40 *The Times* L.R., 736; [1924] A.C., 909) the proviso was not considered. When that case was in the Court of Appeal (39 *The Times* L.R., 347; [1923] 1 Ch., 548, at p. 563) Lord Justice Warrington said that the provision seemed to recognize the right of companies or persons to supply electricity for their own use, and even to supply it to others in the circumstances there mentioned. The plaintiffs in this case asked, by their statement of claim, that the defendant should be restrained from generating electricity for the purpose of lighting his own shop and residence, but their counsel, while making no admission, had now withdrawn that claim. It would be startling if, as the result of a local authority being authorized to supply electricity within a particular area, a private individual could not install a plant to light his own house. The plaintiffs now asked for an injunction to restrain the defendant from supplying electrical energy to Messrs. Woolworth and to the market and the stalls.

Section 23 was a monopoly section and had, therefore, to be construed strictly. Was the business of the defendant primarily that of the supply of electrical energy to consumers? In his (his Lordship's) opinion, on the facts of the case, it was not. The defendant primarily had two businesses, his draper's business and the business of developing his property. In the course of those businesses the defendant provided plant to light his shop and residence, and he afforded the supply of electrical energy to Messrs. Woolworth and the market to attract tenants and develop his property. The supply of energy was only incidental to the defendant's two businesses and was not his primary business. On the facts of the case the action failed, and must be dismissed.

[Solicitors—Messrs. Wrentmore and Son, for Messrs. Spickett and Sons, Caerphilly; Messrs. John T. Lewis and Woods, for Mr. R. R. Morgan, Cardiff.]

K.B. Div. (MacKinnon, J.) 1927. Dec. 5.

GOOLE AND HULL STEAM TOWING COMPANY, LIMITED v. OCEAN MARINE INSURANCE COMPANY, LIMITED.*

Insurance (Marine)—Particular average damage—Ship in collision—Both to blame—Amount recoverable from insurers.

The defendants insured the plaintiffs' steamer against the usual marine risks, the steamer being valued in the policy at £4,000. During the currency of the policy the steamer collided with another steamer. The ship was repaired at the cost of the plaintiffs, and a collision action by the plaintiffs against the owners of the other steamer was settled on the basis of both ships being to blame. The owners of the other steamer then paid over to the plaintiffs £2,500 as being half the damages, and for the purpose of the argument of the present case the amount of the damages was assumed to be £5,000.

The plaintiffs brought this action against their marine insurers to recover whatever amount the Court might hold to be due to them under the policy, and the plaintiffs contended that as the balance of their loss was £2,500 they were entitled to recover this amount, it being less than the value of £4,000 put on the steamer in the policy. The defendants contended that they were liable only for £1,500, being the difference between £4,000 and £2,500, the amount recovered by the plaintiffs from the owners of the other ship.

Held, that the contention of the defendants was correct.

The plaintiffs in this case, the Goole and Hull Steam Towing Company, Limited, claimed from the defendants, the Ocean Marine Insurance Company, Limited, under a policy of marine insurance.

Mr. Raeburn, K.C., and Sir Robert Aske appeared for the plaintiffs; Mr. A. T. Miller, K.C., and Mr. Mitchison for the defendants.

There were no pleadings in the case, no evidence was called, and the case was argued on an agreed statement of facts.

The material parts of the agreed statement of facts were as follows:—

By a policy dated June 5, 1924, the defendants insured the plaintiffs, the owners of the s.s. Goole,

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

for 12 months from May 31, 1924, to May 31, 1925, against the usual marine risks, subject to the Institute Time Clauses annexed to the policy. In the policy the steamer was valued at a total of £4,000—being £2,500 as to hull and materials and £1,500 as to engines and machinery.

During the currency of the policy the Goole, having loaded a cargo of salt, went on a voyage on January 21, 1925, from Middlesbrough to London, and while proceeding up the River Thames came into collision with another steamer, the Delphinus, near King George's Dock pierhead. The Goole received considerable damage and had to be beached on the mud at the lower end of Woolwich Arsenal.

The Salvage Association, acting for the defendants, were advised of the accident by the plaintiffs' brokers, but they had already instructed Captain Shotton to attend and arranged for Messrs. Fletchers to proceed to the Goole and take pumps, &c., and this arrangement was made on the time and lime basis. Later the owners' superintendent arrived in London and his approval was obtained for this course.

On January 24, 1925, the Goole was towed off and proceeded under her own steam into Fletcher's Dry Dock.

On January 23, 1925, an action was commenced in the High Court against the owners of the Delphinus, and they were notified of the survey which was then taking place on the Goole. The owners of the Goole were represented by their superintendent, Mr. Glentworth, and the Delphinus was represented by Messrs. Camps. The underwriters of the Goole were represented by Messrs. Joseph Blackett and Sons, and Lloyd's Register surveyors were also in attendance. Messrs. Fletchers proceeded with the work on the time and lime basis as agreed.

When the work had been in progress for some time it was found that the condenser bed plate was broken; it was condemned and a new one was supplied. The repairs were eventually completed on April 1, 1925, and the cost of same was agreed at £4,285, and with salvage and other expenses in connexion with the accident brought the total up to more than £5,000.

The owners of the Delphinus put forward a counterclaim, and on April 28, 1925, the solicitors acting for the owners of the Goole reported on the collision case by letter addressed to the owners and underwriters, and their report was submitted to underwriters, who approved the proceedings but desired to be kept fully advised; on the advice of counsel, however, the case was settled in Court on the basis of both ships being equally to blame.

The claims of each steamer were dealt with by the Registrar. The owners of the Delphinus contended on the reference that the damage to the condenser was not caused by the collision, and alternatively that the vessel was in fact a constructive total loss and should not have been repaired. Both these contentions were disallowed by the Registrar and he assessed the damages against the Delphinus at the sum of £5,994 17s. 3d., which, however, included crew's effects, detention, and loss of cargo and freight. Having regard, however, to the fact of both vessels being to blame, only half of the damages so assessed was recoverable from the Delphinus.

In December, 1925, the solicitors acting for the Delphinus paid over the amount due from them, and the owners of the Goole thereupon handed to Messrs. Manley, Hopkins, Son, and Cookes, average adjusters, the whole of the documents in order that they might ascertain the owners' loss and then show the claim against the various underwriters concerned.

The principle adopted by the average adjusters was as follows:—In the first place they proceeded to allocate the expenditures to the various interests and to distinguish between items which were general average and items which were particular average. They took the accounts as allowed by the Registrar and apportioned them in the same way. Then, by taking 50 per cent. of the amounts thus shown in each column, they arrived at the amount paid by the Delphinus. The total expenditure allocated to the various interests was then brought forward and each column was credited with its proportion of the recovery from the owners of the Delphinus after deducting its proportion of the costs, thereby arriving at the loss sustained by the owners. Having done that, the average adjusters then applied that loss to the policies, and as the net loss as ascertained was less than the insured value of £4,000, they charged the underwriters with the general and particular average.

The owners claimed from the underwriters their loss after deducting the amount recovered from the owners of the Delphinus, and, that sum being less than the £4,000 value of the Goole as stated in the policy, they contended that they were entitled to be indemnified to the full amount of their loss—*i.e.*, the loss incurred through the faulty navigation of their own captain, that caused by the Delphinus having been paid by that vessel.

The defendants contended that that method of adjustment was incorrect, and that, as their limit of liability as stated in the policy was £4,000, the adjusters should take the gross figures without deduction of the recovery from the Delphinus and then state the claim against the underwriters, limiting it to £4,000 and charging the balance to the owners. After that had been done the amount recovered should, they contended, be credited up to £4,000 to the underwriters.

The question for the opinion of the Court was the correct way of adjusting the claim.

Mr. Raeburn submitted that the right method by which to ascertain the sum to be paid by the underwriters was to find the total amount by which the owners were out of pocket, say £5,000, and deduct from that sum the amount recovered from the other ship, £2,500, and then let the owners recover from the underwriters the balance of their loss—namely, £2,500—which they could claim because it did not exceed the £4,000 insured. The underwriters contended that, as the Goole was only insured for £4,000 and the owners had recovered £2,500 from the other ship, the underwriters were only liable for the difference between those two sums—namely, £1,500. Another view was that the £2,500 recovered from the Delphinus should be apportioned as to one-fifth to the owners and four-fifths to the underwriters, that being the proportion between the insured value, £4,000, and the cost of repairs, £5,000. That method would apportion £2,000 to the underwriters and leave them liable to the insured for the remaining £2,000. The action was a friendly action, and was brought to obtain the guidance of the Court, for there appeared to be no direct authority on the matter.

He referred to *Oppenheim v. Fry* (3 B. and S., 873; 5 B. and S., 348); *North of England, &c., Association v. Armstrong* (L.R., 5 Q.B., 244); *Burnand v. Rodocanachi* (7 App. Cas., 333, at p. 342); *Thames and Mersey Insurance Company v. British and Chilian Steamship Company* (31 *The Times* L.R., 275; [1915] 2 K.B., 214); *The Main* (10 *The Times* L.R., 242; [1894] P., 320); *The Commonwealth* (23 *The Times* L.R., 420; [1907] P., 216); *Steamship Balmoral Company v. Marten* (18 *The Times* L.R., 802; [1902] A.C.,

511) ; and to Arnould on Marine Insurance, sections 1,225 and 1,226, and to the Marine Insurance Act, 1906.

Mr. MILLER submitted that the underwriters need only pay so much as was needed to make up, with the amount recovered from the other ship, the total of £4,000 for which the Goole was insured. The plaintiffs' contention was, in effect, that, having insured for £4,000, they were entitled to be indemnified as if they had insured for £5,000 and had paid the higher premiums for that amount. The converse of this case was seen in *The Commonwealth* (*supra*, at pp. 217-8). The value of the vessel having been agreed, the underwriters, if they paid the insured that value, were entitled to be subrogated in respect of all the insured's interest to the extent of the indemnity given.

He referred to Halsbury, Laws of England, Vol. XVII., p. 540. Where an underwriter had paid the full amount of the agreed value, anything which the insured might recover from third parties must go in reduction of the loss of the underwriter.

Mr. RAEBURN replied. For the purposes of partial loss it did not matter whether the policy was a valued policy or not, and in case of a partial loss there was no reason why the insured should not say that the actual loss which he had sustained was more than the sum insured.

MR. JUSTICE MACKINNON, in giving judgment, stated the facts, and said that the logical course would be to see what the parties had agreed by the policy, but the time had long passed when one could construe a policy of marine insurance otherwise than in the light of decided cases, the results of which had been crystallized in the Marine Insurance Act, 1906. The insured vessel had suffered particular average damage, and by section 69 (1) of the Act the assured were entitled to the reasonable cost of the repairs, not exceeding the sum insured—namely, £4,000. The repairs, in fact, cost more than that sum. Taking hypothetical figures which had been accepted for convenience of argument, the repairs cost £5,000. That being so, the assured could only have recovered £4,000 from the underwriters and would have to bear the balance themselves as expenditure incurred by them outside their insurance. But in the events which happened the assured recovered £2,500 from the other ship, and the question was, What was the effect of their receipt of that £2,500 on their claim under their £4,000 insurance ? For how much must the assured give credit to the underwriters on the ground that they had been indemnified *aliunde* ?

The assured contended that, as they had spent £5,000 and had received £2,500, they were £2,500 out of pocket ; and that, as that sum was less than £4,000, the amount for which they were insured, they were entitled to be paid the £2,500 in full. The underwriters contended that, as they were liable for £4,000 and no more, and the assured had already received £2,500, they were only liable for the difference—namely, £1,500. They said that the extra £1,000 which the assured had spent was outside the insurance altogether.

There was also a third course suggested—that the £2,500 should be divided on an apportionment basis. He could not see any legal ground for that third view, and he would not, therefore, discuss it.

In his opinion, the contention of the underwriters was right. The contract of marine insurance was said to be a contract of indemnity, though it was not an ideal indemnity, but only an indemnity in accordance with the conventional terms of the bargain. It might happen that an assured could recover more than, or less than, his actual loss ; and by section 79 (2) the insurer who had paid for a partial loss was subrogated to all the rights and remedies of the assured. The words of that subsection were "indemnified according to this Act," not "indemnified" generally, and for the £4,000 here paid the underwriters were entitled to be subrogated to all the rights and remedies of the plaintiffs. In the case of a total loss their right would have been clear from *North of England, &c., Association v. Armstrong* (L.R., 5 Q.B., 244) and *Thames and Mersey Insurance Company v. British and Chilian Steamship Company* (31 *The Times* L.R., 275 ; [1915] 2 K.B., 214), and he could not see any difference in principle between the case of a total loss and a partial loss. If the assured in this case had recovered the whole £5,000 from the owners of the other ship, the underwriters would only have been able to claim £4,000 under their right of subrogation. They were here only liable for the balance of the £4,000 after the £2,500 recovered had been taken into account.

There must, therefore, be judgment for the defendants, with costs.

[Solicitors—Messrs. Holman, Fenwick, and Willan; Messrs. Waltons and Co.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)
1927. Nov. 29.

ATTORNEY-GENERAL v. METROPOLITAN WATER BOARD.*

Revenue — Income-tax — Water authority—Interest on stock and debentures—Deduction and retention of tax—Whether interest paid out of profits not brought into charge—Liability to account for tax—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), All Schedules Rules, Rules 19, 21.

The profits of the Metropolitan Water Board are assessable under Schedule A, No. III., Rule 3, of the Income Tax Act, 1918, by reference to the profits of the year preceding the year of assessment. The accounts of the Board for the year ending March 31, 1922, showed a loss, and therefore no assessment was made on the Board under Schedule A, No. III., for the year ending April 5, 1923. The accounts for the year ending March 31, 1923, showed a profit of over two millions, out of which the Board paid over one million interest on water stock and debentures, deducting and retaining the income-tax thereon. On an information claiming that under Rule 21 of the All Schedules Rules the Board was liable to account to the Commissioners of Inland Revenue for the amount of the tax so deducted, the Board contended that the interest paid for the year 1922-23 was payable out of profits brought into charge for 1922-23 within Rule 19 of the All Schedules Rules and was in fact paid out of the profits for 1922-23, and that, although the income-tax for 1922-23 was to be measured by the profits of the preceding year, the profits for 1922-23 were profits "brought into charge," and Rule 21 did not apply.

* Reported by G. T. WHITFIELD-HAYES and H. LANGFORD LEWIS, Esqs., Barristers-at-Law.

Held, that as the Board had been assessed at zero under Schedule A for 1922-23, the interest had not been paid out of profits brought into charge, and the Crown was entitled to succeed.

Decision of Rowlatt, J. (43 *The Times* L.R., 656), affirmed.

This was an appeal from a decision of Mr. Justice Rowlatt (43 *The Times* L.R., 656).

The Attorney-General, by an information, claimed £409,060 2s. 11d. from the Metropolitan Water Board, being the amount of tax on interest paid on water stock and on other annual payments made in the year ending April 5, 1923. The amount of the payments was £1,668,351, and the sum claimed represented income-tax at the rate of 5s. in the pound, the rate in force at the time when the interest was paid, less £8,027 odd, tax on profits and gains otherwise brought into charge.

By Rule 3 of No. III. of the Rules applicable to Schedule A of the Income Tax Act, 1918, it is provided that

"In the case of . . . waterworks . . . the annual value shall be understood to be the profits of the preceding year."

For the year ending March 31, 1922, the Metropolitan Water Board made a loss of £57,366, and, therefore, by reason of the above Rule, no assessment was made upon the Board for the year ending April 5, 1923. For the year to March 31, 1923, the Board, owing to the coming into force on April 1, 1922, of the Metropolitan Water Board (Charges) Act, 1921, made a profit of £2,481,085, out of which the interest payable by the Board on water stock issued by them or on redeemable debentures in respect of which they had assumed liability and certain other annual payments due from them amounted to £1,730,751 16s. 10d. Part of that sum was paid without deduction of income-tax, but from the remainder—£1,668,351—£435,617 3s. was deducted and retained as representing the tax thereon at the rate or rates in force during the period through which the interest and other annual payments of which the sum of £1,668,351 0s. 7d. was composed was accruing due. Income-tax on £1,668,351 0s. 7d., at the rate of 5s. in the pound, being the rate in force during the year ending April 5, 1923, amounted to £417,087 15s. 2d. That figure made the basis of an assessment upon the Board for the year ending April 5, 1924.

Rule 21 of the All Schedules Rules of the Income Tax Act, 1918, enacts :—

"(1) Upon payment of any interest of money, annuity, or other annual payment charged with tax under Schedule D . . . not payable or not wholly payable out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment.

"(2) Any such person shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted . . . and every such amount shall be a debt from him to the Crown. . . ."

The Attorney-General, by this information, claimed :—

Tax at the rate of 5s. in the £ in respect of interest and annual payments	£417,087	15 2
Less tax on taxed income, £32,110 9s. 0d.	£8,027	12 3
	£409,060	2 11

The Board contended that the interest on the water stock and on the redeemable debentures and the annual payments referred to paid by the Board for the year 1922-23 were payable wholly out of profits or gains brought into charge to tax within Rule 19 of the All Schedules Rules ; that the profits or gains of the Board brought into charge to tax for the year 1922-23 were the profits of the Board of that year (namely, the said £2,481,085), though the liability to income-tax for that year was to be measured by the amount of the profits of the preceding year, and that was so whether there were profits of the preceding year or not ; that the profits or gains of the Board brought into charge to tax for the year 1922-23 were sufficient in amount to meet the interest and annual payments payable for that year, and the interest was in fact paid and the annual payments were in fact made out of those profits or gains ; that the fact that no assessment was or could be made on the Board for the year 1922-23 was irrelevant ; that the Board was entitled, under Rule 19 of the Rules, to retain for itself the income-tax deducted on payment of the interest and annual payments ; and that Rule 21 of the Rules had no application to this case.

Mr. Justice Rowlatt gave judgment for the Crown.

The Board appealed.

Sir John Simon, K.C., Mr. Latter, K.C., Mr. Cyril King, and Mr. F Grant appeared for the appellants ; the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills for the Crown.

The Master of the Rolls.—The Metropolitan Water Board appeal from a judgment given by Mr. Justice Rowlatt on June 16, 1927, in favour of the Crown upon this information. It was brought to recover from the appellants a sum of £409,060 2s. 11d., which was the balance in their hands after adjustment, in respect of sums deducted by them at the rate of 5s. in the pound from a total of £1,668,351 0s. 7d., distributed by them by way of interest on stocks of the appellants in the year of assessment 1922-23. No question arises upon the figures. The question is one of principle—whether the appellants can rightly claim to hold this sum of £409,060 2s. 11d. against the claim made to it by the Crown. The facts are fully set out in the statement of facts. It is only necessary to recapitulate some of them for the purpose of this judgment.

For the purpose of the income-tax the undertaking of the appellants falls to be assessed as "waterworks," that is to say : "(7) The profits of the Board are assessable under Schedule A in accordance with Schedule A, No. III., Rule 3, Income Tax Act, 1918, by reference to the profits of the year preceding the year of assessment. For the year to March 31, 1923, the Board's accounts relating to the said undertaking showed (after adjustment for income-tax purposes) a profit of £2,481,085, out of which the Board paid the interest referred to in paragraph 6 hereof." I am reading the statement of facts. "This figure formed the basis for an assessment under Schedule A, No. III., made upon the Board for the year ending April 5, 1924, against the amount of which assessment an allowance (including sums carried forward from previous years) in respect of wear and tear of plant and machinery fell to be made to the amount of £798,328, leaving a net figure of £1,682,757 for that year. The accounts relating to the undertaking of the Board for the year to March 31, 1922, disclosed (after adjustment for income-tax purposes) a loss of £57,366 3s. 2d., and therefore no assessment was due to be made or was made upon the Board under Schedule A, No. III., for the year ending April 5, 1923. (10) The Attorney-General contends that for the year ending April 5,

1923, the Board is liable to account to the Commissioners of Inland Revenue under Rule 21 of the General Rules applicable to all Schedules of the Income Tax Act, 1918, for the sum of £409,060 2s. 11d. (11) The Board contends : (*a*) That the interest on the water stock and on the redeemable debentures and the annual payments referred to paid by the Board for the year 1922-23 were payable wholly out of profits or gains brought into charge to tax within Rule 19 of the said Rules. (*b*) That the profits or gains of the Board brought into charge to tax for the year 1922-23 were the profits of the Board of that year (namely, the said £2,481,085), though the liability to income-tax for that year was to be measured by the amount of the profits of the preceding year, and this was so whether there were profits of the preceding year or not. (*c*) That the said profits or gains of the Board brought into charge to tax for the year 1922-23 were sufficient in amount to meet the said interest and annual payments payable for that year and the said interest was in fact paid and the said annual payments were in fact made out of these profits or gains. (*d*) That the fact that no assessment was or could be made on the Board for the year 1922-23 is irrelevant."

The point, therefore, to be determined is whether the sum claimed is included within the words "payable out of profits or gains brought into charge" in Rule 19 so as to justify its retention by the appellants. Are these words to be interpreted as meaning "profits or gains that have in fact actually been brought into charge," or do they mean "profits and gains that are subject to charge and will in due course become factors in the assessment of the liability of the appellants to tax" ?

By reason of the trading in the previous year 1921-22 resulting in a loss, the appellants pay no income-tax for 1922-23, for the assessment upon them works out at nil ; yet they claim that the substantial profits of £2,481,085 for the year 1923, out of which the interest referred to was in fact paid, are to be treated as brought into charge for this same year, and so form the fund contemplated in Rule 19 as the source out of which the interest of £1,668,351 0s. 7d. was paid, and £409,060 2s. 11d., part of the latter sum, was retained by the appellants.

Rules 19 and 21 do not contain new matter. They reproduce section 102 of the Income Tax Act, 1842, section 40 of the Act of 1853, together with section 24 (3) of the Customs and Inland Revenue Act, 1888. We have to construe the Rules which have the force of the statute in which they are found, regardless of the curiosities in taxation which ingeniously may be suggested to arise as the result of a particular rendering of the statute. I respectfully agree with what Lord Sumner said in *Watney, Combe, Reid and Co., Limited v. Berners* (30 *The Times* L.R., 577 ; [1914] 3 K.B., 288, at p. 297) : "We are not entitled to make any assumptions about the policy of the sections, but have simply to construe them."

This sum of £409,060 2s. 11d. has been stopped in the appellants' hands because they were required to be tax collectors for the Crown—to use Lord Loreburn's phrase in *Attorney-General v. London County Council* (23 *The Times* L.R., 390; [1907] A.C., at p. 133). It is an obligation that has been imposed upon those who make payments of any interest of money or annuities charged with income-tax under Schedule D since section 24 (3) of the Customs and Inland Revenue Act was passed in 1888. That section embraces what is now split up into Rules 19 and 21. Its terms make it plain that the person who is told to deduct the income-tax chargeable upon the payee to whom the interest of money is paid in certain events must render an account of the amount so deducted. If the whole of the interest has not been paid out of profits or gains brought into charge, then the account must be of the whole amount deducted. If part only of the interest has not been paid out of profits or gains brought into charge, then the account must cover that part. The section makes it clear that the collector for the Crown will have to pass on the sum collected, either by the means of his profits and gains brought into charge, or by rendering an account of the sum deducted which will not be subjected to charge in the collector's hands.

Looking at the Rules in the Consolidating Act of 1918, there is in my judgment good ground for the Attorney-General's argument that in Rule 19 the words "payable wholly out of profits or gains brought into charge to tax" do not mean payment out of a fund that may be brought into charge, or is, or will be, a factor for the purpose of charge, but refer to a fund brought into charge out of which tax is payable and to be paid ; so that in an account between the Crown, the appellants, as tax collectors for the Crown, and the stock holders it would be clearly seen that the sum deducted from the payments to the stock holders was passed on to and reached the Crown. The appellants pay income-tax. But their assessment is measured by annual value, and that annual value is "understood to be the profits of the preceding year." See Schedule A, No. III., 3. That was in fact nil for the year preceding 1922-3. True, income-tax, charged under the respective Schedules, is the same tax. But the appellants have to justify the retention by them of this sum collected for the Crown by deduction. That can be done where the yearly interest of money is payable wholly out of profits or gains brought into charge to tax. The appellants cannot alter their assessment to this tax which stands for this same year at nil, and for the purpose of the Rule rely on a charge which does not exist for this year. No tax for this year, 1922-3, has been paid by the appellants to the Crown. This reading of the Rule is, in my judgment, confirmed by the passage in the speech of Viscount Haldane in *Sugden v. Leeds Corporation* (29 *The Times* L.R., 402 ; [1914] A.C., at p. 491) : "In each case the question is whether the annual payments taxed are actually and properly payable out of the profits. If they are, these profits are treated by the Acts as diminished *pro tanto* in the hands of the owner, and he, having paid once for all on the whole, is thus entitled to retain for his own benefit the amount of tax he deducts from the annual payments before making them, as being tax that he has already paid." See also *per* Lord Mersey ([1914] A.C., at p. 509). Upon this principle it is no answer to the Crown to say that the profits of this year will in the next year "be understood to be" the annual value on which we will pay tax.

The case of *London County Council v. Attorney-General* (17 *The Times* L.R., 131 ; [1901] A.C., 26) has a close application to the present case. Lord Macnaghten's observations (at [1901] A.C., at p. 40) are in point. Dealing with the Act of 1888, which left the deduction of income-tax no longer optional, he said : "He is bound to make the deduction, and bound to pay over to the Crown the amount deducted unless the payment comes out of income which has already paid the duty." I do not think that he intends to lay emphasis on the word "paid," for it may well be that chronologically the tax is deducted from a yearly payment, or half-yearly payment, when the tax charged upon the person who deducts would not fall to be actually

paid till a few months later; "which has already paid the duty" may be treated as equivalent to brought into charge for the payment of duty upon it. Lord Davey's words are to the same effect. *Inter alia,* on page 46 he says: "But the mortgagor cannot, of course, retain against the Crown more income-tax than he has paid."

Both Lords Macnaghten and Davey intended that the right to retain was co-extensive only with the liability to tax of the fund out of which the interest is paid.

For these reasons I think that the judgment of Mr. Justice Rowlatt was right. The appeal must be dismissed, with costs.

Lord Justice Sargant.—The sum involved in this appeal is a large one. But the facts on which our decision depends are extremely simple, since we have not to deal with any question of precise figures, but only to decide a point of general principle.

Under the Act by which the appellants, the Metropolitan Water Board, were established—namely, the Metropolis Water Act, 1902—provision was made for the establishment of a water fund to which all receipts of the Board have to be carried and out of which all payments by the Board have to be made. The Board had power to borrow money and to create and issue water stock the principal and interest whereof are charged upon the water fund and on the revenues of the Board. By virtue of the issue of such water stock, and also by virtue of the assumption by the Board of liability under debentures issued by water companies whose undertakings had been acquired by the Board, there became charged upon and payable out of the water fund large annual sums, which in the year ending April 5, 1923, amounted to some £1,730,000. Much the greater portion of these sums amounting to over £1,668,000 was paid by the Board, after deducting therefrom income-tax, which at the then rate of 5s. in the £ amounted to over £417,000. But as against this sum there has to be set off a sum of over £8,000 in respect of income which the Board received after the deduction of income-tax. And ultimately the net amount of income-tax deducted by the Board, in respect of the balance of the payments made by the Board, less income-tax, over the payments received by the Board less income-tax, has been agreed in these proceedings at the sum of £409,060 2s. 11d.

The accounts relating to the undertaking of the Board for the year ending March 31, 1922, disclosed (after adjustment for income-tax purposes) a loss of over £57,000; and therefore under the rules relating to the assessment of waterworks no assessment was due to be made or was made upon the Board under Schedule A, No. III., for the year ending April 5, 1923. The large profit made by the Board in that year was due to the Board's having been empowered under the Metropolitan Water Board (Charges) Act, 1921, to raise their charges to the public.

The question to be determined in these proceedings is whether the Board are entitled to retain the above-mentioned sum of £409,060 2s. 11d. for their own benefit, or are bound to account for it and pay it to the Commissioners of Inland Revenue. The solution of this problem depends almost entirely upon the meaning of the phrase "brought into charge" in Rule 19 of the General Rules applicable to the Schedules of the Income Tax Act, 1918. The Crown contends that in the year in question, though profits and gains had in fact been made and would no doubt in ordinary course be "brought into charge" in the succeeding year, no profits and gains at all were brought into charge in the year in question, since for purposes of assessment they were based on the previous year and were assessed at nil. The Board contend that the phrase profits and gains "brought into charge" means profits and gains of a kind which is liable to be brought into charge, and accordingly that the actual profits and gains in the year of assessment are those to be considered for the purposes of deduction, since they will in their turn be brought into charge in the following year.

It is curious that the precise point has never been decided, but this is probably due to the fact that in ordinary cases, where there is but little variation in the profits and gains in two succeeding years, it is of comparatively little importance which standard is adopted. And it may be that the practice of different surveyors of taxes has not been uniform. In the case of *Sugden v. Leeds Corporation* (29 *The Times* L.R., 402; [1914] A.C., 483) it appears that the figure taken for the purpose of deduction was that derived from the assessable figures based on previous years. In *Rex v. Special Commissioners of Income Tax—Ex parte Shaftesbury Homes and Arethusa Training Ship* (38 *The Times* L.R., 860; [1922] 2 K.B., 729, and 39 *The Times* L.R., 99; [1923] 1 K.B., 393) it would seem from an examination of the affidavit of the secretary, Mr. Coupland, that for a year or two the figure taken was that of the actual profits or gains in the year of assessment, but that subsequently the figure taken was that of the assessment based on previous years. In the result little, if any, assistance is to be derived from previous practice. The question has to be decided as a fresh question and on the words of the statute.

In my opinion the words "brought into charge" are more naturally and properly satisfied by the meaning placed on them by the Crown. The past participle "brought" naturally refers to something that has been completed in the year in question, if not by actual payment, at any rate by accrued liability to pay. It is only in a looser sense that it can be applied to a payment or liability to pay in respect of a succeeding year. And this latter construction would involve the anomaly that, if the undertaking ceased at the end of the year of assessment, a deduction would be allowed to the Board for which they would never have to account at all.

Further, I think that the Attorney-General was right in his submission that, when once you have ascertained under the Income Tax Act, 1918, the annual value of the undertaking of the Board for the year 1922-23, you must use the basis of that value for the other purposes of income-tax for that year. The Board here are claiming, on the one hand, to escape any direct assessment of tax on the undertaking on the ground that their profits are to be taken as nil for the year 1922-23, and, on the other hand, to escape the obligation to hand over the income-tax, deducted from the holders of water stock, on the ground that profits were brought into charge for that year to an extent exceeding the amount of the interest on the water stock. This involves using one basis of ascertainment for one purpose and another basis for another purpose, and seems to me to involve an inconsistency. This inconsistency is not cured, though in many cases its results may be minimized, by the consideration that there may be compensating inconsistencies in other years which may ultimately prevent any considerable loss on balance to the Revenue.

The case of *London County Council v. Attorney-General* (17 *The Times* L.R., 131; [1901] A.C., 26)

tends strongly in the same direction. It is not conclusive against the Board here, because the actual decision was that the income-tax paid under any of the various statutory Schedules was essentially a single tax, and that, in calculating the amount of the deductions in respect of dividends on their stocks, which the London County Council were entitled to retain for their own benefit, the London County Council could take into account any income-tax paid either under Schedule A or under Schedule D. But it is impossible to read the judgments in that case, and particularly those of Lord Macnaghten and Lord Davey (see particularly [1901] A.C., at pp. 39, 40, 42 and 45-6), without observing that attention is throughout directed to the actual sums paid in or for the year of assessment whether under Schedule A or under Schedule D. No doubt there are certain slight differences between the Income Tax Act then in force and the present Act, and the earlier Act is somewhat clearer on the point than the present. But this fact does not aid the appellants, and indeed may be slightly against them. For the differences between the two Acts are in respect of arrangement only and not of substance, and it cannot be seriously suggested that the present Act was intended to make any alteration of the earlier Act with regard to the substance of the matter now in question.

Finally, the attitude adopted by the Board is, in my judgment, inconsistent with the view of the legislation so clearly recognized in *London County Council v. Attorney-General* (*supra*) that in making compulsory deductions from the dividends due to their stockholders and handing these deductions to the Crown the taxpayer is acting merely as a tax collector for the Crown. If that is so, it is strange that his obligation to pay what he has collected should be cancelled to any extent exceeding his actual payment of income-tax (including an accrued obligation to pay) for the same period. A statutory set-off would naturally be of like against like, not of a deduction or accrued right to deduct against an expectation merely of an obligation to pay income-tax in a future period.

In my opinion, therefore, the learned Judge was quite right, and the appeal should be dismissed.

Lord Justice Lawrence.—The validity of the claim of the appellants to retain against the Crown the sum which they have deducted in respect of income-tax from the interest paid by them to their stockholders during the year of assessment 1922-23 depends upon whether they are right in their contention that the expression "profits or gains brought into charge to tax" in Rule 19 of the All Schedules Rules in the Income Tax Act, 1918, means the profits or gains actually earned in the year of assessment, and not, as the Crown maintains, the profits or gains in respect of which income-tax for that year has been assessed and charged on the appellants by virtue of the Act.

In order to determine what is the true meaning of the expression "profits or gains brought into charge to tax" in Rule 19, it is necessary to refer shortly to the relevant provisions of the Act. Section 1 of the Act provides (so far as material for the purposes of this case) that income-tax shall be charged in respect of all property described or comprised in Schedule A in accordance with the Rules applicable to that Schedule. Schedule A provides that tax under that Schedule shall be charged in respect of the property in all lands, tenements, hereditaments and heritages in the United Kingdom for every twenty shillings of the annual value thereof. Part No. III. of the Rules applicable to Schedule A provides (*inter alia*), by Rule 3, that in case of waterworks the annual value shall be understood to be the profits of the preceding year, and, by Rule 4, that tax under the preceding Rule shall be assessed and charged on the body of persons carrying on the concern. The effect of these provisions as applied to the facts of the present case is that income-tax for the year 1922-23 is assessed and charged on the appellants in respect of the annual value of their undertaking in that year, and that the factor for ascertaining that annual value is the profits made by the appellants in 1921-22. In other words, the practical result is that the taxable income of the appellants for the year 1922-23 is the income of the appellants for the year 1921-22. This is plain and not disputed : it is the basis on which the appellants have returned their taxable income for the year 1922-23 at nil.

Rules 19 and 21 are mere machinery for facilitating the collection by the Crown of the income-tax imposed by the Act, and it would be a singular thing to find that in such Rules there had been introduced for the first time, and without any explanation, a reference to profits or gains calculated on a basis entirely different from the basis laid down in the earlier provisions of the Act and Rules ; moreover, without any provision enabling the Crown to demand a return of or otherwise ascertain such profits or gains. In the circumstances I should have thought that it was not really open to doubt that the qualifying words "brought into charge to tax" in the expression "profits or gains brought into charge to tax" in Rule 19 were inserted expressly to denote that the profits or gains there referred to were the profits or gains in respect of which a charge to income-tax had been imposed on the appellants by virtue of the Act—that is to say, the taxable income and not the actual income. Sir John Simon, however, strenuously contended that so to construe the expression was to confuse the subject matter of the operation of assessment with the result of the operation of assessment, and that the real subject matter of assessment was the actual income earned in the year of assessment, although that income had to be computed for the purpose of the charge to tax by reference to the income of the preceding year. In my judgment this contention is not well founded. Regard being had to the scheme of the Act and Rules, and particularly to the provisions to which I have referred, the words "brought into charge to tax" would be wholly inept as applied to the profits actually earned by the appellants during the year of assessment. Such profits form no factor in ascertaining the taxable income for the year of assessment, and the Act imposes no charge to tax on the appellants in respect of them ; they do not constitute the annual value of the appellants' works within the meaning of the Act, and are in no way "brought into charge" under any of the provisions of that Act.

Sir John Simon placed considerable reliance upon the introductory words of Rule 19 : "Where any yearly interest of money, annuity, or any other annual payment . . . . is payable wholly out of." His contention was that this phrase necessarily carried with it the implication that the profits or gains brought into charge which immediately follow were the actual profits or gains earned in the year of assessment, as no annual payments could properly be said to be payable out of income computed on an artificial basis. The phrase so relied upon is perhaps not very happily worded, but in my judgment its meaning is plain. It is used for the purpose of defining the character of the annual payments to which Rule 19 is applicable, and not for the purpose of denoting the moneys out of which the annual pay-

ments will in fact be made. The words "payable out of" are there used as equivalent to "properly chargeable against." The meaning and effect of the Rule is that, in order to come within its scope, the annual payments must be of such a character that they can properly be charged against the taxable income—*e.g.*, if the taxable income consists of the profits of a business, the annual payment must be one that is charged upon the profits of that business, and not a payment unconnected with it. That this is the correct reading of the Rule is, I think, borne out by the remarks of Lord Watson and of Lord Herschell in *Gresham Life Assurance Society v. Styles* (8 *The Times* L.R., 618; [1892] A.C., at pp. 320 and 324), and of Lord Davey in *London County Council v. Attorney-General* (17 *The Times* L.R., 131; [1901] A.C., at p. 46). In the latter case Lord Davey, after stating that it is not necessary that the interest or annual payment should be exclusively charged upon or payable out of profits or gains brought into charge, proceeds in these words: "It is enough if the interest is charged upon or payable out of taxable income, though there may be other subjects of charge," which words in my opinion show that Lord Davey read the phrase relied upon by Sir John Simon in the sense in which I have endeavoured to explain that it ought to be construed.

Some stress was laid by counsel for the appellants on the fact that the actual profits for the year 1922-23 would form the basis of taxation for the following year 1923-24, as showing that in this and all similar cases matters will ultimately be adjusted, and that therefore no weight ought to be attributed to the argument of the Crown that on the appellants' construction of Rule 19 the appellants would, in the events which have happened, become tax collectors for their own benefit. The plain answer to this, however, is that income-tax is a tax for a year, and that it is immaterial to consider what may or may not happen in the year or years following the year of assessment. The words "brought into charge" cannot properly be held to refer to profits which are only liable to be brought into charge in the future, and in my opinion they mean profits brought into charge in the year of assessment.

In the result I have arrived at the conclusion that the expression "profits or gains brought into charge to tax" in Rule 19 means the taxable and not the actual profits or gains in the year of assessment. It follows that under the provisions of Rules 19 and 21 no taxpayer can retain against the Crown any more income-tax deducted by him in any year of assessment than he has himself paid or become liable to pay to the Crown for that year. This construction, besides giving proper effect to the particular language of the Rules in question, seems to me entirely to accord with the intention of the Legislature as appearing from the Act and Rules as a whole. It avoids the incongruity which would result from the construction contended for by the appellants, of a taxpayer using one basis for the ascertainment of his taxable income and then turning round and using another basis when confronted with a claim by the Crown under Rule 21. It also avoids the anomaly of a taxpayer whose taxable income for the year of assessment is nominal, but whose actual income for that year is substantial, becoming entitled to retain for his own benefit income-tax collected by him from the persons to whom he has made annual payments, and who, but for the provisions of Rule 19, would have had to pay their income-tax to the Crown direct. It also avoids the further anomaly of a taxpayer whose taxable income for the year of assessment is substantial, but whose actual income during that year is nominal, from being exposed to a double charge of tax in respect of the annual payments which he has had to make during that year.

For the reasons stated, I think that the decision of Mr. Justice Rowlatt is right, and that the appeal should be dismissed with costs.

[Solicitors—Mr. C. A. Hunt; the Treasury Solicitor.]

Prob., Divorce, and Adm. Div. (Hill, J.) } 1927. Nov. 18.

THE RIVERMAN.*

Ship—Collision—Tug and tow—Towage contract—Indemnity clause—Third party action.

The plaintiffs' keel, while at anchor, was damaged by collision with a lighter, which, with five other craft, was being towed by the defendants' steam tug. The collision was caused by the negligence of the defendants' servants. Proceedings were instituted by the plaintiffs against the defendant tug owners for the damage which their keel had sustained, and thereupon the defendants obtained leave to serve third party notices upon (1) the owner (who was also the master) of the lighter, and (2) the hirers of the lighter, claiming to be indemnified, under the conditions of the towage contract, in respect of any sum which they might be found liable to pay to the plaintiffs.

The towage contract in question contained the following conditions:—

"That on the hiring or employment of the steam tug, the master and crew thereof shall be held to become the servants of and identified with the vessel or craft being towed, and under the control of the person in charge of such vessel or craft during the performance of the contract. The steam tug owners are not responsible for the acts, neglect, or default of the masters, pilots, or crews of the steam tugs . . . or for any loss of life or injury to persons or for any damage or loss that may arise to any vessel or craft being towed, or about to be towed, or having been towed, or cargo on board of same, or any other ship or cargo . . . through collision or otherwise, whether such damage arise from or be occasioned by any accident, or by any omission, breach of duty, mismanagement, negligence, or default of the steam tug owners, or any of their servants or employees, or by any defect or imperfection in the steam tugs or their machinery or the towing gear . . . whether such defect or imperfection is in existence before or at the commencement of the towage or arises during or after the performance thereof . . . and the owners or persons interested in the vessels or craft so being towed, or about to be towed, or having been towed, or the cargo on board of the same, shall and do undertake to bear, satisfy and

* Reported by A. W. Grant, Esq., Barrister-at-Law.

indemnify the steam tug owners against all liability for the above mentioned matters and against all costs and charges in respect of any law expenses or actions that may arise or be brought against the said tug owners in relation to any such loss or damage, actual or alleged."

The hirers of the lighter, with whom the Court found that the towage contract had been made, contended, *inter alia,* that the towage conditions as worded were so ambiguous as to be inapplicable where a tug was towing more than one vessel or craft at the same time, *e.g.,* the master and crew of the tug could not be held to become the servants of and identified with all the vessels being towed, and under the control of the persons in charge of all such vessels; and that the words "or persons interested in the vessels or craft so being towed" were not sufficiently clear and unambiguous to cover hirers of such vessels.

Held, without deciding whether the whole of the phraseology used in the towage conditions was applicable in cases where a tug was towing more than one vessel, that the hirers of the lighter, as "persons interested" in the vessels being towed, had clearly undertaken to indemnify the tug owners in respect of the matter in question, and judgment must be given against them, with costs.

Held, further, that under the towage contract the tug owners were entitled to recover from the hirers of the lighter their costs as between solicitor and client of defending the collision action from the date on which the hirers were joined as third parties.

This case arose out of a collision between the plaintiffs' keel Elma and the lighter Blenheim, and came before the Court for the trial of third party issues.

On the evening of January 6, 1927, when the Elma, a wooden keel, was lying at anchor in the River Trent, the lighter Blenheim came into collision with her and did her so much damage that she sank. The lighter was at the time, together with five other craft, in tow of the steam tug Riverman, owned by the United Towing Company, Limited. By writ dated February 10, the owners of the Elma (and her master suing for his lost effects) commenced an action against the owners of the Riverman for the damage caused by the collision. On May 21 the owners of the Riverman delivered their defence, denying liability, but in the meantime, on April 30, they had served a third party notice on Herbert Hinchsliff, owner and master of the barge Blenheim, claiming to be entitled, under the conditions of the towage contract, to be indemnified by Hinchsliff in respect of any sum or sums that they might be adjudged to pay to the plaintiffs. On June 10 Hinchsliff delivered a defence in which it was pleaded, *inter alia,* that the Blenheim was at the time of the collision on hire to Furley and Co., Limited, river carriers, under an agreement in writing, that Hinchsliff was merely acting as her master and as a servant of Furley and Co., and that the towage contract was in fact made between Furley and Co. and the owners of the Riverman. In these circumstances the owners of the Riverman on June 30 joined Furley and Co. as additional third parties, and on July 13 admitted liability to the plaintiffs. The towage conditions, under which the tug owners claimed an indemnity, are sufficiently set out in the head-note.

Mr. G. P. Langton, K.C., and Mr. E. W. Brightman appeared for the owners of the Riverman; Mr. E. A. Digby, K.C., and Mr. R. H. Balloch for Hinchsliff; and Mr. C. R. Dunlop, K.C., and Mr. H. Stranger for Furley and Co.

Mr. Justice Hill.—On January 6, 1927, the lighter Blenheim, which was in tow of the defendants' tug Riverman, was in collision with the plaintiffs' keel Elma. The collision was caused by the negligence of the defendants' servants in charge of the tug. The defendants were sued by the owners of the Elma and her master and have admitted liability. The defendants allege that they are entitled to be indemnified either by the third party, Mr. Hinchsliff, who is the owner of the Blenheim, or by Furley and Co., Limited, for whom the Blenheim was working under an agreement between Hinchsliff and Furley and Co., Limited, or by both.

The defendants set out to prove a contract of indemnity. The questions are: Had they a contract with Hinchsliff? Had they a contract with Furley and Co.? Did that contract contain a term that the party contracting with the defendants should indemnify the defendants against liabilities to the plaintiffs incurred by reason of the negligence of the defendants' servants in charge of the tug Riverman while towing the Blenheim? It is, of course, for the defendants to prove a contract, and to show that, in clear and unambiguous terms, it shifts on to the other contracting party a liability which otherwise would rest upon the defendants alone. There is no question that there was a contract that the tug should tow the Blenheim. With whom was it made? Furley and Co., Limited, carried on business as river and canal carriers and forwarding agents. They owned a number of keels or barges, they hired others. *Inter alia,* by an agreement dated August 16, 1926, and made between themselves and Hinchsliff, they hired the Blenheim for 12 months. From time to time they furnished the defendants with a list of the "boats owned and hired by them." There was an arrangement, current at the material times, between the defendants and Furley and Co. that in respect of towages of all such boats the defendants should debit Furley and Co. and render accounts to Furley and Co. and be paid by Furley and Co. The Blenheim is among the boats in the accounts so rendered and paid in respect of towages in August, September, October, November, and December, 1926, and also in an account rendered on November 14, 1927, and paid on March 25 in respect of January, 1927, towages which include the towage of the Blenheim on January 6, 1927. The voyage on January 6, 1927, was from Hull to Gainsborough, from the dock in Hull. The defendants' managing director, who was called, was unable to say how the order for this particular towage was given; he said that in the ordinary course of business orders were given by telephone from the office of Furley and Co., or by the master of the craft calling at the defendants' office, or by the defendants' manager at the dock, who saw that a boat was ready, applying to Furley and Co. or to the master, and receiving an order. No other evidence was called by the defendants. Mr. Hinchsliff was called on his own behalf, and said that he did not give the order on January 6, 1927. He said that he loaded and went to Furley and Co.'s

office and obtained a bill of lading and that they rang up the defendants and told them that the Blenheim was for Gainsborough. I disregard that as evidence against Furley and Co., but it is evidence that Hinchsliff did not give the order. Mr. Beaver, a director of Furley and Co., was called and said that he had no knowledge as to how the particular order on January 6, 1927, was given. I find that the order was not given by Hinchsliff. But it undoubtedly reached the defendants, and was accepted and carried out, and Furley and Co. were debited with the charge for the work done and paid it.

I find therefore that, immediately, Hinchsliff was no party to the contract. I find also that, immediately, Furley and Co. were parties to the contract. It is, I think, a necessary conclusion from the facts already stated that Furley and Co. contracted as principals and not merely as agents for Hinchsliff. It was submitted for Furleys, but not strenuously argued, that Hinchsliff was liable, and I must therefore consider whether there is any ground for saying that Furley and Co. contracted on behalf of themselves and Hinchsliff. Hinchsliff gave no express authority to contract on his behalf. If authority there was, it must be extracted from the agreement between Hinchsliff and Furley and Co.

This contract is with Hinchsliff as owner of the Blenheim for 12 months, and Hinchsliff undertakes to keep in repair the Blenheim at the disposal and under the control of Furley and Co. and to carry cargo within certain areas as ordered by Furley and Co. and the agreement provides that Furley and Co. shall pay hire at the rate of £155 per annum which shall be the owner's sole remuneration and that in certain events Hinchsliff, as owner, shall discharge himself as master and appoint a fresh master. As master the Hinchsliff contract is that "the captain . . . shall work her on the third system usual and customary in the trade, and that the rate of freight shall be the usual and current rate of freight at the present time paid by the hirers on similar cargoes." This requires some explanation. Furley and Co. received freights. They did not account for them to Hinchsliff. They took a fixed rate of freight, as provided by the agreement, and multiplied it by the amount of cargo and debited themselves with that. Against the amount so ascertained they credited themselves with "brokerage," bill of lading stamp, advances to the master for the ordinary working expenses of the voyage, and the amount due for towage; and the balance was divided one third to Furley and Co. and two-thirds to Hinchsliff as master, and the master paid the crew, that is, the mate. In view of these facts it cannot be said that Hinchsliff was a partner of Furley and Co. in the running of the ship. He did not share in the profits. Nothing at all was said about the losses. He received two-thirds of a sum ascertained at a fixed rate less certain deductions. It was a method of ascertaining his remuneration varying with the work done. I therefore cannot hold that the contract made by Furley and Co. was made for themselves and Hinchsliff. It was made for Furley and Co. only.

Did Furley and Co.'s contract with the defendants contain the indemnity clause relied on? The defendants printed at the head of a printed tariff and towage rates, which they circulated to their customers, a notice that they would tow vessels on the following conditions only, setting out the terms. They say that they sent this document to Furley and Co., and it is highly probable that they did so. The defendants also printed at the head of all the accounts rendered to Furley and Co. a notice in the same terms. Furley and Co.'s manager said that they knew that the words so printed contained conditions, and that they had tried to understand them. When Furley and Co. bespoke the services of a tug to tow the Blenheim they were offering to enter into a contract at the rate mentioned in the defendants' tariff and on the terms which the defendants had said were the only terms upon which they would tow, and that offer was accepted by the defendants sending the Riverman. I therefore hold that the contract must be construed as incorporating those terms.

The next question is, Did those terms, in clear and unambiguous language, impose upon Furley and Co. as the contracting parties the obligation to indemnify the defendants?

It is said that the first sentence of the conditions is quite inapplicable to the case where more ships than one are in tow. That may be. But because that sentence is inapplicable, it does not follow that the remainder is not applicable. The next sentence is a very long one and is in two parts—the first part is an exception clause. Then follows an indemnity clause, "The owners or persons interested in the vessels or craft so being towed, or about to be towed, or having been towed, or the cargo on board of the same, shall and do undertake to bear, satisfy, and indemnify the steam tug owners against all liability for the above mentioned matters and against all costs and charges," &c. The "above mentioned matters" are the matters mentioned in the exception clause and include damage to tug or ship or other property through collision, whether occasioned by the negligence of the servants of the tug owners or otherwise.

Furley and Co. were not the owners of the Blenheim, but when they, being hirers of the Blenheim, entered into a contract for her towage they were persons interested in the Blenheim, at least for the period of the performance of this contract.

I therefore hold that they entered into the contract of indemnity.

In the pleadings something is said about a term of the agreement between Hinchsliff and Furley and Co. as to Hinchsliff being liable for all damage done by the Blenheim. This is irrelevant to the question that I have to decide. And as to whether Furley and Co. have any claim against Hinchsliff I say nothing. Nothing was said in argument as to a particular point raised in the pleadings as to the defendants' right being only for a partial indemnity on the ground that it ought to be split up among the owners of the six craft in tow. There was nothing in that and I am not surprised that very little was said about it. If Furley and Co. contracted to indemnify, they contracted to indemnify, whatever other persons contracted to do. Of course the defendants could not be indemnified twice over. The result is judgment for Hinchsliff against the defendants, with costs, and judgment for the defendants against Furley and Co., with costs.

On the application of Mr. Brightman, the learned Judge directed that the costs incurred by the tug owners in defending the action by the owners of the Elma from the date when Furley and Co. were joined as third parties should be paid by Furley and Co. "as between solicitor and client."

[Solicitors—Messrs. Botterell and Roche, for Messrs. Sanderson and Co., Hull, for the owners of the Riverman; Messrs. Stokes and Stokes, for Messrs. Hearfields and Lambert, Hull, for the third party, Hinchsliff; Messrs. Cunliffe, Blake and Mossman, for Messrs. Moss, Lowe and Co., Hull, for the third parties, Furley and Co., Limited.]

Court of Appeal. (Scrutton, Sargant, and Greer, L.JJ.) 1927. Nov. 25.

GOSSE MILLARD, LIMITED v. CANADIAN GOVERNMENT MERCHANT MARINE, LIMITED.*

Contract — Carriage of goods by sea — Obligations of shipowners—Alleged breach of duty —Repair of ship—Hatches left open—Damage to cargo—Negligence—Exception—"Management of ship" — Carriage of Goods by Sea Act, 1924 (14 and 15 Geo. V., c. 22), Schedule, Art. IV. (2) (*a*).

The plaintiffs had a quantity of tinplates shipped for conveyance by the defendants' steamer from Swansea to Vancouver, and, after the tinplates had been taken on board, the ship went to Liverpool and had to be detained there for repairs. For this purpose part of the cargo had to be shifted, and through the negligence of the ship's officers the hatches were left open with the result that rain got into the hold, and when the tinplates were discharged at Vancouver they were found to have been damaged by rust. In an action for damages for breach of duty in the carriage of the tinplates,

Held (Greer, L.J., dissenting), that as the negligent management of part of the ship, namely, the hatches, caused the damage, and as this management was in the course of repairing the ship for the voyage, there was "management of the ship" within the exception in Article IV. (2) (*a*) of the Schedule to the Carriage of Goods by Sea Act, 1924, and the action failed.

Decision of Wright, J. (43 *The Times* L.R., 544 ; [1927] 2 K.B., 432), reversed.

This was an appeal by the defendants, the Canadian Government Merchant Marine, Limited, from a judgment of Mr. Justice Wright (43 *The Times* L.R., 544 ; [1927] 2 K.B., 432) in favour of the plaintiffs, Gosse Millard, Limited.

The plaintiffs were engaged in the canning industry in Vancouver, and in February, 1925, they ordered a quantity of tinplates from Baldwins, Limited, in South Wales. The plates were shipped at Swansea in a steamer, the Canadian Highlander, belonging to the defendants. After the plates had been taken on board, the steamer went to Liverpool to discharge certain other cargo. While at Liverpool the steamer was damaged by collision with a dock wall, and when the defendants began to do the repairs necessitated by that collision they found that a shaft was defective and must be repaired also. In the result, part of the cargo had to be shifted, and the steamer was detained at Liverpool for ten weeks. She eventually went to Vancouver and discharged the plaintiffs' tinplates, which, it was found, were to a large extent ruined by rust.

Another action, brought by the American Canning Company, raised a similar claim in respect of a consignment of tinplates shipped from the works of Richard Thomas and Co. to Vancouver by the same steamer on the same voyage. The two actions were heard together.

The plaintiffs contended that the plates were in good condition when shipped, and had been damaged owing to the negligence of the defendants in allowing fresh water to reach the cargo ; that the defendants loaded and/or stowed the boxes containing the plates so negligently that many of them were broken and their contents exposed ; and that the defendants had also been negligent in shifting and re-stowing the boxes in order to carry out the repairs to the steamer at Liverpool.

By their defence the defendants put in a general denial and referred to conditions in the bill of lading :—to the words (*a*) "shipped in apparent good order and condition," which, they said, only amounted to a description of the goods by the shippers and did not constitute an acknowledgment by the carriers ; (*b*) "tinplates to be deemed insufficiently packed unless in boxes tin-lined and iron-hooped" ; and (*c*) "any statement herein that metal goods of any description have been shipped in apparent good order and condition does not involve any admission by the carrier as to the absence of rust or fresh water damage or other deterioration between tinplates . . . for which the carrier accepts no responsibility."

They pleaded further that if the plates were damaged it was due to inherent vice or to insufficient packing, because the boxes containing the plates were not tin-lined and were made of unseasoned wood ; and that the plaintiffs themselves had been negligent in shipping the goods in wet weather. They further relied on Article IV., rule 2 (*a*), (*c*), (*d*), (*i*), and (*q*), of the Schedule to the Carriage of Goods by Sea Act, 1924.

By their reply the plaintiffs pleaded that the delay at Liverpool constituted a deviation and that the defendants could not, therefore, rely on the exceptions ; and that the defendants had been negligent in not taking care that the plates should not be damaged while the repairs were being carried out.

Mr. Justice Wright held that the defendants had failed to carry out the obligation imposed on them by Article III., rule 2, of the Schedule to the Carriage of Goods by Sea Act, 1924, carefully to stow, keep, and care for the goods, and that, even if the cause of the damage was unexplained, the onus was not on the cargo-owners to prove negligence, but on the shipowners to prove that neither they nor their servants had been guilty of negligence contributing to the loss. He held that the plaintiffs were entitled to recover.

The defendants appealed only against the decision in favour of Gosse Millard, Limited.

Mr. Miller, K.C., and Sir Robert Aske appeared for the appellants ; Mr. Jowitt, K.C., and Mr. Pilcher for the respondents.

Lord Justice Scrutton delivered the following considered judgment :—This appeal raises an important question under the Carriage of Goods by Sea Act, 1924. Fortunately the facts raising it can be shortly stated. A large quantity of tinplates was shipped at Swansea in the defendants' steamship Canadian Highlander for carriage to Vancouver. They were shipped in good condition, but they arrived in Vancouver seriously damaged by fresh water, of which, judging by the extent of the damage, a large quantity must have entered the hold in which they were stowed. At the trial two theories were put forward to explain this fresh water damage.

* Reported by T. W. Morgan and E. J. M. Chaplin, Esqrs., Barristers-at-Law.

The shipowners alleged that the water came from the unseasoned timber of the boxes in which the tinplates were packed. The Judge was not satisfied of this and found that the boxes were "good average normal boxes." The cargo-owners alleged that the fresh water causing the damage was rain entering through the shelter deck and the 'tween deck hatches of Hold No. 5, left open by negligence of the ship's officers and their deputies while it was raining. The Judge accepted this view and found that, while damage to the stern by collision was being examined, cracks were found in the lines of the tail shaft, which had to be taken out and replaced. This involved the presence of a considerable number of surveyors and workmen in No. 5 Hold, where the tinplates were stowed on the square of the hatch, and the constant passing of men and material through the hatches. The Judge found that there was default of the ship's officers in leaving the hatches open so that rain entered. In fact, it must have entered in considerable quantities to cause the very extensive damage ; the Judge found that enough rain entered during this period of repair (during which also the crew were scaling and painting in No. 5 'tween decks, which they entered through the shelter deck hatch) to account for all the damage found. He also found that it was probable that some rain had entered earlier on a day when lumber was being discharged from the No. 5 'tween decks. On that day the shelter deck hatch was open, and the Judge has found that the lower deck hatch was not protected, as it should have been, by any tarpaulin. This appears to be a small matter, the rain entering during the period of repair, when the 'tween or lower deck hatch was open, being found sufficient to account for all the damage to the tinplates. No attempt was made on the hearing of the appeal to challenge these findings of fact.

The next question is : "Do these facts bring the damage within any exception protecting the shipowners" ? These exceptions are to be found in the Carriage of Goods by Sea Act, 1924, and in the bill of lading, if the bill of lading provisions do not weaken the protection given to the cargo-owners by the Act. Article III. of the Schedule to the Act describes the obligation of the shipowner to be to "properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried." This obligation replaces the previous obligation of a common carrier and improves the position of the shipowner. This obligation, moreover, is subject to the provisions of Article IV., which is also introduced by the provision in Article II. and which is headed, "Rights and Immunities." Exception (*a*) of paragraph 2 of Article IV. reads as follows : "Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship." While this partially follows the wording of the United States Harter Act of 1893, which reads "shall not be responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel," that wording was derived from earlier English bills of lading. It could not have come from United States bills of lading, for the United States Courts took the view that all negligence clauses in contracts of affreightment were void as contrary to public policy, a conclusion which the English Courts were not able to adopt. The question, therefore, is whether the facts found by the Judge amount to "neglect or default of the servants of the carrier in the management of the ship." Unassisted by authorities I should have felt no doubt that they did. Assuming that the words deal with the management of the ship as a physical entity, and not with the management of the cargo-carrying adventure on which the shipowners and the cargo-owners have agreed to use the ship, what has been managed here is the hatches of No. 5 Hold, an essential physical part of the ship. For the purpose of repairing damage to the ship in order that she may resume her voyage, those hatches have been physically dealt with and dealt with so negligently that, during their absence in rainy weather, such quantities of rain have entered the hold as to damage the cargo in the hold. I cannot understand why on the words themselves, without reference to any authorities, this is not negligence in the management of the ship, or a substantial physical part of the ship.

The words to be construed occur in a statutory contract between shipowner and cargo-owner relating to the carriage of goods in a ship. The cargo-owner has no interest in an empty ship or its management. The shipowner undertakes to use due diligence to provide a ship fit for the carriage of goods (including proper propelling and pumping machinery and, where the cargo requires it, proper refrigerating and ventilating appliances) and in such a proper ship properly to carry and deliver a cargo, and he is exempt from liability for negligent management of such a ship by his servants. Why it should be an objection to management of part of the ship coming within the exception, that it is being primarily managed for the benefit of the cargo, I do not understand. That is what the ship is to be used for. It is "navigated" to direct the ship, and so carry the cargo safely, to its proper destination. It is as a physical entity "managed" for the same purpose. Some portion of the management may not preserve the physical ship, but is still carried out to preserve the cargo. I cannot see any difference between negligently leaving partly open a port or sea cock, whereby water enters which is no danger to the ship but damages the cargo, negligently managing the pumping apparatus with the same result, and negligently leaving hatches off, whether to repair the ship or to ventilate the cargo, whereby salt water at sea, or fresh water in rainy weather in port, enters the hold and damages the cargo.

Negligent management of the propelling machinery, which is hardly "navigation," and negligent management of the refrigerating or ventilating or pumping machinery, seem all equally to be management of the ship. Most modern steamers have masts with no yards, but derricks for loading and unloading cargo attached to them. I do not understand why the derricks are not part of the ship. But it is said that the authorities compel me to hold that a part of the ship primarily used for the benefit of the cargo, if negligently managed, does not come within the exception. It might be enough to say that these hatches were primarily taken off to enable the ship to be repaired and prosecute the contract voyage. But the contention is so important that it is well that the authorities, which are supposed to support it, should be considered.

The authorities fall into three classes : (1) The decisions of the English Courts on bills of lading ; (2) the decisions on the Harter Act of 1893, either by the American Courts construing their own statute, or by the English Courts construing the words of the statute as incorporated in a bill of lading made in the United States ; and (3) the decisions on the English Act of 1924.

The original wording of English bills of lading was either "perils of navigation," "negligence in navigation," or "negligence in the course of the voyage."

Questions arose under this wording whether negligence in the conduct of the ship while loading or discharging was covered. *Laurie v. Douglas* (15 M. and W., 746), where loss during discharge was held covered as a peril of navigation, may be compared with *The Accomac* (6 *The Times* L.R., 482 ; 15 P.D., 208), where the Court of Appeal held negligence in removing a bilge pipe during discharge not to be "navigation," though it might be in the course of the charterparty "voyage." This latter view was also taken by Sir James Hannen in *The Carron Park* (6 *The Times* L.R., 474 ; 15 P.D., 203). Probably to meet this difficulty the word "management" was added after "navigation." I have not found, and counsel could not refer us to, any case using the word "management" earlier than *The Ferro* in 1892 ([1893] P., 38), but I think it had been used for some years before. That was a case of bad stowage of cargo by the stevedores, not involving any movement of parts of the ship. Sir F. Jeune thought that such stowage was not management of the ship, but suggested that removal of the hatches for the purpose of ventilation would be. Mr. Justice Barnes agreed that bad stowage was not "management of the ship," words which he did not think "went much, if at all, beyond the word 'navigation.'" Oddly enough, when three years later the same two Judges considered the words of the Harter Act (*The Glenochil* [1896] P., 10), each slightly altered his view in *The Ferro* (*supra*). Sir F. Jeune thought that his illustration of removal of the hatches for ventilation was "not a happy one." I do not know why, as I should have thought that, like pumping the bilges, it was a typical case of "management of the ship." The President made the distinction between "want of care of cargo" and "want of care of vessel indirectly affecting the cargo." I do not understand why want of care in dealing with the vessel or part of it should not be management of the vessel, whether it affects the cargo directly or indirectly, so long as a physical part of the vessel is affected or manipulated. Mr. Justice Barnes held that "management" certainly added something to "navigation" and applied to the proper handling of the vessel for her own safety and not primarily to the safety of the cargo, though done when the ship was not being navigated. Again, I do not understand why a negligent handling of part of the vessel should not be management of the ship because it is primarily done for the protection of the cargo. Take failure to pump water out of a cargo-hold, the water not being sufficient to affect the safety of the ship, but enough to damage the cargo. Why should not this be "management of the ship" in a contract which is concerned with safe carriage of cargo ? Anyhow, in *The Glenochil* (*supra*) negligently running water into a tank to stiffen the ship while discharging, without discovering a broken pipe through which the water ran into the cargo-hold, was held to be "management of the ship." In *The Rodney* (16 *The Times* L.R., 183 ; [1900] P., 112), also a Harter Act case, the boatswain, in clearing a drainage pipe, poked a hole in it, whereby water entered a cargo space, and this was held to be "management of the vessel." The President treated the words as covering "keeping the vessel in a proper condition," and Mr. Justice Barnes defined them as "improper handling of the ship, as a ship, which affects the safety of the cargo." These definitions seem to me to cover the present case. The ship was being repaired, "kept in a proper condition." To effect the repairs part of the ship, the hatch, was being handled, removed, and replaced. This was done so negligently that, through the open hatch, rain entered the hold and damaged the cargo. The definition of Mr. Justice Barnes was accepted by Lord Justice Stirling in *Rowson v. Atlantic Transport Company* (19 *The Times* L.R., 668 ; [1903] 2 K.B., 666, at p. 681), a Harter Act case, and by Lord Justice Bankes and Lord Justice Atkin in *R. F. Brown and Co., Limited v. T. and J. Harrison* (43 *The Times* L.R., 633), a case on the English Act.

Some of the trouble in the case arises from the decision of the Court of Appeal in *Rowson's* case (*supra*). Nowadays, many ships are built with insulated holds, the walls of which are thickly lined with charcoal. This does not refrigerate them, but, like a Thermos flask, keeps a hot hold hot, and a cold hold cold. Refrigeration is effected by very elaborate pipes and machinery, sometimes built into the hold, sometimes connected with it, but as much a part of the ship as the propelling machinery, the pumping machinery, and the ventilating machinery. Indeed the English Act of 1924 speaks of all these refrigerating holds as "parts of the ship" to be made fit for the carriage of goods. As explained, no hold is refrigerating without elaborate machinery. In *Rowson v. Atlantic Transport Company* (*supra*) the engineer mismanaged the refrigerating machinery, whereby the cargo was damaged. Mr. Justice Kennedy held that this was mismanagement of the ship, of which this machinery was a part. I quite agree with him. The Court of Appeal, while affirming him, had doubts about the matter till they discovered that the refrigerating machinery, which cooled the cargo of butter, also cooled the ship's butter, which was then being carried in another insulated compartment that might be used for either cargo or ship's provisions. Lord Justice Vaughan Williams used the phrase "management of the vessel *qua* vessel." I do not see how you can manage the vessel except as a vessel ; and in a contract between shipowner and cargo-owner the vessel is a cargo-carrying vessel, and the management of the vessel is the management of a cargo-carrying vessel—not an empty vessel. Some higher tribunal may feel strong enough to treat the words "management of the ship" as management of the cargo-carrying adventure carried on in the ship, which is the purpose of the contracting parties. I should welcome such a decision. This meaning would cover bad stowage, and the management of the crew and stevedores. But, without going so far as this, "management of the ship" must include management of parts of the ship which, incidentally, damages some of the cargo, and, if it is necessary that the management should be primarily intended to keep the ship fit, that condition is fulfilled when the management of part of the ship, the hatches, is for the purpose of repairing damage to the ship itself in the course of her contract voyage.

It is difficult to reconcile the decisions of the United States Courts with themselves or with the English decisions ; and the Harter Act itself differs widely from the English Act. This arises partly from the fact that the United States Courts treated all negligence clauses in contracts of affreightment as contrary to public policy, and the Harter Act was therefore an allowance of clauses which were contrary to public policy, and as such were to be restricted ; while the English Courts allowed freedom of contract and limited provisions which restricted that freedom. From this point of view, sections 1 and 2 of the Harter Act were treated as the fundamental purpose of the Act, and, as Mr. Justice Holmes said in *The Germanic* (196 U.S., at p. 597), removed matters which would otherwise be within the exceptions of section 3 from its operation. The English Act, on the other hand, expressly makes the obliga-

tions of Articles II. and III. subject to the immunities and exceptions of Article IV.

In *The Germanic* (*supra*) a combined operation of loading coal for ship's use and of discharging cargo was conducted so negligently that the ship lost her trim and capsized. This was held not to be management of the ship. I should have thought that it clearly was such management, just as the provision of ballast would be. The United States Courts have held management of the ship not to include :— Insufficient covering of the hatches (*The Jeannie*, 236 Fed., 463) ; failure to open hatches to ventilate cargo (*The Jean Bart*, 197 Fed., 1002) ; failure to close during rough weather hatches which had been opened to ventilate cargo (*Andean Trading Company v. Pacific Steam Navigation Company*, 263 Fed., 559) ; negligent management of refrigerating machinery (*The Samland*, 7 Fed., 2nd series, 155). I should have decided all these cases differently.

They have held management of the ship to include :—Failure to pump water out of bilges, causing damage to cargo (*The Merida*, 107 Fed., 146, and other cases) ; mismanagement of seacocks, whereby cargo is damaged (*American Sugar Refining Company v. Rickinson*, 124 Fed., 188) ; failure to cover ventilators, or sounding pipes, or to close portholes (*The Hudson*, 172 Fed., 1005 ; *The Newport News*, 199 Fed., 968 ; *The Carisbrook*, 247 Fed., 583 ; *The Silvia*, 171 U.S., 462). I refer to an excellent summary and discussion of the American cases in the third edition of Mr. Robert Temperley's work on the English Act, pp. 46-61.

I appreciate the desirability of getting uniformity of decision in maritime cases, as pointed out by Lord Justice Atkin in *R. F. Brown and Co., Limited v. T. and J. Harrison* (*supra*), though the cogency of these remarks is somewhat weakened by the learned Lord Justice's view in the same judgment, with which I agree, that negligence in managing machinery built into the ship for the purpose of protecting the cargo is probably management of the ship. The United States Courts had decided the other way. But on this question of harmony of decisions, I have always thought that the words of Lord Esher (then Sir Baliol Brett, M.R.) in *Svensden v. Wallace* (13 Q.B.D., 69, at p. 72) are of great value. He says :—

"It was urged that even if the proposition is stated in terms larger than have hitherto been recognized in English law, yet it ought now to be adopted in order to bring the principle of English law on the subject into consonance with the laws of all other countries. But to this I cannot agree. It is useless to inquire whether the law is, as stated, the same in all European countries. For if it is, yet no English Court has any mission to adapt the law of England to the laws of other countries ; it has authority only to declare what the law of England is, and even if we could do what is suggested, I should doubt the expediency of making the law of the greatest commercial and maritime country in the world bend to the law of other countries where commercial operations are far less extensive, and where commercial adventure is far more timid. As to the cognate law of America, it has been declared over and over again that the English and American Courts have diverged upon this particular head of law, the law of general average. The question, therefore, must be, what is the law of England in this matter."

For reasons which it is unnecessary to indicate, the United States of America have not been—except in some exceptional periods—a shipowning country, and they have approached shipping matters from the point of view of the cargo-owner. I cannot think that their decisions, while treated with great respect, should necessarily control the shipping decisions of the Courts of the greatest shipowning country in the world.

There is only one relevant decision in the English Courts. In *R. and F. Brown and Co., Limited v. Harrison* (*supra*) this Court decided that thefts by stevedores in Mexico, which the officers apparently could not stop, were not defaults in the management of the ship. The Court accepted Mr. Justice Barnes's definition in *The Rodney* (*supra*), but confined the exception to management of the ship, and declined to include in it management of the business of the ship, a management solely relating to the goods. This decision prevents us from holding, (1) that "management of the ship" in a contract between shipowner and cargo-owner about carriage of goods in the ship covers management of the cargo-carrying adventure ; but does not, as I understand it, prevent a decision, (2) that where part of the ship is managed, even primarily, for the purpose of protecting the cargo, still more, (3) where part of the ship is managed primarily for the purpose of making the ship fit for the adventure, with secondary results on the cargo, there is negligent management of the ship within the exception.

As my view of the facts is that, to repair the ship for the voyage, part of the ship (the hatches) was managed, but managed so negligently that cargo was damaged by rain, I think the case falls into the third class above and is covered by the exception of negligence of the servants of the carrier in the management of the ship.

The learned Judge below devoted the greater part of his judgment to the facts and dealt with the point under consideration in a few lines. He apparently thought that the hatches were not a part of the ship and that managing them for the purpose of the ship was not management of the ship. He said that the case fell within Article III. (2) and not Article IV. (2) (*a*), but, as Article III. (2) is expressly said to be subject to the provisions of Article IV., I do not understand that observation. The obligation properly to keep and care for the cargo is expressly said to be subject to the "immunity" that if cargo is damaged by careless management of the ship the shipowner is freed from liability ; and the hatches, ventilating, pumping, and refrigerating machinery and ship's derricks seem to be clearly part of the ship.

After dealing with a small point which arose on a clause in the bill of lading his Lordship concluded his judgment by saying that the exception of negligence in the management of the ship protected the shipowner and therefore the appeal must be allowed and judgment entered for the defendants, with costs here and below. They must, however, pay the costs of the issues of fact on which they failed in the lower Court.

Lord Justice Sargant.—In this case both the appellants and the respondents have accepted the findings of fact of Mr. Justice Wright, and therefore we must take it that the damage to the respondents' tinplates was due to the penetration of rain water into No. 5 hold where the tinplates were stowed ; that only trifling, if any, damage was so caused during the one day, February 9, on which the ship was discharging in an ordinary dock at Liverpool certain lumber which had been shipped at Swansea and stowed between decks immediately above No. 5 hold ; and that the substantial damage was caused during the seven or eight weeks between February 10

and an early date in April, while the ship was in dry dock at Liverpool and undergoing repairs which had been occasioned by a collision with the dock-head as she was coming out on February 10. During this period the tail shaft had to be taken out, repaired, and replaced, and there was a necessary accompanying shifting of some of the cargo of tinplates in Hold No. 5. There was also some scraping and painting of the 'tween decks, together with a constant coming and going of workmen, and, as I understand the learned Judge, he has found that, in the course of these operations, the lower hatch above Hold No. 5 was from time to time removed, and the hatchway was left insufficiently protected against the heavy rain which occurred during this period, with the result that, to quote his exact words, "during that period rain did get into the lower hold and did get in in sufficient quantity to explain and to account for the damage which was observed."

In these circumstances the question arises whether the appellants are freed from their *prima facie* liability to the respondents by reason of the provisions of Article IV., rule 2, of the Schedule to the Carriage of Goods by Sea Act, 1924, which, so far as material, are "2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (*a*) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship." Or, accepting what I think must be accepted, that there was some neglect or default in the supervision of the operations by the officers of the ship, was it a neglect or default in the management of the ship?

The learned Judge's decisions in this action and in a similar action by other claimants in respect of a similar consignment of tinplates are reported so far as questions of law are concerned in 43 *The Times* L.R., 544; [1927] 2 K.B., 432. The principal part of this report is occupied with a discussion of the question of liability on the hypothesis that the cause of the damage to the respective consignments of tinplates had not been ascertained. This was his finding of fact with regard to the other consignment and was mentioned by him, though not adopted, as a possible alternative finding in the case of the appellants' consignment. On the present appeal it is unnecessary to consider this part of the report. The only material part of the judgment as reported is to be found in the last paragraph, where the learned Judge says: "But if the tinplates were damaged through the negligent admission of rain water into the hold at Liverpool, I do not think that that constituted a case of management of the ship. These words refer to matters affecting the ship as a ship—for instance, its safety, which might incidentally affect the cargo, such as the improper opening of sea connexions so as to prejudice the ship's safety while also damaging the cargo."

The brevity of the learned Judge's judgment on this point is probably due to the fact that it formed one only of a number of questions of both fact and law with which it had to deal; and no doubt he had not the advantage of so full a discussion and examination of the numerous authorities as we have had. And further, since the date of his judgment, there has been the decision in this Court of this very question of the scope of Article IV. (2) (*a*) in the important case of *R. F. Brown and Co., Limited v. T. and J. Harrison* (43 *The Times* L.R., 633). Not only was the attention of the Court in that case solely occupied with this question, but most of the previous English decisions and one or two important United States decisions were referred to in the judgments of Lords Justices Bankes and Atkin. We are therefore in a better position to solve the present problem than was Mr. Justice Wright.

Now, with great respect to the learned Judge, he seems to me to have paid too little attention to the occasion, scope, and purpose of the operations in the course of which the negligent acts or omissions took place. In my opinion, if these operations are operations with regard to the ship as a whole and for ship's purposes, and are not merely operations in relation to the cargo, then any negligence in conducting those operations is within Article IV. (*a*) (2), although the result of the negligence may be limited to damage to cargo and may not imperil or injure the ship at all. And I think that this view underlies all the decisions, and is, if not expressed, at any rate implied in the language of most, if not all, of the judgments.

For instance, in *R. F. Brown and Co., Limited v. T. and J. Harrison* (*supra*) Lord Justice Bankes says at page 635: "In order to bring any particular matter within the exception it must be something which can be said to be in the management of the ship." And again: "The more one looks into the authorities the more authority one finds for the proposition that such an act as this, a mere discharging of the cargo, cannot properly be said to come within the expression 'management of the ship.'" And Lord Justice Atkin says (at page 639): "The stevedores brought in were employed by the ship for the purpose of discharging the cargo, and that which was done was not a defect in the ship or a defect in the management of the ship as defined, but merely a default of a person dealing with the cargo." And on the same principle in *The Ferro* ([1893] P., 38), Sir Francis Jeune and Mr. Justice Gorell Barnes held that an act of damage done merely in the stowage of the cargo and apart from anything done in reference to the ship could not be held to be mismanagement of the ship.

Again in *The Glenochil* ([1896] P., 10) Mr. Justice Gorell Barnes applied the same test. He said at page 18: "It certainly seems to me to be a fault in the management of the vessel in doing something necessary for the safety of the ship herself"; and again, (at p. 19): where the act "is done for the safety of the ship herself, and is not primarily done at all in connexion with the cargo, that must be a matter which falls within the words 'management of the said vessel.'" Further, in *Rowson v. Atlantic Transport Company* (19 *The Times* L.R., 67; [1903] 1 K.B., 114, at p. 117) there is an adoption by Mr. Justice Kennedy of the language of Mr. Justice Gorell Barnes in *The Rodney* (16 *The Times* L.R., 183; [1900] P., 112, at p. 117): "I think that the words 'faults or errors in the management of the vessel' include improper handling of the ship, as a ship, which affects the safety of the cargo." And in the Court of Appeal in the same case (19 *The Times* L.R., 668; [1903] 2 K.B., 666) the reasoning proceeds on the same lines, particularly in the elaborate judgment of Lord Justice Stirling.

To the same effect is the judgment of Mr. Justice Holmes in a case in the Supreme Court of the United States, *The Germanic* (196 U.S., 589), where after referring to *The Glenochil* (*supra*) and to a case of *The Silvia* (171 U.S., 462) he said at p. 597: "If the primary purpose is to affect the ballast of the ship, the change is management of the vessel, but if, as in view of the findings we must take to have been the case here, the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make it the less a fault of the class

which the first section" (of the Harter Act) "removes from the operation of the third. We think it plain that a case may occur which, in different aspects, falls within both sections, and if this be true the question which section is to govern must be determined by the primary nature and object of the acts which cause the loss."

Now in the present case it is clear that the operations on the Canadian Highlander, in the course of which the hatchway leading to Hold No. 5 was left wholly or partially open and so allowed the penetration of rain into that hold, were operations for the purpose of repairing damage to the structure of the ship, and of scraping and painting parts of the ship, and had nothing at all to do with the case of the cargo. Had the 'tween decks hatch been removed for cargo purposes, as, for instance, for the ventilation of the cargo, and had there then been negligence in replacing the hatch or otherwise covering the hatchway, the result might have been different (see, for instance, *Andean Trading Company v. Pacific Steam Navigation Company,* 263 Fed., 559), though I express no definite opinion on the matter in view of the remarks of Lord Justice Scrutton to the contrary effect. But, as things stand here on the findings of fact of the learned Judge, I have come to the conclusion that the primary, or rather the sole, nature and purpose of the operations in which the negligence occurred concerned the ship as a whole; and accordingly that the appellants are protected from liability by Article IV., 2 (*a*).

In the view which I have taken it is not necessary to deal with the second defence of the appellants, based on the particular language of the document in this case, which is said to be rendered void by Article III. (8). I agree that the appeal should be allowed.

Lord Justice Greer.—This is an appeal by the defendants, who are the owners of the s.s. Canadian Highlander, from a judgment of Mr. Justice Wright awarding the plaintiffs damages for breach of contract, evidenced by a bill of lading of which the plaintiffs were the holders.

The question raised by the appeal is whether the defendants are entitled to be relieved from liability to compensate the plaintiffs for the damages which they sustained through injury to a quantity of tinplates shipped in the Canadian Highlander under the contract of carriage, on the ground that they are protected by the words of Article IV., 2 (*a*), of the Schedule to the Carriage of Goods by Sea Act, 1924.

The defendants also relied on a clause in the bill of lading which reads as follows:—

"18. The following are to be deemed insufficiently packed, (*a*) tinplates in boxes unless tin-lined and iron-hooped. . . ."

Other questions were involved in the action when heard by Mr. Justice Wright, but the above were the only ones that survived and were argued in the Court of Appeal.

The first question may be stated broadly thus. Is the failure to utilize the hatch covers or tarpaulins of the ship with care for the protection of the cargo an act, neglect, or default in the management of the ship within the meaning of the said rule, when it cannot be said to be, or at least has not been proved to be, an act, neglect, or default with regard to the safety, or with regard to the condition or purposes of the ship itself? The learned Judge held that the act, neglect, or default proved by the evidence was not an act, neglect, or default in the management of the ship, within the meaning of the said rule.

The material facts may be quite shortly stated. The tinplates were shipped at Swansea, under a bill of lading dated February 6, 1925, for carriage to Vancouver. The bill of lading had pasted on it the paramount clause giving effect to the provisions of the Carriage of Goods by Sea Act, 1924, and the rules comprising the Schedule thereto. By section 3 of the Act it is necessary for every bill of lading to contain a clause to this effect. The vessel sailed from Swansea, and on her way to Vancouver arrived at Liverpool to discharge some lumber and take in additional cargo. The tinplates in question were in No. 5 lower hold, and the lumber was stowed in the 'tween decks of that hold. The lumber was discharged on February 9 through the hatchway of No. 5 hold. A good deal of rain fell during part of the time occupied by the discharge. As I understand the learned Judge's findings of fact, he decided that the 'tween decks hatches were insufficiently protected by tarpaulins, and some rain penetrated to the lower hold and caused some damage to the plaintiffs' tinplates.

The vessel was moved on February 10 and unfortunately met with an accident by striking the pierhead. She was found to be damaged, and was taken to dry dock for repairs. It was then discovered that in addition to the repairs necessitated by the accident she required a new liner to the tail shaft. This made it necessary for the repairers to descend into No. 5 lower hold and do a good deal of work there, the nature of which it is unnecessary to describe in detail. While the repairers were at work, the defendants' sailors seized the opportunity of doing some painting in the 'tween decks. There was rain on some of the days when the work was being done, and the rain somehow or other fell on the plaintiffs' boxes of tinplates, which extended about halfway across the lower hatchway from the after end towards the forward end. The ladder leading to the hold was at the after end of the hatch, and the learned Judge came to the conclusion that at some time or other either the defendants' employees on board the ship must have negligently omitted to see that the hatch covers or tarpaulins were replaced after the men descended to their work, or that the opening in the hatch was not covered by a tarpaulin. He did not find, and on the evidence, in my opinion, he could not find, that there was any neglect of the safety or of the condition of the ship itself, or any negligence towards the ship itself or any part of it. I treat his judgment as meaning that, if there was no cargo to be considered, the occasional omission completely to cover the hatchway would not have constituted negligence at all. I agree with this view.

The conclusions of the learned Judge are stated as follows:—

"The conclusion, therefore, I arrive at .... is that rain did get into the hold during the period of the repairs at Liverpool and also during some part of the discharge of the lumber at Liverpool and that rain accounted for the exceptional damage.

His final conclusion is stated as follows:—

"Mr. Miller further relied on Article IV., 2 (*a*), and contended that if there was neglect on the part of the defendants' servants, it was 'in the management of the ship,' so that the defendants would be excused. But if the tinplates were damaged through the negligent admission of rain water into the hold at Liverpool, I do not think that that constituted a case of management of the ship. These words refer to matters affecting the ship as a ship—for instance, its safety, which might incidentally affect the cargo, such as the improper opening of sea connexions, so as to prejudice the ship's safety while also damaging

the cargo. The principle was so stated in *Rowson v. Atlantic Transport Company* (19 *The Times* L.R., 668 ; [1903] 2 K.B., 666), where it was somewhat subtly applied to the management of refrigerating machinery, but on the ground that its functions were not limited to cooling cargo. I think that in the present case the protection of the tinplate cargo fell under Article III., 2, and not Article IV., 2 (*a*). Any other view would in effect nullify the former provision." In my judgment the learned Judge was right.

The material rules in the Schedule to the Act are Articles II., III., 2, and IV., 2 (*a*).

In interpreting these rules it is not immaterial to consider the circumstances which gave rise to the enactment of the statute which gives the force of law to these rules.

In 1893 the Congress of the United States of America passed the Harter Act. This Act provides by section 2 that it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any covenant or agreement "whereby the obligations of the master, officers, agents, or servants, to *carefully handle and stow her cargo, and to care for and properly deliver the same,* shall in anywise be lessened, weakened, or avoided." As pointed out by Mr. Jowitt in his argument for the respondents, this is not a provision imposing a duty to take care, but is a declaration that the shipowner is not to limit his common law obligation to carry and deliver the cargo by exceptions relieving him, his master, officers, servants, or agents from the duty of exercising care in the handling, stowing, caring for, and delivery of the cargo.

Section 3 then proceeds to provide "that if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of the said vessel."

After the Harter Act was passed, several other countries, including some British Colonies, legislated on similar lines, but not in every case using similar words. It was felt by a large number of shipowners, merchants, and bankers in this and other countries that it was desirable to make the law of the countries interested in international trade as nearly as possible uniform with regard to the matters dealt with by the Harter Act, and recommendations were made by an international body to the British Legislature which resulted in the passage of the Carriage of Goods by Sea Act, 1924.

It seems clear that section 3 of the Harter Act when incorporated in a British bill of lading ought to be read as a limitation of the liability of the shipowner as a common carrier, and ought to be interpreted as an exception clause, and any decision of our Courts as to its meaning is an authority which can be properly applied to the similar exception clause in the Carriage of Goods by Sea Act, 1924. Further I think it is incumbent on the Court not to attribute to Article IV., 2 (*a*), a meaning that will largely nullify the effects of Article III., 2, unless they are compelled to do so by clear words.

The words "act, neglect, or default in the management or navigation of the ship," if they are interpreted in their widest sense, would cover any act done on board the ship which relates to the care of the cargo, and in practice such an interpretation, if it did not completely nullify the provisions of Article III., 2, would certainly take the heart out of those provisions, and in practice reduce to very small dimensions the obligation to "carefully handle, carry, keep, and care for the cargo," which is imposed on shipowners by the last-mentioned rule. In my judgment a reasonable construction of the rules requires that a narrower interpretation should be put on the excepting provisions of Article IV., rule 2 (*a*). If the use of any part of the ship's appliances that is negligent only because it is likely to cause damage to the cargo is within the protection of Article IV., rule 2 (*a*), there is hardly anything that can happen to the cargo through the negligence of the owner's servants that the owner would not in actual practice be released from. To hold that this is the effect of Article IV., rule 2 (*a*), would reduce the primary obligation to "carefully carry and care for the cargo during the voyage" to a negligible quantity. In my judgment the reasonable interpretation to put on the rules is that there is a paramount duty imposed safely to carry and to take care of the cargo, and that the performance of this duty is only excused if the damage to the cargo is the indirect result of an act or neglect which can be described as either (1) negligence in caring for the safety of the ship, or (2) failure to take care to prevent damage to the ship or some part of the ship, or (3) failure in the management of some operation connected with the movement or stability of the ship or otherwise for the ship's purposes. It is worth while noting that Article IV., rule 2 (*a*), is not directed to acts, neglects, or defaults in the course of management of the ship, but to acts, neglects, or defaults in the management of the ship. All the cases in our Courts where the ship has been held to be excused come under one or other of these heads.

The decisions of the English Courts on the meaning of the Harter Act (when made part of an English bill of lading) and on the Carriage of Goods by Sea Act, 1924, seem to me to be in accord with the view of the law above stated. In *The Glenochil* ([1896] P., 10), the President, Sir F. H. Jeune, and Mr. Justice Gorell Barnes held that the shipowner was protected from liability for damage caused by the negligent way in which the process of filling the water ballast tanks to stiffen the ship during discharge was carried out. The stiffening was done in order to keep the ship afloat in proper trim, and was for the benefit of the ship, as a ship. It was held that the negligence complained of was negligence in the management of the ship within the meaning of section 3 of the Harter Act, which had been incorporated in the bill of lading contract. That case is distinguishable from the present in that the act complained of was the negligent management of an operation done for the purposes of the ship, as a ship, and, as this negligence resulted in damage to the cargo, the ship was held to be protected by section 3 of the Harter Act. The negligence complained of was negligent treatment of the ship as a ship indirectly affecting the cargo. In giving judgment the President pointed out ([1896] P., at p. 16) that the words "management of the said vessel" were not merely co-extensive with navigation but at any rate went "far enough to take in this very class of acts which do not affect the sailing or movement of the vessel, but do affect the vessel herself," and after referring to the judgment in *The Ferro* ([1893] P., 38), he uses these words: "The distinction I intended to draw then, and intend to draw now, is

one between want of care of cargo and want of care of vessel indirectly affecting the cargo." If this is the correct way of describing the legal effect of the material words in the Harter Act, it seems to me to mean this, that the shipowner has to prove two things in order to bring himself within the protection of section 3, (*a*) that there was some act or neglect that can be described as want of care of the vessel, and (*b*) that damage to the cargo was indirectly caused thereby. As I have already indicated, the evidence in this case failed to establish any want of care of the vessel, but only want of care of the cargo, consisting of a failure to use the hatch covers and tarpaulins sufficiently to afford adequate protection of the cargo. Lord Gorell (Mr. Justice Gorell Barnes, as he then was), in giving judgment said ([1896] P., at p. 19) : "I think that where the act done in the management of the ship is one which is necessarily done in the proper handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connexion with the cargo, that must be a matter which falls within the words 'management of the said vessel.'" Having regard to the words which I have quoted from the judgments it seems to me that *The Glenochil* (*supra*) is an authority in favour of the plaintiffs' contentions in the present case.

The facts in the next case, *The Rodney* (16 *The Times* L.R., 183 ; [1900] P., 112), were that during the voyage the vessel met with heavy weather, and, the forecastle becoming flooded, the boatswain, whilst endeavouring, with the aid of a poker, to clear a pipe used to carry off the drainage, drove a hole through it, thereby admitting water into the forehold and damaging a portion of the cargo. It was decided that there was a fault or error in the management of the vessel, and the shipowner was protected by section 3 of the Harter Act, which had been made part of the contract of carriage. Here it is clear that the negligent act complained of which damaged the cargo was an act done for the purposes of the ship, which actually damaged part of the ship. The negligence was negligence in respect of the ship which indirectly damaged the cargo. In giving judgment, Mr. Justice Gorell Barnes said ([1900] P., at p. 117) : "Practically there is very little difference, if any, between the case of *The Glenochil* (*supra*) and this case, except that in the former case there are to be found some expressions referring to the act as being done for the safety of the ship, but those expressions were not intended to limit the meaning of the words 'management of the ship.' I think that the words 'faults or errors in the management of the vessel' include improper handling of the ship, as a ship, which affects the safety of the cargo."

The next case to be considered is the case of *Rowson v. Atlantic Transport Company* (19 *The Times* L.R., 668 ; [1903] 2 K.B., 666). This is the authority referred to by Mr. Justice Wright in support of his judgment. The actual decision in that case was that the negligent management of the refrigerating apparatus, which was installed in the ship partly to preserve the cargo, and partly to preserve the food used by the crew, amounted to a fault or error in the management of the ship, and therefore the shipowner was protected by section 3 of the Harter Act, which was incorporated in the contract of carriage. But it is clear that the ground for the decision was that as the apparatus was used not merely for the purpose of the preservation of the cargo, but also for the purposes of the ship herself as a ship, the negligence was accordingly negligence in the management of the ship. Lord Justice Vaughan Williams states his view of the proper construction of section 3 by saying ([1903] 2 K.B., at p. 675) that the words "in the management of the said vessel" mean "in the management of the vessel *qua* vessel." Lord Justice Romer in his judgment asks himself the question whether the negligent engineer was acting in the ordinary course of his duties and on behalf of the vessel regarded as a whole, or was he acting solely, or in particular, in looking after the cargo and for the purposes of the cargo, and as he came to the conclusion that he was acting on behalf of the vessel regarded as a whole, and not merely or particularly on account of the cargo, he came to the conclusion (at p. 678) that "the mismanagement of the pipe was a mismanagement of it in working the pipe *qua* pipe, as I have said, and as part of the vessel." Further on he says, "In any point of view it was, in my judgment, an act of negligence by an officer of the ship in the performance of his duties to the ship as a ship, not with regard to any particular cargo, and was such an act as really concerned the management of the vessel as a whole, and, therefore, in my opinion, really came within the express limitation in section 3 of the Act." Lord Justice Stirling in his judgment says (at p. 682), "If the refrigerating chambers or refrigerating machines were entirely devoted to cargo, and the neglect had been, as it was in the present case, the act of turning a handle which intercepted the supply of oil to this particular spot in the machine, I should have felt very great hesitation in saying that was not neglect in taking proper care of the cargo ; and for a long while I was under the impression that that really represented the state of things here, and that the negligent act had nothing to do really with the general management of the vessel, but simply with the management of a portion of the vessel which was exclusively appropriated to the cargo. But it now turns out that the refrigerating portion of the vessel does include chambers which are applied and used for carrying provisions for the ship, and these are worked with precisely one and the same apparatus as the chambers which are devoted to the preservation of the cargo. The duties of the particular engineer in charge were not limited, as I understand, to taking care of the cargo, or indeed to this particular portion of the refrigerators ; and although I think the case very near the line, it does seem to me that I ought to come to the conclusion that the fault or error was committed in the management of the vessel within the meaning of section 3 of the Harter Act."

The only other case that I think it necessary to consider is *R. F. Brown and Co., Limited v. T. and J. Harrison* (43 *The Times* L.R., 633). The actual question involved in that case was whether theft by the stevedore's men at Mexican ports amounted to mismanagement of the ship within the meaning of Article IV., rule 2 (*a*), of the Schedule to the Carriage of Goods by Sea Act, 1924. The decision is a decision of the Court of Appeal, and though the facts of the case are not in any way similar to the facts in the present case, it seems to me that the judgments of Lord Justice Bankes and of Lord Justice Atkin are only consistent with the construction of a contract similar to that decided in *Rowson's* case (*supra*) with regard to the construction of the Harter Act, and similar to the construction which I have indicated in an earlier part of this judgment. Lord Justice Bankes quotes with approval the passages from the judgment of the President in *The Glenochil* (*supra*) which I have

cited above, and also the judgment of Lord Justice Vaughan Williams in *Rowson's* case (*supra*). He cites with approval the judgment of Mr. Justice Holmes in the case of *The Germanic* (196 U.S., at p. 596), including that part of the judgment which approves the words of Mr. Justice Gorell Barnes in *The Glenochil* (*supra*), that in order to be within the protection of section 3 of the Harter Act the *faults or errors* should be *primarily connected with the navigation of the vessel, and not with the cargo,* and Lord Justice Atkin says (43 *The Times* L.R., at p. 638) : "It appears to me that here we are not dealing with anything which is or can be said to be part of the ship as a ship," and earlier on the same page he says, "I do not propose to add anything at any length to what has been said by my Lord, with whose judgment I entirely agree, but I think perhaps one might point out this, that in this statute it is plain that a very clear distinction is drawn between dealings with goods and dealings with ships, and that 'ship' is defined in the Act. 'Ship' is defined as being 'any vessel used for the carriage of goods by sea'; and it is quite plain that what is meant by 'ship,' when the word is used, is the actual vessel, the *res,* the actual thing itself. One will find in Article IV., rule 1, that 'Neither the carrier nor the ship shall be liable for loss,' and in rule 2 that : 'Neither the carrier nor the ship shall be responsible for loss'; that means that the ship as a *res* shall not be responsible for loss ; and while it is quite true that, in general language, in another context, 'management of the ship' might be construed as meaning management of the business of carrying goods by ship, it seems to me plain that that is not the meaning here, but that there is a clear distinction drawn between goods and ship, and when the Act uses the word 'ship' it means the management of the ship, and does not mean the general carrying on of the business of transporting goods by sea. The effect of it is that, in the words of Mr. Justice Gorell Barnes, in *The Rodney* (16 *The Times* L.R., 183 ; [1900] P., 112, at p. 117) : 'Faults or errors in the management of the vessel include improper handling of the ship, as a ship, which affects the safety of the cargo,' and that construction merely follows, I think, and was intended by the learned Judge to follow, his decision in *The Glenochil* (*supra*), and the decision of Sir Francis Jeune and Mr. Justice Gorell Barnes in both these cases of *The Glenochil* (*supra*) and *The Rodney* (*supra*) is supported in terms by Lord Justice Stirling in the case of *Rowson v. Atlantic Transport Company* (*supra*), to which my Lord has referred, and I think that those statements of the meaning of the word 'management' must be taken, so far as this Court is concerned, as being authoritative."

As I read the decisions of the English Courts, especially the two cases in the Court of Appeal, they mean this. If the cause of the damage is solely, or even primarily, a neglect to take reasonable care of the cargo, the ship is liable, but if the cause of the damage is a neglect to take reasonable care of the ship, or some part of it, as distinct from the cargo, the ship is relieved from liability, but if the negligence is not negligence towards the ship, but only negligent failure to use the apparatus of the ship for the protection of the cargo, the ship is not so relieved. I respectfully agree with this view, but whether it ultimately proves to be a right construction of the Act, I think in this Court we ought to follow the opinions expressed by this Court in those cases.

With regard to the point made by Mr. Miller on Clause 18 of the bill of lading, I think it is unnecessary to say more than this ; if my judgment is right, the clause cannot operate as a defence when there is a cause of action for negligence. If I am wrong, then the defendants are entitled to judgment without any need to rely on this clause.

I am of opinion that this appeal should be dismissed with costs, but as the other members of this Court think differently it will be allowed with costs.

[Solicitors—Messrs. William A. Crump and Son ; Messrs. Botterell and Roche.]

Judicial Committee of the Privy Council. (Viscount Cave, L.C., Lord Carson, and Lord Darling.) — 1927. Dec. 6.

ARSECULERATNE v. PERERA.*

Ceylon—Agreement affecting land—Statutory mode of execution—Non-observance—Nullity of agreement—Whether curable—Part performance—Ceylon Ordinance No. 7 of 1840, cl. 2.

By clause 2 of the Ceylon Ordinance No. 7 of 1840, no agreement for the sale or purchase of land "shall be of force or avail in law unless the same shall be in writing and signed by the party making the same or by some person lawfully authorized by him or her in the presence of a notary public and two or more witnesses present at the same time and unless the execution of such writing deed or instrument be duly attested by such notary and witnesses."

Held, that where an agreement affecting land has not been executed and attested in the manner required by the above enactment, the operation of the enactment cannot be avoided either by an application of the principle of the decision in *Forster v. Hale* (3 Ves., 696 ; 5 Ves., 308) or under the equitable doctrine of part performance, but such an agreement may be valid merely for the purpose of establishing a partnership between the parties.

Pate v. Pate (31 *The Times* L.R., 590 ; [1915] A.C. 1100) applied.

This was an appeal from a judgment of the Supreme Court of Ceylon in a suit relating to the validity of a partnership agreement.

Mr. Owen Thompson, K.C., and Mr. Hugh Hallett were counsel for the appellant ; Mr. Herbert du Parcq, K.C., and Mr. Hugh C. Bischoff for the respondent.

The Lord Chancellor, in delivering their Lordships' judgment, said :—This is an appeal from a decree of the Supreme Court of Ceylon affirming a decree of the District Court of Colombo in an action in which the appellant was plaintiff and the respondent was defendant.

By an agreement in writing dated December 21, 1915, the respondent and the appellant agreed to prospect for plumbago at the Pattagoda Mines under the name of the Pattagoda Mining Company. The agreement provided that the respondent "would thereby give over" his interest in the lease which he

* Reported by Sir W. J. Soulsby, Barrister-at-Law.

had taken from the owners of the mine (which had still eight years to run) to the company ; that the appellant should manage the mine and receive a commission of 2½ per cent. on all transactions ; that the partners should contribute equally to the expenses to be incurred on the pit or pits ; and that they should be entitled to the profits and liable for the losses in equal shares. The agreement was signed by both parties, but the signatures were not attested by a notary or witnesses. The mine was duly worked under the management of the appellant from the date of the agreement until the month of January, 1918, when the working was stopped by mutual arrangement.

On January 25, 1923, the appellant brought this action against the respondent pleading the above facts and alleging that he (the appellant) had paid or borrowed moneys in respect of the business amounting to Rs. 72,857 and was entitled to commission amounting to a further Rs. 1,504 ; and the plaintiff claimed a dissolution of the partnership and payment by the defendant of one-half of those sums or of such sum as might be found due upon an account being taken. The respondent by his written statement admitted that he had agreed to work the Pattagoda plumbago pits under the name of the Pattagoda Mining Company, that the profits and losses were to be divided equally, that the plaintiff was to manage the business for a commission of 2½ per cent., and that the business had been carried on as alleged ; but he pleaded that the agreement of December 21, 1915, on which the plaintiff's action was based, was invalid in law. Issues were framed, which included the following :—

1. Is the document containing the agreement between the plaintiff and the defendant invalid in law, inasmuch as it has not been notarially executed and has not been duly stamped ?

5. Had the plaintiff authority to borrow money for the working of the partnership ?

6. Is the defendant liable to pay a half share of any of the moneys borrowed by the plaintiff or of the interest due on such loans ?

8. What sum, if any, is due by the defendant to the plaintiff or by the plaintiff to the defendant ?

On the trial of the action the District Judge held on the first issue that the agreement of December 21, 1915, not having been attested by a notary and two witnesses in manner directed by clause 2 of Ordinance No. 7 of 1840, was void in law, and without dealing with the other issues he dismissed the action with costs. On an appeal by the plaintiff to the Supreme Court of Ceylon, that Court affirmed the judgment of the District Judge, and it is against that decision that the present appeal is brought.

The material provisions of Ordinance No. 7 of 1840 are as follows :—

" 2. No sale purchase transfer or mortgage of land or other immovable property and no promise bargain contract or agreement for effecting any such object or for establishing any security interest or incumbrance affecting land or other immovable property (other than a lease at will or for any period not exceeding one month) nor any contract or agreement for the future sale or purchase of any land or other immovable property shall be of force or avail in law unless the same shall be in writing and signed by the party making the same or by some person lawfully authorized by him or her in the presence of a licensed notary public and two or more witnesses present at the same time and unless the execution of such writing deed or instrument be duly attested by such notary and witnesses."

" 21. No promise contract bargain or agreement unless it be in writing and signed by the party making the same or by some person thereto lawfully authorized by him or her shall be of force or avail in law for any of the following purposes :— . . .

" 4. For establishing a partnership where the capital exceeds £100 ; provided that this shall not be construed to prevent third parties from suing partners or persons acting as such and offering in evidence circumstances to prove a partnership existing between such persons or to exclude parol testimony concerning transactions by or the settlement of any account between partners.

" 22. Provided always that nothing in the preceding clause shall be construed to exempt any deed or instrument in any manner affecting land or other immovable property from being required for that purpose to be executed and attested in manner declared by the second clause of this Ordinance."

Applying these provisions, the Supreme Court held that the agreement of December 21, 1915, not having been executed and attested in manner required by the second clause of the Ordinance, was void so far as it purported to affect the lease of the Pattagoda mines vested in the respondent ; and after a careful examination of the cases of *Forster v. Hale* (3 Ves., 696 ; 5 Ves., 308), and *Dale v. Hamilton* (5 Hare, 369 ; 2 Phillips, 266), they decided that the defect in the agreement was not cured, either by the principle laid down in those cases, or by the equitable doctrine of part performance. They further held that the agreement was one and indivisible, and that, the stipulation as to the transfer of the mine to the Pattagoda Company being ineffective, the whole agreement was void and of no effect ; and accordingly that the action was rightly dismissed.

Upon the first of the two points so decided by the Supreme Court their Lordships are wholly in agreement with the opinion of that Court. The effect of clause 21 of the Ordinance was considered by this Board in the case of *Pate v. Pate* (31 *The Times* L.R., 590 ; [1915] A.C. 1100), where it was held that no suit could be maintained in Ceylon upon an agreement for a partnership which was not in writing, signed by the parties as required by that section, even though the partnership business had been carried on for a time and had then been dissolved, and although the plaintiff was only claiming an account of the transactions of the dissolved partnership and payment of what might be found due. Doubtless the decision applies with equal force to an agreement affecting land which has not been executed and attested in manner required by clause 2 of the Ordinance ; and their Lordships agree with the opinion of the learned Judges of the Supreme Court that in the case of such an agreement the operation of the Ordinance cannot be avoided either by an application of the principle of the decision in *Forster v. Hale* (*supra*), or under the equitable doctrine of part performance. Both the case last cited and the doctrine of part performance have reference to section 4 of the English Statute of Frauds, and they have no application to the more stringent provisions of clause 2 of the Ordinance by which an agreement as to land not duly attested by a notary and two witnesses is rendered of no " force or avail in law."

But this does not conclude the matter. Assuming that the agreement by the respondent to " give over " the lease of the mine to the proposed company was void for want of proper attestation under clause 2 of the Ordinance, the question remains whether a partnership between the parties is established. In

this connexion it is to be remembered that the respondent by his pleading admits the existence of a partnership, an admission which would appear to entitle the appellant to an order for an account. But it would not be satisfactory to decide the case on that ground alone, since the terms of the partnership as admitted by the respondent differ in some respects from those alleged in the plaint ; and it is necessary to consider whether the agreement of December, 1915, although ineffective to pass any interest in the land, may yet be referred to as showing the other terms of the partnership. In their Lordships' opinion it may be so referred to. Clause 21 of the Ordinance requires that an agreement for a partnership where the capital exceeds £100 shall be in writing signed by or on behalf of the parties ; and the agreement of December, 1915, complies with that requirement. Clause 22 adds the proviso that an instrument affecting land shall "for that purpose" be executed and attested as required by clause 2, an expression which leads to the inference that the instrument, although not notarially executed and attested, may yet be referred to for the purpose of establishing the other terms of the contract. It is true that in the present case the agreement to transfer the mine was an important term of the contract ; and it may well be that if, during the currency of the lease, the plaintiff had sought to compel the defendant to put the mine at the disposal of the company and the defendant had refused so to do, the substratum of the partnership would have disappeared and the partnership must have been dissolved. But no such claim was ever made or is now made in this suit. It is possible, as Lord Rosslyn pointed out in *Forster v. Hale* (*supra*), for a mining business to be carried on in land in which no estate is given to those who share in the working ; and in the present case it must be inferred that throughout the duration of the partnership the mine was worked by the licence of the respondent, which he did not choose to revoke. The partnership has now run its course, without the necessity for calling for a transfer of the lease, and all that is claimed is an account of the partnership transactions and payment of what may be found due. The partnership, apart from any claim to the land, is established by the written agreement and the admissions in the pleadings. If the venture had proved successful, and substantial profits had come to the plaintiff's hands, he would assuredly have been bound to account for them ; and there is no reason why, now that the business has resulted in a loss, the plaintiff, who is alleged to have borne the whole expenses of the mining operations, should be left to bear that loss alone. He is entitled to an account on the footing of the agreement and to payment by the defendant of what may be found due on the taking of such account.

For these reasons their Lordships are of opinion that the judgment of the Supreme Court should be set aside, and that upon the first issue it should be declared that the agreement of December 21, 1915, is valid for the purpose of establishing a partnership between the parties, but not for the purpose of affecting the ownership of the mine, and the case should be remitted to the District Court to be dealt with upon the above footing, and their Lordships will humbly advise His Majesty accordingly. The respondent will pay the costs of the appeal to the Supreme Court and to this Board, the remaining costs of the suit being reserved to be dealt with by the District Judge.

[Solicitors.—Mr. O. A. Cayley ; Messrs. Freeman and Cooke.]

K.B. Div. (Rowlatt, J.) 1927. Dec. 7.

GREEN v. J. GLIKSTEN AND SON, LIMITED.*

Revenue — Income-tax — Insurance of timber against fire — Money received by insured — Whether an ordinary trading receipt.

Where a timber merchant insures his timber against fire and the timber is destroyed by fire, the amount received by him from the insurance companies, in respect of the timber so destroyed, is to be taken, for the purpose of income-tax, as an ordinary trading receipt, and it is not sufficient to value the timber destroyed at cost or market value, whichever may be the lower, and to enter that amount in the profit and loss account and to put to reserve the balance of the money received from the insurance companies.

This was an appeal by the Crown from a decision of the Special Commissioners of Income Tax.

At meetings of the Commissioners for the Special Purposes of the Income Tax Acts held in June, 1924, and April, 1925, to hear appeals the respondents, Messrs. J. Gliksten and Son, Limited, appealed against an assessment to income-tax in the estimated sum of £100,000 for the year ending April 5, 1924.

The company was incorporated under the Companies Acts, 1862 to 1900, on December 14, 1905, and carried on business as timber merchants at Stratford, E. On August 8, 1921, a large quantity of timber, which was stored in the company's timber yard, was destroyed by fire. In respect of the timber so destroyed the company received in February, 1922, £477,838 from various insurance companies.

The timber destroyed consisted mainly of the best class of hardwood, which was bought by the company seasoned, unseasoned, or partly seasoned. A large quantity of seasoned wood, which had been taken into stock before the War, was destroyed.

The company's accounts were made up to June 30 in each year, stocks being valued (according to the usual practice) at cost or market value, whichever was the lower. For that valuation large sums were in the last two years of account before the fire written off the original cost prices of the stock in respect of depreciation, to arrive at the closing stock values, and the reduced sums so arrived at were adopted each year to ascertain the company's profits for income-tax purposes. In respect of the stock on hand at June 30, 1921, which was the subject-matter of the appeal, the sums from time to time written off the stock values amounted in the aggregate to £107,000 or thereabouts, and the total stock on hand at that date was valued in the company's accounts at £266,831, after writing off £107,000.

For many years the company had kept its stock-in-trade insured against loss or damage by fire, and had, in computing its profits for income-tax purposes, been allowed to deduct the premiums paid by it in respect of the policies of insurance as an expense of its business. For the purposes of fire insurance the stock-in-trade of the company was valued at replacement value. At the date of the fire the value of timber of the kind which constituted the greater part

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

of the company's stock was very high, and the company accordingly claimed from the insurance companies concerned, and was paid by them, in respect of the replacement value of the stock so destroyed, £477,838 2s. 4d. Out of that sum £160,824 (being part of the sum of £266,831, the value of stock in hand at June 30, 1921), estimated by the company to be the written-down value of the timber so destroyed, had been brought into the company's accounts for the year ending June 30, 1922, as a trading receipt.

After deducting £2,845 for law charges, £1,000 for expenses of clearing the yard, and £160,824, the balance of the moneys received from the insurance companies in respect of the destroyed timber, amounting to £313,168, was carried into the balance-sheet for the year ending June 30, 1922, as a reserve, but was not brought into the profit and loss account.

Mr. F. W. Gower, chartered accountant and advisory accountant to the Commissioners of Inland Revenue, who was examined before the Special Commissioners on behalf of the appellant, the inspector of taxes, stated in evidence that, in his experience as a chartered accountant extending over 20 years, the normal commercial method of dealing with moneys recovered by a trader under a policy of insurance in respect of stock destroyed by fire was to include the actual amount received in the accounts as an ordinary trading receipt in the same way as the proceeds of an ordinary sale of stock.

During the War the greater part of the company's trade consisted in supplying seasoned and specially selected timber of various kinds to Government Departments and various aircraft contractors. The timber required for those purposes was of a special character, and had to be, and was, picked out from the company's stocks. The whole of the company's stocks of the required types of timber, such as silver spruce, mahogany, walnut, and English ash, had (before the fire) been gone over in this way, and the company was, at the date of the fire, left in possession only of such portions of those stocks as had not been found suitable for the purposes mentioned. Since the Armistice the company had done an increasing business with the motor body-building industry and like industries, and that class of business had led to a demand for, and the company had stocked, timber of types and qualities different from those stocked by the company during and before the War. For that reason only a small portion of the timber destroyed by the fire had been replaced—namely, to an amount of £18,400, or thereabouts. The word "replaced" in that connexion included the purchase of timber suitable for purposes similar to those for which the destroyed timber had been intended, as well as timber of a precisely similar nature. The replacements by timber of a nature precisely similar to that of the timber destroyed were almost negligible.

At the date of the fire there was a boom, which was being prolonged by the adoption on the part of the larger timber merchants of a policy of "holding up" stocks. The high prices obtaining at that time, on the basis of which the insurance companies paid the company's claim, were due to that boom. The timber destroyed was of such a character that it would have been practically impossible to have put it on the market without causing a glut and destroying the market for the time being.

It was contended by the appellant, on behalf of the Crown, (*a*) that the whole sum received from the insurance companies in respect of the destroyed timber — namely, £477,838 — constituted a trading receipt, and should have been brought into the company's profit and loss account for the year in question; and (*b*) that the amount of the assessment should be £84,227, less £373 for wear and tear.

It was contended on behalf of the company, (*a*) that no part of the sum received by the company from the insurance companies in respect of the destroyed timber constituted a trading receipt; and (*b*) that no part of the difference between the £160,824 and the £477,838 constituted a trading profit.

The Special Commissioners decided that the £477,838 recovered from the insurance companies did not represent a trade receipt, and that no part of it was assessable as trade profits under Case I. of Schedule D, and they expressed the opinion that the burned timber which had been replaced should be brought into stock at the original cost price of the timber. That replacement need not be a purchase of timber precisely similar to that burned. It was sufficient if it were timber suitable for similar purposes. The Special Commissioners fixed the amount of replacements at £18,400, and reduced the assessment under appeal to nil.

The Crown appealed.

The Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills appeared for the Crown; Sir John Simon, K.C., Mr. Latter, K.C., and Mr. Cyril King for the respondents.

MR. JUSTICE ROWLATT, in giving judgment, said that the company's trading account was in the usual form. On one side of it there appeared the stock-in-trade in hand at the beginning of the year, the amount of purchases of stock, and the amount of expenses. On the other side were shown the sales and the stock-in-trade at the end of the year. The difference between the totals of those figures showed the gross profit of the year's trading. The stock which had been burned by the fire was not accounted for either in the sales or in the stock in hand at the end of the year. It was shown as timber destroyed.

At what figure was it so brought in? The timber had been replaced by the money paid by the insurance companies, but that money had not been brought in instead of the timber. Instead of that a figure had been brought in which was the estimated cost price of the timber. In other words, the insurance was treated, not as having provided money to take the place of the timber which had been burned, but as having prevented the fire.

In his opinion, what had really occurred must be recorded in the account. The timber which had been destroyed by the fire had to be accounted for. The company had received money in place of it. That money must be brought into the account.

It had been argued that it was not the business of the company to have fires and then to collect the insurance money from the insurance companies. That might be a very pretty way of stating it, but it was part of the company's business to buy, hold, and sell timber and to insure the timber while they held it, so that, if it were destroyed, they would have the money instead of it and as an item of the same account. The appeal must be allowed.

Judgment was entered accordingly for the Crown, with costs.

[Solicitors—The Solicitor of Inland Revenue; Messrs. Ward, Perks, and Terry.]

K.B. Div. (Rowlatt, J.) 1927. Dec. 14.

H. AND C. STEPHENSON v. WALLER.*

Revenue — Income-tax — Farmer — "Seller of milk"—Assessment under Schedule B—Additional assessment under Schedule D—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. D, Case III., r. 4.

By rule 4 of the rules applicable to Case III. of Schedule D of the Income Tax Act, 1918,

"If the Commissioners find that lands which have been charged under Schedule B on the assessable value and which are occupied by a dealer in cattle or a dealer in or a seller of milk are insufficient for the keep of the cattle brought on to the lands, so that the assessable value affords no just estimate of the profits, they may require a statement of the profits to be delivered, and charge such further sum thereon as, together with the charge under Schedule B, will make up the full sum wherewith the dealer or seller ought to be charged in respect of the like amount of profits charged according to rule 2 of the rules applicable to this Case."

Held, that a farmer may be a "seller of milk" within the above rule even though he merely sells, by wholesale, the milk produced on his farm; and it is not necessary that, to come within the rule, he should own some outside trading organization for the disposal of the milk.

This was a case stated by General Commissioners of Income Tax.

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for Leeds held on May 14, 1925, to hear appeals, the appellants, Messrs. H. and C. Stephenson, of Harper Farm, Farnley, near Leeds, appealed against an assessment to income-tax for the year ending April 5, 1921, in respect of the profits of their business as milk sellers, cattle dealers, and horse dealers, made upon them by the Additional Commissioners of Income Tax for the division under Rule 4, Case III., of Schedule D of the Income Tax Act, 1918.

Rule 4 of the Rules applicable to Case III. of Schedule D enacts that:—

"If the Commissioners find that lands which have been charged under Schedule B on the assessable value and which are occupied by a dealer in cattle or a dealer in or a seller of milk are insufficient for the keep of the cattle brought on to the lands, so that the assessable value affords no just estimate of the profits, they may require a statement of the profits to be delivered, and charge such further sum thereon as, together with the charge under Schedule B, will make up the full sum wherewith the dealer or seller ought to be charged in respect of the like amount of profits charged according to rule 2 of the rules applicable to this Case."

The appellants occupied 161 acres of agricultural land known as Harper Farm and Parkside Farm, both situate in the parish of Farnley, in the division of Leeds. In addition to the assessment under Schedule D, they were also assessed for the year in question under Schedule B of the Income Tax Act, 1918, in respect of the occupation of the land in the sum of £536, being the assessable value, *i.e.*, twice the annual value of the lands.

The appellants on the lands occupied by them kept milk cows, and sold the milk from such cows wholesale to Leeds retailers. No milk was sold retail and no milk for resale was bought by the appellants. A few pigs and poultry were also kept. The lands occupied by them comprised meadow, pasture, and arable land, and, being within the Leeds city boundary, were favourably situated for the conduct of the business so carried on.

At the hearing Mr. Harry Stephenson, a member of the appellant firm, giving evidence, stated that the lands were not insufficient to maintain the cattle brought thereon.

The respondent, an inspector of taxes, stated (*a*) that Mr. Stephenson had informed him at an interview on September 15, 1924, that the lands were insufficient to maintain the cattle brought thereon, that large quantities of foodstuffs were bought, and that he had been slightly interested in the horse trade; and (*b*) that the appellants' chartered accountant stated to him at an interview on October 31, 1924, that Mr. Stephenson had informed him that the land was not insufficient to maintain the cattle.

In the course of the hearing of the appeal it appeared from some very meagre details that the profits of the appellants for the year ending April 5, 1920, were about £1,925, but the General Commissioners considered it vitally necessary, before hearing certain witnesses (who, it was understood, were present to give evidence on behalf of the appellants to the effect that the lands were not insufficient to maintain the cattle brought thereon), and for the due consideration of the case, that a trading account of the appellants, including detailed analysis of all purchases and sales for the year ending April 5, 1920, should be supplied. The appellants agreed to produce such an account and the hearing was adjourned.

At an adjourned hearing on September 24, 1925, Mr. E. H. Vant, solicitor, of Settle, Yorkshire, appeared on behalf of the appellants. He called no witnesses and refused to produce the trading account, as he stated that, in the appellants' view, they were engaged in husbandry only, and that as they were assessable under Schedule B they could not be assessed in pursuance of Rule 4 of Case III. of Schedule D.

He contended (*a*) that the appellants were not liable to assessment under Rule 4 of Case III. of Schedule D; (*b*) that they were already fully assessed under Schedule B; (*c*) that before the appellants could be charged under Schedule D, Case III., Rule 4, the General Commissioners must find that the lands charged under Schedule B were occupied by a seller of milk, and that they were insufficient for the keep of the cattle brought on to them; (*d*) that the appellants were not sellers of milk within the meaning of the rule; (*e*) that the General Commissioners were wrong in refusing to hear the evidence brought by the appellants (essential to the proper determination of the case) that the lands were not insufficient for the keep of the cattle brought thereon; (*f*) that purchase of foodstuffs (being a common practice among farmers) was not of itself sufficient to justify the conclusion that the farmers' lands were insufficient for the keep of the cattle on them so as to give the Additional Commissioners jurisdiction to assess under Rule 4; (*g*) that the General Commisioners wrongfully admitted as evidence the statement of the respondent that Mr.

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

Harry Stephenson had, before the hearing, admitted to him that the lands were insufficient to maintain the cattle brought thereon, which was denied by the appellants in evidence at the hearing.

The inspector of taxes contended (1) that the appellants were sellers of milk; (2) that the lands were insufficient for the keep of the cattle brought thereon; (3) that the assessable value afforded no just estimate of the profits; and (4) that the assessment was rightly made and should be confirmed.

The General Commissioners found that the appellants were not dealers in cattle, dealers in milk, or dealers in horses, but were sellers of milk, within the meaning of Rule 4, Case III., Schedule D. They were unable to accept the contention of the appellants that, if they were engaged in husbandry, they were necessarily assessable under Schedule B only, and could not be assessable under Rule 4, Case III., Schedule D.

It appeared to the General Commissioners that liability under Rule 4, Case III., Schedule D, arose if three conditions were fulfilled—namely, (1) that the appellants occupied land; (2) that the appellants were dealers in cattle, or dealers in or sellers of milk; and (3) that the lands so occupied were insufficient for the keep of cattle brought on them so that the assessable value under Schedule B afforded no just estimate of the profits.

In the opinion of the General Commissioners, the first two conditions were fulfilled, and, to investigate the applicability of the third condition, they required the appellants to furnish for their information the certified trading account and analysis referred to. The appellants having refused to comply with the General Commissioners' order to furnish the evidence which they considered necessary to complete fully their inquiry, the General Commissioners confirmed the assessment.

The appellants accordingly appealed.

Mr. Cyril King appeared for the appellants; the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. Reginald P. Hills for the Crown.

Mr. Justice Rowlatt, in delivering judgment, said that, for the appellants to be liable to additional assessment under Schedule D, they must be either dealers in cattle or dealers in or sellers of milk, and the lands occupied by them must be not only insufficient to maintain the cattle on them, but must be insufficient so that their assessable value under Schedule B afforded no just estimate of their profits. A farmer might buy foodstuffs for his cattle in the ordinary course of husbandry without bringing himself within Rule 4. The General Commissioners had found that the appellants were "sellers of milk" within that Rule, and Mr. King had contended, in effect, that there was no evidence to support that finding. Mr. King had said that a man was not a seller of milk unless in some way he carried on the business of selling milk otherwise than by simply disposing wholesale of the milk which was produced on his farm. He had argued that there must be some sort of business outside the farm, a shop or something of that sort.

He (his Lordship) agreed that merely because a farmer habitually sold a little milk to his neighbours by retail he would not become a "seller of milk" within the rule. To come within the rule a farmer must make the production of milk his primary business. Mr. King had said that in such a case he would be merely a dairy farmer and not a "seller of milk." In his (his Lordship's) opinion, however, a man might be a dairy farmer and also a "seller of milk." He could see no reason for holding that a man, to be a "seller of milk," must not only devote his farm to the production of milk, which he sold, but must also have some outside trading organization for the disposal of the milk. That, indeed, would not be relevant to the principle which underlay Rule 4. The question dealt with in that Rule was whether the assessment of a farm as a farm was or was not just, and that question was not affected by what the farmer did outside the farm.

In the present case the appellants' farm was wholly populated by cows, except for a few pigs and some poultry. The General Commissioners had to deal with a farm which was used for practically nothing else but cows, whose milk was sold wholesale. That was evidence on which they could come to the conclusion that the appellants were "sellers of milk." The General Commissioners were entitled to ask for the appellants' trading account, so that they could see by figures how far the assessment of the appellants' farm under Schedule B was a just criterion of the appellants' profits.

The decision of the General Commissioners on the other issues in the case could be supported by abundant evidence, and, therefore, the appeal must be dismissed, with costs.

[Solicitors—Mr. F. B. Brook, for Mr. E. H. Vant, Settle; the Solicitor of Inland Revenue.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)
1927. Dec. 12.

IN RE WHEATER.*

Lunacy—Receiver of lunatic's estate—Order to pay to creditors — Death of lunatic before drawing up of order—Cesser of jurisdiction in lunacy.

An order was made in lunacy for the payment of £1,800 out of the lunatic's assets to certain of his creditors. The lunatic died three days after the order was made and before it was drawn up.

Held, that the death of the lunatic operated as a cesser of the jurisdiction in lunacy, and therefore the order ceased to be operative, and the executors of the lunatic were entitled to ask to have all his assets transferred to them. The creditors could not claim that they had any charge in respect of the proposed payment; for the order was made at the instance of the receiver, as a matter concerning the management of the lunatic's estate only, and the persons receiving the £1,800 would have had no interest or right in that sum until payment was actually made to them.

This was an appeal from a decision of Master Hildyard in Chambers upon a summons in an administration action in lunacy.

The following facts are taken from the judgment of the Master of the Rolls:—

"This case raises an interesting point in lunacy practice. This man (Mr. Wheater) was certified in 1924. On May 1 of that year a receiver was appointed. The lunatic had been engaged in building operations. His business was considerable,

* Reported by G. T. Whitfield-Hayes, Esq., Barrister-at-Law.

and it was thought that it would be for the benefit of his creditors that that business should be continued, and so the receiver had leave to continue. In March, 1925, an order was made to distribute some £4,000 amongst his creditors; these were all the creditors generally. Then on June 17, 1926, there was an order made to distribute another sum of £4,000 among creditors who were creditors after the receivership order. Then on May 26, 1927, an order was made to raise out of the assets of the estate (which included sums of Conversion Loan and War Stock) a sum of £1,800, which was to be paid amongst the creditors as existing after the receivership order. Three days later the lunatic died; that was on May 29. On July 22 a summons was taken out by the executors and on July 29 that summons was heard, and the purport was for a final order and the winding-up of the estate so that the balance should be handed over to the executors. The Master refused to make the order, except on the terms that the order of May 26 should be drawn up and given effect to, and that the £1,800 should be distributed amongst the creditors, as by that order provided. The executors now appeal, and they say that the right to receive the balance of the estate has passed to them, and that they, as executors, are entitled now to receive the money of the lunatic. On the other hand there are creditors here before us who would have received money under the order of May 26 to pay out that sum of £1,800, and they say that though the order was not drawn up yet it is an effective order within the meaning of Order LII., Rule 13, an order which ought to be drawn up, and which, when drawn up, will have full effect as from the date when it was made."

Mr. C. E. JENKINS, K.C., and Mr. H. SIMMONS, for the appellants, contended that the death of the lunatic stopped all proceedings in lunacy, exactly as if he had recovered and resumed control of his own affairs. *In re Bennett—Greenwood v. Bennett* ([1913] 2 Ch., 318), *In re Marman's Trusts* (8 Ch.D., 256), and *In re Walker* ([1907] 2 Ch., 120) all supported that view. *In re E. G.* ([1914] 1 Ch., 927) was distinguishable, because there the creditor claiming had a definite charge. They also referred to Theobald on Lunacy, Chapter 70, page 494.

Mr. OWEN THOMPSON, K.C., and Mr. P. B. MORLE for the respondents (creditors who would have received some of the £1,800), argued that the order of May 26 once made conferred definite rights as to the sum indicated. The subsequent drawing up of the order was a mere ministerial act; for when the order had been made the persons who would have the £1,800 were entitled to say that the Court had allotted it to them, and that they had a prior claim upon it. *In re E. G.* (*supra*) was authority for the contention of the respondents that when rights were vested under an order of the Court they could not be divested except by appeal against the order within the ordinary limits.

Mr. TOMLIN, for other creditors, supported this argument.

The MASTER OF THE ROLLS, having stated the facts, continued (referring to the contention of the respondents):—Now it seems to me that that contention, which has led to a very interesting argument, is not correct. The receiver is introduced in lunacy not as a receiver in ordinary Chancery proceedings. He is placed there to deal with money as agent of the lunatic, who will still and always be his principal. The Court has jurisdiction in lunacy only so long as the lunatic remains alive, or remains insane. The power of the Court would and does determine when the lunatic recovers, and it seems to me that the power of the Court must also determine by the lunatic's death. In the present case the lunatic's death took place at a time when an order for dealing with the lunatic's estate had been made, but not perfected, and I think that after the death all the estate of the lunatic passed to his executors.

Now what is the position of these creditors, and what are their rights under that order? They were not represented at the making of the order of May 26. That order was made in their interests, it is true, and they would have received benefits under it, but at the same time the order was made quite independently of them, probably without their knowledge as to its terms, and it did not, I think, give any right or title to persons named in the order or coming under its provisions; whether they had any knowledge of it before or after it was made or not, in my opinion, they were complete strangers to the making of the order. If they had been entitled to payment under a contract, and nothing remained to be done but to make payment to them under that contract, and the order was to that effect, then the position might have been different, but it seems to me that in the present circumstances, so far from these creditors being in any way concerned in the making of the order, they were strangers to the order when it was made.

Now it is said in argument that the position might have been different if the order had not been made until after the lunatic died, but, as it was actually made before he died, it must stand and be given effect to. To me, however, it seems that for this purpose we must regard the order as not being perfected. Until it is actually effective, and has been put into operation, there is an opportunity for those applying for it, or even for those affected by it, to make application to have it varied, or rescinded, and therefore I think that it is not yet a perfect order, and I do not think that that is inconsistent with the fact that if and when ultimately perfected it speaks from the date when it is first made, in this case May 26.

Moreover, I think that the creditors have another difficulty in supporting their claim, because the order was made in lunacy, dealing with funds which are in lunacy, and I think that such an order was never intended to deal with the case where the funds were no longer in lunacy. This is not a case where, as under the terms of Order XVII., a cause or matter does not become abated by reason of the death of one of the parties. I think that in this case before the order was perfected there was a transmission of the interest in the lunatic's assets to the executors. The case of *In re Bennett—Greenwood v. Bennett* ([1913] 2 Ch., 318) illustrates this point. There the mother was a lunatic. She had daughters, and there had been a system in force under which sums had to be paid to the daughters, and other sums reserved for the lunatic. As regards the balance over after providing for the keep of the lunatic, an order was made for payment to the daughters. The lunatic died and the daughters claimed certain payments under the order. Mr. Justice Warrington, as he then was, says (at p. 323): "I will treat the matter, however, as if it depended on the order of March 12, 1908. Is there any jurisdiction now to order that the fund shall be dealt with as if the lunatic were still alive? In my opinion there is not. On the death of the lunatic the committee ceased to have any authority to deal with money in his hands except as the Rules in Lunacy provide—*i.e.*, to hand it over to the administrator or to pay it into Court.

Except for this purpose the powers and duties of the committee come to an end on a *supersedeas* or the death of the lunatic." So in the present case I think that on May 29 all the powers of the receiver came to an end. He had one duty only—namely, to ascertain the balance of the lunatic's funds and hand it over to the executors, and, if it seems hard that he could not pay that sum of £1,800 to those creditors for whom it was intended, that only means that the changes and chances of this mortal life have intervened to prevent him from doing so. The creditors still have hopes from the estate, but it seems that even if the lunatic had remained alive they would not have taken any ascertained interest in the fund until it was paid over to them.

And so I think that before the order was made complete the lunacy jurisdiction ceased entirely, and that the executors became entitled to the moneys and securities remaining in the estate. As, however, I understand that an administration action is pending, the order will be that the money in the hands of the receiver in lunacy be paid over to the credit of that action, without prejudice to any rights which the creditors may have, and to any rights of retainer in the executors.

Lord Justice Sargant.—I am of the same opinion. The question before us is whether this £1,800 will be used for a preferential payment to certain creditors since the receiver was appointed, or whether it will go as a payment amongst all the creditors. (His Lordship stated the facts, and continued.) The Master took the view that the order of May 26, 1927, although not perfected, was an order which had given definite rights to the persons amongst whom the receiver would have distributed the £1,800 in question, and accordingly he declined to make the order for transfer to the executors, except subject to the priority of those who would have received the £1,800. The executors of the lunatic object to the creditors since the date of the receivership having this £1,800 ; first because the order never was perfected during the life of the lunatic. It would have been effective if it had been drawn up, and from the date when it was pronounced, but the executors say that the death of the lunatic prevented the final touch being given to the order, and caused the order itself to become inoperative. The death of the lunatic, they say, had put an end to lunacy proceedings altogether, and the lunacy jurisdiction had ceased before the order was perfected. In my opinion, the executors are right in that contention, and although the Master, since the death of the lunatic, has directed that the order should be perfected, I do not think that that was a right direction, because his jurisdiction in lunacy ceased entirely at the death and he could not turn that order in abeyance into an effective order. Secondly, it is said that even if the order had been perfected during the lifetime of the lunatic, nevertheless the order did not give to those creditors any right on which they were entitled to insist. The order was made simply and solely on the application of the receiver, without, I think, any other person being present. It was an order of a purely domestic character. The Court decided to grant it as a matter of what I might call domestic management, and I think that it gave no right to the persons who were to be paid the £1,800, for the Court could have rescinded or varied it at any time, and I do not think that it would have been necessary to serve the persons who were to be paid with any notice of that proposed rescission or variation. It does not seem to me that it conferred any definite rights on these creditors, and therefore until the order was actually drawn up and put into operation the matter was as much at large as if it had never been made at all, therefore I think the order asked for by the executors should be made.

Lord Justice Lawrence.—I agree. The determination of this question, in my opinion, depends on the realization of the proper position of the receiver. Sir Herbert Cozens-Hardy, M.R., in *In re E. G.* ([1914] 1 Ch., 927) stated that the position of a person acting in lunacy is that of statutory agent to the lunatic. He says at page 933 : "What then is the position in point of law of the quasi-committee ? I think that he is a statutory agent of the lunatic who cannot himself appoint an agent. He acts on behalf of the lunatic under the statutory powers conferred upon him." I think that, as stated in *In re Walker* ([1907] 2 Ch., 120), his duties cease with the death of the lunatic. In that case Sir Herbert Cozens-Hardy, M.R., dealing with the powers and duties of a person appointed to represent the lunatic, says (at p. 124) : "Those cease with the death, not in the sense that he is not bound to account for receipts during the life, but in the sense that he has no right to receive anything after the death of the lunatic." Lord Justice Kennedy in the same case says (at p. 125) : "Supposing the committee and receiver had made payments after the death of the lunatic and sought to get credit for them in passing the accounts. How could he discharge himself on the credit side of his account by payments which he had no jurisdiction to make because the period of his duties had come to an end ? " Applying that reasoning to the present case the order of May 26, 1927, which was, as Lord Justice Sargant put it, purely a domestic order, obtained by the receiver alone, not at the instance of or by agreement with any other person, was only an order to realize certain assets and to pay certain debts. Now the lunatic has died, and that at once determined the jurisdiction as regards the receiver and, in my opinion, it was just as if a principal had died for whom that receiver was acting as statutory agent, the death of the principal determining the authority of the agent. I think that in those circumstances the Master might have done one of two things—not have drawn up the order of May 26 at all, or he might have rescinded the order and dealt with the costs. I think that he had no right to direct the receiver to act, when the receiver, by reason of the death of the lunatic, had ceased to exercise his functions. Counsel for the creditors put forward the suggestion that by this order of May 26 a charge was given in favour of these creditors. I do not think that that is so. This case is not like *In re E. G.* (*supra*), where a creditor, the solicitor acting for the lunatic's estate, had obtained a charge, or something to that effect, for his costs. Here the order made was purely a domestic order, obtained at the instance of the receiver alone, and could have been revoked without the creditors concerned having any right to protest, and it did not give any charge or right to the creditors whom it was proposed to pay.

I think that in the present case the order made amounted to nothing more than certain proposals and directions as to what the receiver was to do in the future, and the lunatic having died all proceedings in lunacy had come to an end. Therefore, in my view, there is no answer to the claim of the executors to have the funds transferred to them.

[Solicitors—Messrs. W. F. Foster and Newton ; Messrs. Batchelor, Pirkis, and Fry ; Messrs. Bulcraig and Davis.]

K.B. Div. } 1927.
(Avory, Branson, and Talbot, JJ.) } Dec. 15.

WADSWORTH v. MINISTER OF HEALTH.*

Pensions — Widow — Statutory conditions—Husband's entry into insurance—Subsequent payment of 104 contributions—Whether "entry" means "last entry"—Widows', Orphans', and Old Age Contributory Pensions Act, 1925 (15 and 16 Geo. V., c. 70), s. 5.

The expression "entry into insurance" in s. 5 of the Widows', Orphans', and Old Age Contributory Pensions Act, 1925, means "last entry into insurance."

This was a special case stated for the opinion of the Court under section 19 of the Arbitration Act, 1889, by Mr. B. A. Cohen, K.C., and Mr. Eustace Hills, K.C., the referees selected by the National Health Insurance Joint Committee to determine a question referred under section 29 (2) of the Widows', Orphans', and Old Age Contributory Pensions Act, 1925, as to the applicant's right to a pension under the Act.

The following facts were proved or admitted :— The applicant, Mrs. Lottie Wadsworth, claimed to be entitled under the Act to a widow's pension (with additional allowances) as the widow of Mr. James Oscar Wadsworth, who died on November 26, 1926. Mr. Wadsworth was employed by Messrs. McQuat, Limited, of Leeds, as a manager from 1912 to 1926 (saving a period of War service). He was a member of an approved society—namely, the Manchester Unity of Oddfellows' Friendly Society—and was compulsorily insured under the National Insurance Act, 1911. The first contribution was paid by or in respect of him on July 15, 1912, and the last contribution was paid on July 3, 1915, between which dates his contributions were paid in full. Thereafter his rate of remuneration was in excess of the limit (£160 per annum up to June 30, 1919, and £250 per annum thereafter) for compulsory insurance in the case of a non-manual worker.

On January 4, 1926, Mr. Wadsworth became a voluntary contributor under the provisions of the Act. His first contribution was paid on January 4, 1926. His weekly contributions were paid regularly thereafter until his death on November 26, 1926. On December 1, 1926, the applicant applied to the Minister of Health, claiming to be entitled to a pension. By a letter of December 30, 1926, the Minister rejected her claim for the following reason : "It has not been established that at the time of the death of your late husband 104 contributions had been paid by or in respect of him since his last entry into insurance."

The applicant duly made application for a reference. The referees heard the arguments for and against the decision, and agreed to state a case for the opinion of the Court as to the meaning of the expression "entry into insurance" in section 5 (*a*) of the Widows', Orphans', and Old Age Contributory Pensions Act, 1925. But they expressed the view (in a letter to the applicant's advisers, written by the Registrar of Appeals on May 18, 1927) that if the applicant succeeded in the contention that "entry into insurance" did not mean "last entry" the case would have to be remitted to the referees, as it appeared that the conditions of section 5 (*b*), which had not been complied with, would then apply. They offered a further hearing on that point, and, after further correspondence, the applicant's advisers agreed to a further hearing without prejudice to the contention that the point was not open to the Minister (who did not ask for leave to rely on any contentions other than that set out in the letter of December 30, 1926).

Section 2 (1) of the Widows', Orphans', and Old Age Contributory Pensions Act, 1925, provides :—

"In this Act, unless the context otherwise requires, the expression 'insured' means insured under the National Health Insurance Act, 1924 (in this Act referred to as the Insurance Act), or the Acts repealed by that Act, and in relation to any person who is deemed to be insured for the purposes of this Act includes such a person ; and the expression 'insurance' in relation to a person so deemed to be insured shall be construed accordingly."

Section 3 (1) provides :—

"Subject to the provisions of this Act, the widow of a person who dies after the commencement of this Act and who is insured at the date of his death but has not attained the age of seventy before the commencement of this Act shall, if the statutory conditions hereinafter mentioned are complied with, be entitled to a widow's pension. . . ."

Section 5 provides :—

"The statutory conditions to be complied with in the case of a person in respect of whose insurance a widow's pension . . . is payable are :—

"(*a*) that one hundred and four weeks have elapsed and one hundred and four contributions have been paid by or in respect of that person since the date of his entry into insurance ; and

"(*b*) where two hundred and eight weeks or more have elapsed since the date of the entry of that person into insurance, that the number of contributions paid, or deemed in accordance with regulations under this Act to have been paid, by or in respect of him for the three contribution years immediately prior to his death, or to the date on which contributions under the Insurance Act ceased to be payable by or in respect of him by reason of his age, as the case may be, represents on the average not less than twenty-six contributions calculated in the prescribed manner in respect of each of those three years."

By section 44 (1) "Expressions in this Act have the same meaning as in the Insurance Act." Neither Act defined the expression "entry into insurance," but the use of that expression in the Insurance Act, in sections 13 and 14, related to the "last entry." This seemed to be the result of reading these sections with s. 3 (4) of that Act, though, as was said by Mr. Justice Avory during the argument, "It would be difficult to see how this could be made more obscure."

By the Calculation of Contributions Regulations, 1927 (S. R. and O., 1927, No. 862), Reg. 5, it is provided :—

"In calculating for the purpose of para. (*b*) of section 5 of the Pensions Act . . . the average number of contributions paid by or in respect of an insured person within the meaning of that Act, a contribution shall be deemed to have been paid . . . (iii) in the case of a person who entered into insurance for the purposes of the Pensions Act after the commencement of the first of the contribution years in respect of which the calculation is made in respect of every two weeks which have elapsed between the commencement of that contribution year and the date of his entry into insurance for the purposes aforesaid."

* Reported by J. W. HALL, Esq., Barrister-at-Law.

It was contended on behalf of the applicant :—

(1) That the decision of the Minister was wrong in law, in that the Minister had, in construing section 5 (*a*) of the Act, substituted for the words "entry into insurance" the words "last entry into insurance." (2) That upon the true constructions of sections 5 (*a*) and 2 (1) of the Act the facts above stated established that the date of the entry of the deceased man into insurance for the purpose of section 5 (*a*) was July 15, 1912, and that, accordingly, 104 weeks had elapsed and 104 contributions had been paid by or in respect of him since his entry into insurance. (3) That it was not open to the referees to entertain any grounds for the rejection of the applicant's claim other than those set out in the letter of December 30, 1926. (4) Alternatively, that the provisions of section 5 (*b*) of the Act had been duly complied with by Mr. Wadsworth, inasmuch as by virtue of the Contributory Pensions (Calculation of Contributions) Regulations, 1927, Regulation 5 (3), he was deemed to have paid the average contributions required by section 5 (*b*) for the three contribution years immediately before his death.

On behalf of the Minister it was contended :—

(1) That the deceased husband ceased to be an insured person in the year 1915, and became again insured on January 4, 1926. (2) That by virtue of sections 2 and 44 (1) of the Act the term "date of entry into insurance" had the same meaning as in the National Health Insurance Act, 1924, and that where the term occurred in that Act, *e.g.*, in sections 13 (2) and (3) and 14 (3), it denoted the last entry into insurance. (3) That the referees had power, under Regulation (9) of the Contributory Pensions (References) Regulations, 1925, at any stage of the proceedings, to allow amendment of any application, statement, or particulars, and, under Regulation 14 of these Regulations, power to allow either the applicant or the Minister to rely upon any contentions other than that set out in the application for a reference. (4) Alternatively, that before allowing an appeal the referees were, upon the facts proved before them at the first hearing, bound to have regard to the question whether the statutory conditions imposed by section 5 of the Act had been complied with. (5) That if, contrary to the contention of the Minister, the date of entry of Mr. Wadsworth into insurance for the purpose of section 5 (*a*) of the Act was July 15, 1912, that date must also be the date of entry for the purposes of paragraph (*b*) of the same section, and the case accordingly fell within the latter paragraph, since more than 208 weeks had elapsed between the date of his entry, July 15, 1912, and the date of his death (November, 1926). (6) That the statutory condition contained in paragraph (*b*) had not been satisfied for the following reasons :—(*a*) An average of 26 contributions a year was not in fact paid by or in respect of the deceased husband during the three contribution years immediately before his death (July, 1923, to July, 1926) ; and (*b*) he was not entitled to be credited with any additional contributions under Regulation 5 (iii) of the Contributory Pensions (Calculation of Contributions) Regulations, 1927, since he had not entered into insurance for the purpose of the Pensions Act after the beginning of the first of the three contribution years, and consequently the paragraph had no application to the case.

The questions for the opinion of the Court were :—(1) Whether the conditions of section 5 (*a*) of the Pensions Act had been complied with in the case of Mr. Wadsworth. (2) Whether it was open to the referees upon the facts above stated to entertain any grounds for the rejection of the applicant's claim other than that set out in the letter of December 30, 1926. (3) Whether the conditions of section 5 (*b*) of the Pensions Act had been complied with in the case of Mr. Wadsworth.

Mr. Willoughby Jardine, K.C., and Mr. John Neal appeared for the applicant ; Mr. Harold Murphy for the Minister of Health.

Mr. Justice Avory said that, as this was a consultative case, the practice was merely to answer the questions asked without more. The majority of the Court were of opinion that the answer to question No. 1 was in the negative ; to No. 2 in the affirmative ; to No. 3 in the negative.

[Solicitors—Mr. E. H. Crabb ; the Solicitor to the Ministry of Health.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)
1927. Dec. 9.

ROYAL EXCHANGE ASSURANCE v. HOPE.*

Insurance (Life)—Policy for one year—Assignment—Renewal for three months—Death of assured during renewal period—Policy money—Whether belonging to testator's estate or to assignee.

The plaintiffs' testator took out an insurance policy on his life for 12 months and assigned the benefit of it to the defendant absolutely. Before the expiry of the policy he renewed it for a further period of three months, and the policy was altered by endorsement, no new policy being issued and no fresh stamp duty being paid. While the further period of three months was running, the testator died.

Held, that as the intention was to continue and extend the original contract but not to rescind it, the renewed policy enured for the benefit of the defendant, and not for the benefit of the testator's estate.

This was an appeal by the plaintiffs, the Royal Exchange Assurance, from a decision of Mr. Justice Tomlin.

The plaintiffs were the personal representatives of a testator, Mr. Samuel Barker, who had taken out a policy for £1,000 in the Sun Life Insurance Society on his own life for one year from July 31, 1925, and had subsequently assigned the benefit of the policy to the defendant, Mrs. Hope, absolutely. Notice of the assignment was given to the society on September 3, 1925.

The testator was in California when the policy had nearly run out, and his solicitors cabled to him for instructions whether he wanted the policy renewed, and they stated the terms on which the society would extend it for three months. He cabled to them to accept the offer and renew the policy till October 31, 1926. On October 1, 1926, he died. The question raised was whether the renewed policy enured for the benefit of the defendant, or whether the policy moneys belonged to the plaintiffs, as representing the testator's estate. Mr. Justice Tomlin gave judgment for the defendant, and the plaintiffs appealed.

* Reported by H. Langford Lewis, Esq., Barrister-at-Law.

Mr. S. L. Porter, K.C., and Mr. Macgillivray appeared for the appellants ; Mr. Archer, K.C., and Mr. H. Johnston for the respondent.

The MASTER OF THE ROLLS, in his considered judgment, stated the facts, and said that the schedule on the face of the policy which described the event in which the sum assured was payable—namely, "the death of the life assured on or before the 31st July, 1926"—had the words added, "altered by endorsement." No fresh stamp duty was paid. The original policy stood, but one of its terms, the time limit, was extended, just as in a policy containing a restriction on foreign residence that term might be withdrawn so as to make the assurance world-wide on the payment of an extra premium.

The executors of Mr. Barker claimed that the contract of insurance operative at the time of his death was not the original one assigned to the defendant, but a new and separate policy altogether—a contract insuring the life from August 1 to October 31, 1926, at a separate premium of £6 2s. 6d., and that that policy did not pass to the defendant. Mr. Justice Tomlin had decided that the testator entered into the contract for the extended period as trustee for the defendant, and that she was entitled to the moneys payable under it.

In his (the Master of the Rolls's) opinion it was impossible to hold that the insurance for the extra period of three months was a new and separate contract. The terms offered and accepted were for a short extension of the contract then in being and unexpired, and no suggestion was made for a new and independent policy. There was no fresh stamp, as there must have been had a new policy been effected, and no new number was assigned to the contract. The alteration was subsidiary to the main purpose of the original contract, and the subject matter of the risk was not changed. The observations of Lord Sumner in *British and Beningtons, Limited v. North Western Cachar Tea Company* ([1923] A.C., 48, at pp. 68, 69), appeared to be in point. The variation might be in strict logic a new contract, but the discharge of the old contract was a matter of intention, and here the intention appeared to have been to continue and extend it, but not to rescind it. In *Morris v. Baron and Co.* ([1918] A.C., 1) it was held that a clear intention to rescind must be shown for the old contract to be rescinded. The distinction was well pointed out by Lord Ellenborough in *Kensington v. Inglis* (8 East, 273, at p. 293), where it was held that a fresh stamp was not required because of an alteration in the dates of sailing. Section 13 of the Statute 35 Geo. III., c. 63, excused the necessity of a fresh stamp in such cases.

There remained the point taken by the plaintiffs that at the time when the extension was made all interest in the policy had passed to the defendant by the assignment, so that the deceased man had no rights or power in relation to it, and that the defendant had no insurable interest in the deceased man's life, so that he could not act as her agent. In his (his Lordship's) opinion, however, the deceased man could enlarge or improve the policy with the consent of the society, and the enlargement or improvement enured to the benefit of the defendant. If during the original term policy No. 276,732 had been increased to £1,500 by the payment of an additional premium, the extra £500 would have been receivable by the defendant.

That view made it unnecessary to consider the point on which Mr. Justice Tomlin based his judgment—namely, that Mr. Barker, when he effected the extension, acted as trustee for the defendant. But the principle could be adopted, if necessary, in the present case, and the money received, even if it were treated as received under a separate contract, must be treated as received under a contract made by a trustee for the defendant, who could enforce her rights as a beneficiary under it, as in *Lloyd's v. Harper* (16 Ch. D., 290). The appeal must be dismissed, with costs.

LORD JUSTICE SARGANT and LORD JUSTICE LAWRENCE delivered judgments to the same effect.

[Solicitors—Messrs. Parker, Garrett and Co. ; Messrs. Stilgoes.]

Chan. Div. (Tomlin, J.) 1927. Dec. 16.

LONDON HOLEPROOF HOSIERY COMPANY, LIMITED v. PADMORE.*

Vendor and Purchaser — Lessees' option of purchase—Destruction of premises by fire—Subsequent exercise of option—Refusal of lessor to reinstate premises—Repudiation of contract by lessees—Specific performance.

The defendant demised to the plaintiffs for three years a piece of land with a factory on it, and the plaintiffs were to keep the inside of the factory in repair. The agreement said nothing as to the repair of the outside and as to insurance, but gave the plaintiffs an option of purchase during the term. The defendant insured the factory against fire, and, on the occurrence of a fire which almost completely destroyed it, he received compensation from the insurance company. The plaintiffs then gave notice of the exercise of their option of purchase, but the defendant declined to reinstate the walls and roof and alleged that in exercising the option the plaintiffs had to take the property as it was. In an action for a declaration that in these circumstances the plaintiffs were not bound to proceed with the purchase the defendant counterclaimed for specific performance.

Held, that as the plaintiffs had elected to insist upon exercising their option it was now too late for them to repudiate the contract, and therefore the action failed and the counterclaim for specific performance succeeded.

In this action the plaintiffs, the London Holeproof Hosiery Company, Limited, claimed from the defendant, (1) damages for breach of contract (if any), and (2), in the alternative, a declaration that the plaintiffs were not bound to proceed with the purchase of a factory, and an order for the return of £160 paid as deposit.

The defendant counterclaimed for specific performance.

By an agreement, dated August 20, 1925, the defendant demised to the plaintiffs a piece of land at Woodgate Rothby, Leicestershire, with a factory fitted with machinery thereon, for the term of three years from August 1, 1925, at a rent of £60 a year.

* Reported by H. C. GARSIA, Esq., Barrister-at-Law.

The agreement contained a provision that the plaintiffs should keep in good repair and condition at all times during the term the inside of the factory and premises. The agreement was silent as to keeping in repair the outside of the factory and as to keeping it insured. It contained an option for the plaintiffs to purchase the factory and premises on or before June 24, 1927, at the price of £1,600 on giving to the defendant six months' notice in writing and paying a deposit of £160 and all arrears of rent up to the date fixed for completion.

In November, 1926, the factory was almost completely destroyed by fire. The factory had been insured by the defendant against fire and he received the sum of £625 from the insurance company.

Correspondence ensued between the parties and on December 8, 1926, the defendant's solicitors wrote to the plaintiffs saying :—

"According to the agreement you are responsible for payment of rent of the factory until August 1, 1928, notwithstanding the fact of the fire which has occurred, and you are similarly liable to repair the interior of the premises. . . . Our client is obtaining an estimate for the necessary repair of the exterior roof and exterior walls and will be glad to know that you appreciate the responsibility for the repair and replacement of the interior and will be glad to know when this work will be put in hand."

To that the plaintiffs' solicitor replied on December 13, 1926 :—

"My clients in no way suggest that they do not intend to carry out their obligations under the agreement for tenancy and they are quite willing to proceed with the repairs as soon as your client has put the building in such a condition that it can be repaired. I understand it is quite obvious that there is nothing in the nature of internal repairs which can be carried out until after your client has replaced the building. It has occurred to me that as your client is dealing with the roof and walls, &c., it might be advisable if you put me into touch with the builder who is doing your client's work."

In answer to that the defendant's solicitors wrote on December 14 stating that they were obtaining an estimate of the work required for external repairs.

On December 20, 1926, the plaintiffs' solicitor gave the defendant a notice in writing exercising the option to purchase and paid a deposit of £160. That notice was accompanied by a covering letter in which the plaintiffs' solicitor said that it was, of course, necessary for the building to be placed in proper repair by the defendant at the earliest possible moment, and pointing out that the plaintiffs would have the freehold of the property when reinstated by the defendant. The defendant's solicitors replied on December 22 :—

"In reference to your suggestion that the building should be placed in proper repair by our client we can only say this is a misconception of the position. Your clients in exercising the option take the property in its present state subject to and with the benefit of the tenancy agreement, which contains no covenant on our client's part to repair."

The plaintiffs' solicitor replied saying that he could not agree that there was any misconception of the position on the plaintiffs' part. Further correspondence ensued, in which each side maintained the same position. Requisitions were delivered and answers made maintaining the same opposed views. Ultimately, on March 2, 1927, the plaintiffs brought this action, claiming (1) damages for the breach of contract (if any) ; and (2), in the alternative, a declaration that the plaintiffs were not bound to proceed with the purchase, and an order for the return of the deposit of £160.

The defendant counterclaimed for specific performance.

Mr. C. A. Bennett, K.C., and Sir Arthur Underhill appeared for the plaintiffs ; Mr. H. A. H. Christie for the defendant.

Mr. Justice Tomlin, in giving judgment, said that this was a somewhat unusual and difficult case. Having stated the facts and referred to the correspondence, he said that the effect of the letter of December 22 was to inform the plaintiffs that the defendant repudiated any suggested liability to reinstate the premises, and it might well be that the plaintiffs might then have said that in that case the exercise of the option could not stand, because it was based on a misapprehension. That was not the course which the plaintiffs took, but, on the contrary, their solicitor wrote a letter on December 30 putting forward their view of the construction of the contract. Later on, they made a requisition that the insurance money should be applied in reinstating the property.

The transaction was not unprofitable to the defendant if the plaintiffs were wrong in their view. The defendant was selling a damaged article for the price of the perfect article, and, at the same time, he was putting in his pocket money paid to him by the insurance company to indemnify him against his loss. But he (his Lordship) was only concerned with the legal position.

The point advanced by the plaintiffs was that the contract was for the purchase of the reinstated premises. It seemed to him that that view amounted to a contention that when the option was granted the grantor must guarantee that the property would be in the same condition when the option was exercised. He did not know how it would be if there had been a change in the condition of the property between the grant of the option and its exercise and if the change was unknown to the purchasers. But here the purchasers were aware of the deterioration of the property and, notwithstanding that, they exercised the option. It was true that in doing so they said that the vendor must reconstruct the premises before completion, but the vendor at once pointed out that that was a misconception.

He (his Lordship) thought that it was probably then open to the purchasers to say that the option had been exercised under a misapprehension and that they would not go on with it. But they did nothing of the kind. They elected to go on, relying, first, on the defendant's being bound to reinstate the property, and, secondly, on the insurance money being applicable for the purpose. They must be taken to have gone on in reliance on their view of the construction of the contract.

Could they at a later stage repudiate the contract ? It seemed to him that they were too late. Further, there was no ground for the view suggested, that the plaintiffs thought that they were buying one thing and the defendant thought that he was selling another thing. Both parties thought that they were dealing with the damaged property, but the plaintiffs thought that they could make the defendant put it right.

The action, therefore, failed, and the defendant's counterclaim for specific performance succeeded, with the usual consequences as to costs.

[Solicitors—Mr. W. G. A. Edwards ; Messrs. Peter Thomas and Clark, for Messrs. Ironside and New, Leicester.]

Prob., Divorce, and Adm. Div. } 1927.
(Lord Merrivale, P., and Hill, J.) } Dec. 9.

THE ROYAL STAR.*

Ship—Shipping casualty—Court of Inquiry in British Possession — Shipmaster censured—Rehearing—Right of appeal—Merchant Shipping Act, 1894 (57 and 58 Vict., c. 60), ss. 475, 478 — Merchant Shipping Act, 1906 (6 Edw. VII., c. 48), s. 66.

A Court of Inquiry at Singapore, Straits Settlements, which sat to investigate the stranding of the London steamship Royal Star on some unidentified submerged object between Sumatra and the mainland, found the master of the vessel guilty of negligence and censured him, but declared that it did not deem it necessary to deal with his certificate. The shipmaster applied to the Board of Trade for a rehearing, which was refused. On appeal,

Held, that whether or not a shipmaster whose certificate had been neither cancelled nor suspended had a right of appeal under ss. 475 and 478 of the Merchant Shipping Act of 1894, the matter was put beyond doubt by s. 66 of the Merchant Shipping Act of 1906, which was passed in order to enlarge the right of appeal; that the appellant, as a person who, having an interest in the investigation or inquiry, had appeared at the hearing and was affected by the decision of the Court, was entitled under s. 66 to appeal in the same manner and subject to the same conditions in and subject to which a shipmaster might appeal under ss. 475 and 478 of the Act of 1894 against the cancelling or suspension of his certificate.

This was a motion on behalf of the master of the Blue Star steamship Royal Star for the decision of a preliminary point as to the right of a master to appeal from a decision of a Court of Inquiry held at Singapore, censuring him for the neglect of which the Court found he had been guilty in connexion with the damage sustained by his vessel through striking on a submerged object between the mainland and the Island of Sumatra.

Mr. C. R. DUNLOP, K.C. (with him Mr. R. F. Hayward), who appeared for the applicant, said that the Admiralty Registrar had made an order giving the master leave to appeal for the purpose of determining as a preliminary point whether there was a right of appeal against the report of a Court of Inquiry, which censured the applicant but did not interfere with his certificate in any way. The Board of Trade, who had refused to sanction the rehearing of the case, raised two objections, he understood, to the jurisdiction of the Divisional Court:—(1) That no appeal lay to any Court where the Court of Inquiry, by its report, did not suspend or cancel the officer's certificate; and (2) that if an appeal lay to any Court it was only to the Supreme Court of the Straits Settlements.

Mr. ALFRED BUCKNILL, who appeared for the Board of Trade, said that so far as he knew the Board had never taken the second point mentioned by Mr. Dunlop.

Mr. DUNLOP, continuing, said that the Royal Star was a vessel registered in the port of London, and her master held a certificate originally issued in Barry. It was not, therefore, a local certificate. While the Royal Star was proceeding from China to London she struck some submerged object. Although the Court of Inquiry had been unable to decide what the vessel struck, whether a charted or uncharted rock, they had severely censured the master for his conduct. The finding of the Court of Inquiry was, in accordance with the rules, signed by the Governor of the Colony and transmitted to the Board of Trade.

On May 6, 1927, notice appeared in the *London Gazette* that the Board of Trade had received the report. It was from that date that the right of appeal began to run. On May 20 the appellant gave notice of appeal, which was duly served on the Board of Trade. On September 5 the appellant applied to the Board of Trade for an order for a rehearing of the inquiry, and on October 15 the Board refused the application. The appeal was brought under section 478 of the Merchant Shipping Act, 1894, and section 66 of the Merchant Shipping Act, 1906.

Mr. BUCKNILL contended that section 478 of the Act of 1894 and section 66 of the Act of 1906 must be read in conjunction with section 475 of the Act of 1894, which allowed a rehearing or appeal only in cases where the Court of Inquiry had suspended or cancelled an officer's certificate. Section 475 had not been repealed by the Act of 1906. The Board of Trade had no option except to take the course which they had taken. They were not desirous of denying any master a right of appeal which was given to him by law, but merely wished to ascertain the view of the Admiralty Court, and were prepared to act on the decision when given.

The Merchant Shipping Act, 1894, section 475, provides: "(1) The Board of Trade may, in any case where under this Part of this Act a formal investigation as aforesaid into a shipping casualty, or an inquiry into the conduct of a master, mate, or engineer has been held, order the case to be reheard either generally or as to any part thereof, and shall do so—(*a*) if new and important evidence which could not be produced at the investigation or inquiry has been discovered; or (*b*) if for any other reason there has in their opinion been ground for suspecting that a miscarriage of justice has occurred. . . .

"(3) Where on any such investigation or inquiry a decision has been given with respect to the cancelling or suspension of the certificate of a master, mate, or engineer, and an application for a rehearing under this section has not been made or has been refused, an appeal shall lie from the decision to the following Courts. . . ."

Section 478 provides: "(1) The Legislature of any British possession may authorize any Court or tribunal to make inquiries as to shipwrecks, or other casualties affecting ships, or as to charges of incompetency, or misconduct on the part of masters, mates, or engineers of ships. . . .

"(6) The Board of Trade may order the rehearing of any inquiry under this section in like manner as they may order the rehearing of a similar investigation or inquiry in the United Kingdom, but if an application for rehearing either is not made or is refused, an appeal shall lie from any order or finding of the Court or tribunal holding the inquiry to the High Court in England: provided that an appeal shall not lie" [from an order or an inquiry into a casualty affecting a ship registered in a British

* Reported by A. W. GRANT, Esq., Barrister-at-Law.

possession or a decision affecting the certificate of an officer holding a non-British certificate].

The Merchant Shipping Act, 1906, section 66, provides: "Where, on any investigation or inquiry under the provisions of Part VI. of the principal Act, the Court find that a shipping casualty has been caused or contributed to by the wrongful act or default of any person, and an application for rehearing has not been made under section four hundred and seventy-five or section four hundred and seventy-eight of the principal Act, or has been refused, the owner of the ship, or any other person who, having an interest in the investigation or inquiry, has appeared at the hearing and is affected by the decision of the Court, may appeal from that decision in the same manner and subject to the same conditions in and subject to which a master may appeal under those sections against a decision with respect to the cancelling or suspension of his certificate."

The PRESIDENT.—This is a preliminary application in a proposed appeal of an officer in the Merchant Marine against a finding of the Wreck Inquiries Court in the Straits Settlements, by which he conceives himself to be aggrieved. The Court in the Straits Settlements found him guilty of negligence in three particulars, whereby a vessel of some 8,000 tons had been stranded, and expressed its severe censure judicially, and declared that it did not deem it necessary to deal with his certificate. That, of course, is a grave matter for an officer in the Merchant Marine, especially an officer who has been in charge of one of the great ships which sail the wide seas, and he seeks to secure reconsideration of those findings of negligence, and of the censure which has been so expressed.

Whether he is entitled to a rehearing is a matter of statute. He is not entitled to a rehearing unless some statute, which creates the jurisdiction under which he has been placed at disadvantage, confers that right of rehearing. The view has been taken that there is a limited right of rehearing which does not apply to his case—that under the terms of the relevant section in the Merchant Shipping Act, if his certificate had been dealt with he would have been entitled to be reheard, but that in view of the fact that his certificate has not been dealt with the statute gives him no right of rehearing. That, of course, is a matter purely of the construction of the statute. The matter has been well and concisely argued, and it was hardly necessary that Mr. Bucknill should emphasize the fact that the Board of Trade has no desire to restrict, in the case of officers in the Merchant Marine service, their right of access to his Majesty's Courts when they are aggrieved. The Board of Trade would fall short of its duty if it pursued any such course. It has not pursued any such course, and does not, and in desiring a determination of the preliminary question here the Board of Trade has simply taken an account of opinions expressed from the Bench from time to time, and views which have evidently been held by the judicial authorities in respect of which neither of us, I am sure—no one who is aware of their eminence or of their ability—would entertain any doubt. But the question still has to be determined.

It is said on behalf of the proposed appellant that under the relevant sections of the Merchant Shipping Act, 1894, sections 475 and 478 in particular, the appellant—the proposed appellant—probably had a right of appeal—that there is a construction of the sections which would give him a right of appeal—but it is said further that under the Merchant Shipping Act of 1906, section 66, he has unmistakably a right of appeal. The relevant sections of the Merchant Shipping Act of 1894, certainly, do not make it clear beyond all doubt. I think they are capable of a construction which would give the right of appeal. After providing for wreck inquiries, and establishing tribunals which have power to deal with the certificates of masters, mates, and engineers, and providing power for the Board of Trade to order the rehearing of any such inquiries, section 475 goes on to say: "(3) Where on any such investigation or inquiry a decision has been given with respect to the cancelling or suspension of the certificate of a master," and so forth, an appeal shall lie. I pressed Mr. Bucknill, perhaps a little too closely, as to whether in this case there had been a decision with respect to the cancelling or suspension of the certificate of the proposed appellant, but Mr. Bucknill gave the answer that it depended upon the true construction of section 475, subsection 3. He said that the finding of the Court was a decision with respect to the cancelling or the suspension of the certificate of the proposed appellant, as it was decided to be unnecessary to cancel or suspend his certificate. That does not look, however, like the kind of decision against which the right of appeal is of necessity to be assumed. That leaves the matter an open question. I do not express any concluded view against the proposition that there would be a right of appeal there—I leave that matter where it is. But section 475 dealt with wreck inquiries in this country, and section 478 dealt with wreck inquiries in the Dominions Overseas in a different manner; because, after giving to the Board of Trade the like power of ordering a rehearing which was expressed in section 475, section 478 went on to say: "An appeal shall lie from any order or finding of the Court or tribunal holding the inquiry to the High Court in England." It was suggested that a possible view of the two sections was that those general words in section 478 are limited by the specific words in section 475, and we are asked to apply a well-known rule of construction. In my view those general words in section 478 are not limited by the express words in section 475. In my view an appeal lies at the instance of a party to the proceedings from an order or finding of the Court or tribunal holding the inquiry except, in the specified cases, where such an appeal, it is directed, shall not lie.

That is the view I hold upon the Merchant Shipping Act of 1894, but many things have happened since 1894. From time to time there has been resort to this Court by persons alleging themselves to be aggrieved, and it was found that persons might suffer a substantial grievance by proceedings before tribunals dealing with shipping casualties, and be left without a specific right of redress. There was a case, to which my brother referred (*The Golden Sea*, 7 P.D., 194), of the owners of a vessel who were in effect placed in a position of great disadvantage and were held not to be within the provisions of the Act which gave the right of appeal, and by reason of occurrences of that kind section 66 was placed in the Merchant Shipping Act of 1906, and that directed that "where, on any investigation or inquiry [such as is here under consideration] the Court find that a shipping casualty has been caused or contributed to by the wrongful act or default of any person . . . the owner of the ship, or any other person who, having an interest in the investigation or inquiry, has appeared at the hearing and is affected by the decision of the Court . . . may appeal." It is

necessary after reading that section for us to see whether the proposed appellant here comes within its terms. Had he an interest in the investigation or inquiry? He had. He was accused of negligence and was subject to the cancellation of his certificate, or to the endorsement of his certificate. Had he appeared at the hearing? He had. He had appeared and given his evidence. Was he affected by the decision of the Court? That has been submitted as the true question here. He was found guilty of negligence—that is of professional misconduct. He was found guilty at a public proceeding, and the decision of the Court was placed on record. The Court sat in public, as such Courts do, and, of course, ought to do. To my mind it is impossible to say that an officer in the merchant service who has been tried upon charges of negligence and found guilty is not affected by the decision of the Court. It seems to me that he is placed very nearly in the position of a person tried under a criminal charge who is found guilty, but who is subjected to no sentence. That being so, it seems to me that the proposed appellant has a right of appeal probably under the sections of the Act of 1894, but, certainly, under section 66 of the Act of 1906. I do not think there is any substantial danger of a great rush of litigants to the Court if given the right of appeal, and if the Court should be obstructed in that way it will know how to deal with any such phenomenon.

In my view the proposed appellant is entitled to succeed upon this motion.

MR. JUSTICE HILL.—I agree. Whether under section 475 of the Act of 1894 a man who is found guilty of negligence, but whose certificate was neither cancelled nor suspended, had a right of appeal, I express no opinion. But assuming that he had no such right under section 475 of the Act of 1894, in my opinion the words of section 478 of the Act of 1894, which are so much wider than the words of section 475, gave him in such a case a right of appeal from a Colonial Court of Inquiry. Any doubt is removed, however, by section 66 of the Act of 1906, which was passed—as is clear upon its terms—in order to enlarge the right of appeal, and which clearly includes the master in this case, in that he appeared, and, indeed, must have been given notice to appear, because it was proposed that his certificate should be dealt with, and he was in my view quite clearly a person affected by the finding that the casualty had been caused by his negligence. I therefore agree that he has a right of appeal.

[Solicitors—Messrs. G. F. Hudson, Matthews and Co.; the Solicitor to the Board of Trade.]

K.B. Div. (MacKinnon, J.) } 1927. Dec. 16.

LLOYDS BANK LIMITED v. CHARTERED BANK OF INDIA, &c.*

Bankers — Crossed cheques — Protection of collecting banker—No title in customer—Receipt of payment by banker without negligence—Failure of banker to discharge burden of proof—Bills of Exchange Act, 1882 (45 and 46 Vict., c. 61), s. 82.

One L., who was the chief accountant at a branch of the plaintiff bank, and who had authority to sign cheques on their behalf, fraudulently drew upon another bank crossed cheques, signed by himself and by another official of the branch, and payable to the defendant bank, and, by letters written on the plaintiffs' office paper, he instructed the defendant bank to credit the proceeds to the joint account of himself and his wife at the defendant bank. The defendant bank collected the amounts of the cheques and credited them to the account, and L.'s practice was to draw the amounts out quickly after paying them in, and observation of the account would have shown that L. was engaged in extensive speculations through stockbrokers. In an action for damages for conversion of the cheques or for money had and received, the defendants relied on the provisions contained in s. 82 of the Bills of Exchange Act, 1882.

Held, that although the cheques were payable to the defendants themselves they had received payment "for a customer" within the meaning of the section and had done so in good faith, but that they had not discharged the burden of proving the absence of negligence on their part, and the plaintiffs were entitled to recover.

In this action the plaintiffs, Lloyds Bank Limited, sued to recover from the defendants, the Chartered Bank of India, &c., damages for the conversion of certain cheques. Alternatively, the plaintiffs claimed the amount represented by the cheques as money had and received.

Mr. Stuart Bevan, K.C., and Mr. Le Quesne, K.C., appeared for the plaintiffs; Mr. Jowitt, K.C., and Mr. James Wylie for the defendants.

Mr. BEVAN, in opening, said that the claim related to 19 cheques drawn by one Lawson, who was chief accountant at the Bombay branch of the plaintiffs' bank. The cheques were drawn at various times from March, 1922, to January, 1924, and were for sums in rupees which were equivalent in all to between £17,000 and £18,000. The cheques, which were signed by Lawson, and also by another official of the plaintiffs' Bombay branch, were drawn on the Imperial Bank of India, and were payable to the defendant bank. The proceeds of them were, on Lawson's instructions, credited to a joint account which Lawson and his wife kept at the defendants' bank.

All the cheques were drawn without the knowledge of, and in fraud of, the plaintiffs. Lawson was an officer of the bank whose payments for salary and allowances amounted to less than £1,500 a year. The defendants had put in various defences, and relied in particular on section 82 of the Bills of Exchange Act, 1882, and the equivalent section, 131, of the Indian Negotiable Instruments Act, 1881. But, said counsel, a defendant could only rely on those sections if he had received the payment "for a customer and without negligence"; and here the cheques were made payable to the defendants themselves and not to a customer. He submitted that the facts showed that the defendants had been negligent. They should have examined the cheques to see if they related to ordinary business transactions between themselves and the plaintiffs, and they would at once have seen that they did not.

The defendants credited the amounts to the

* Reported by W. B. THOMPSON, Esq., Barrister-at-Law.

account of Lawson and his wife on the instructions of Lawson personally, and not in his capacity as an officer of the plaintiffs. The fact that an official in receipt of a moderate salary should be paying in large sums at frequent intervals should have made them suspect that something was wrong.

The plaintiffs were Lloyds Bank, but the frauds actually took place at Cox's Bank at Bombay, Cox's having since been absorbed by Lloyds. Lawson's practice was to draw the money out quickly after paying it in. It appeared that he was engaged in speculating through native stockbrokers, and if the defendants had taken proper care in watching his account they would have seen that he was paying large sums to those natives.

In the circumstances of this case the defendants could not claim the protection of section 82 of the Bills of Exchange Act, 1882, or the corresponding provision of the Indian Act, because they did not receive payment for a customer (*Capital and Counties Bank v. Gordon*, 19 *The Times* L.R., 462 ; [1903] A.C. 240, at p. 245). A bank was only protected by the section when, on behalf of a customer, it received for collection a cheque which, if it had not been crossed, could have been collected by the customer himself. And, apart from that, the bank was liable if it had been negligent. The onus of showing that there had been no negligence was on the bank. Where a servant of the drawer of a cheque directed the receiving bank to credit the amount to the servant's private account, that must be enough to put the receiving bank on inquiry.

He referred to *Morison v. London County and Westminster Bank* (30 *The Times* L.R., 481 ; [1914] 3 K.B., 356, at p. 367) ; *Ross v. London County Westminster and Parr's Bank* (35 *The Times* L.R., 315 ; [1919] 1 K.B., 678) ; *Underwood v. Bank of Liverpool and Martins* (40 *The Times* L.R., 302 ; [1924] 1 K.B., 775).

Evidence which had been taken on commission was read, and other evidence was called.

Mr. JOWITT said that section 82 of the Bills of Exchange Act, 1882, presupposed liability and provided a means of defence. This case differed from the usual case of fraud in that the cheques were payable to the defendants themselves. The plaintiffs sent the cheques to the defendants with implied instructions to clear them, and the defendants did so. So far there was no conversion. Then it was argued that if there were no conversion of the piece of paper there was a conversion of its proceeds by applying them to Lawson's account. But in doing that the defendants were only applying cheques, which had been issued by the plaintiffs, according to the directions of an official of the plaintiffs, who had both actual and ostensible authority to give directions.

He referred to *Clutton v. Attenborough* (13 *The Times* L.R., 114 ; [1897] A.C., 90, at p. 93) ; Grant on the Law of Banking (6th Edn., p. 52). *Morison's* case (*supra*) differed from this case because there the cheques were marked "Not negotiable," and were drawn by only one person. The question of conversion was dealt with in *Underwood's* case (*supra*) at page 795.

The claim here could not succeed on the alternative ground of money had and received, because the money was no longer in the defendants' hands (*Morison's* case, *supra*, at p. 386). The fact that the cheques in this case were signed by another official besides Lawson showed that they were intended to be "issued," and the plaintiffs must be held to have issued them. He referred to *Jones v. Waring and Gillow* (42 *The Times* L.R., 644 ; [1926] A.C., 670), and the cases cited at page 684 of that report, and submitted that there was no such payment under a mistake of fact as would enable the plaintiffs to recover the money.

As to section 82 of the Bills of Exchange Act, 1882, that section introduced a hypothetical standard of care and, as shown by the judgment in *Ross's* case (*supra*), at pages 685-6, the standard must be that of an ordinary bank clerk in an Indian bank. Any ordinary bank clerk, dealing with perhaps thousands of cheques as rapidly as possible, would have passed these cheques without question. The same rule was laid down in *Commissioners of Taxation v. English, Scottish, and Australian Bank* (36 *The Times* L.R., 305 ; [1920] A.C., 683, at pp. 686 to 689), which said that the standard to be applied must be that of the ordinary practice of bankers, in view of the particular circumstances, antecedent and present.

The evidence here showed that one bank would quite commonly make a cheque payable to another bank, but would send with the cheque a covering letter directing that the money should be credited to a customer. In *Hannen's Lake View Central, Limited v. Armstrong* (16 *The Times* L.R., 236) the cheque was in favour of an employer and was paid in by his servant, but in this case there was no indication on the face of the cheques to show the individual whom they were intended to benefit. If the plaintiffs had exercised a proper system of control over their officials Lawson's frauds would have been impossible.

Evidence having been called for the defence, Mr. JOWITT submitted that the law was accurately summarized in Paget on Banking, third edition. The foundation of the action was that the Imperial Bank of India had properly debited the account of the plaintiffs, that the cheques were negotiable instruments, and there was an *animus emittendi*. The cases in which a banker could be liable for conversion were discussed in Paget on Banking, third edition, pages 171, 274, 278, 280, and 289. The defendants were entitled to the protection of section 82 because they were not guilty of any negligence whatever. If, however, they were negligent in dealing with the first cheques, the plaintiffs had raised no objection after those cheques had been dealt with, and the defendants were not negligent in treating the subsequent cheques in the same way. Lawson was a man who was supposed to have private means, and the plaintiffs knew that he had an account with the defendants, and the evidence showed that one bank often drew a cheque in favour of another bank with the intention that the proceeds should be credited to a customer.

Mr. LE QUESNE replied. The cheques were not issued by the plaintiffs within the meaning of the definition of issue in section 2 of the Act, *Baxendale v. Bennett* (3 Q.B.D., 525). No intention to issue the cheques could be imputed to the plaintiffs, because the second signature was not affixed to the cheques with an intention to issue and Lawson's signature alone could not be sufficient. The defendants were not holders in due course (*Jones v. Waring and Gillow, supra*, at p. 680). It was never contemplated by anyone that section 82 should protect a banker who was himself the payee of the cheque. Whether the plaintiffs themselves were or were not negligent, the defendants could not be protected by section 82 if they were negligent, and the evidence here clearly showed that they were negligent.

MR. JUSTICE MACKINNON, in giving judgment, said that the case was a very difficult and complicated one, but as he had formed a clear view what his

decision ought to be he would not reserve judgment. Lawson was an officer of the plaintiffs and had full authority to sign cheques on their behalf. He had a banking account of his own in London, and he also had an account, originally in his own name and subsequently in the names of himself and his wife, with the defendants.

His LORDSHIP stated the facts with reference to the payment of the 19 cheques to Lawson's account with the defendants and continued. The drawing by the plaintiffs of a cheque in favour of the defendants, accompanied by a letter requesting the defendants to credit it to a customer, would be a perfectly normal proceeding ; and in this case the defendants received such requests to credit Lawson's account, the requests being written by Lawson himself on the plaintiffs' office paper. When the cheques were paid in Lawson almost immediately drew the money out again by cheques which were payable to stockbrokers, and anyone must have seen that he was carrying on extensive speculations. Lawson went through a complicated process of "cooking" the plaintiffs' books to conceal his operations, and he remained undetected until he went on leave. While he was away his fraud was discovered. If the plaintiffs had had a proper and reasonable system of checking the work of their servants the fraud would have been discovered immediately after it began, but it was not directly material to this case to decide whether the plaintiffs had been negligent ; if it had been material he should have had no hesitation in holding that they had been negligent.

Prima facie, the plaintiffs would be entitled to succeed on the claim. The principle was that where one person received the property of another without that other's authority, and used it for his own purposes, he was guilty of conversion. But the defendants said that they had not been guilty of conversion ; that the plaintiffs—induced, indeed, to do so by fraud—issued negotiable instruments, and that those instruments were valid and effectual. See *Clutton v. Attenborough* (13 *The Times* L.R., 114 ; [1897] A.C., 90). The crucial question on that point was whether those cheques were issued by the plaintiffs. It was admitted that if Lawson alone had signed them that would not have been enough ; but the defendants said that the second signature made the cheques "issued" by the plaintiffs. The position resembled that in the *Underwood* case (*supra*), and, in his opinion, this defence failed.

Then there was the more difficult defence of the Indian equivalent of section 82 of the Bills of Exchange Act, 1882. There was no substantial difference between the provisions of the two Acts. In his view, Lawson, a customer, had a defective title within the meaning of those Acts. Mr. Bevan argued that, as the cheques were payable to the defendants themselves, the defendants did not receive payment for a customer, but it would be giving far too narrow a meaning to the words to say that receipt by a banker of cheques payable in words to himself, but accompanied by a request to credit them to a customer, was not a receiving on behalf of a customer. The point was really decided by *Morison's* case (30 *The Times* L.R., 481 ; [1914] 3 K.B., 356). The defendants did receive payment for Lawson as their customer in good faith. But the onus was on them to show that they did so without negligence, and he felt that that was a very difficult question. In law negligence implied the breach of a duty to take care, but there was no duty at common law on the collecting bank to exercise care, and the duty was entirely created by the Act. The standard of care had been discussed by Mr. Justice Bailhache in *Ross's* case (35 *The Times* L.R., 315 ; [1919] 1 K.B., 678) and by Lord Dunedin in *Commissioners of Taxation v. English, Scottish, and Australian Bank* (36 *The Times* L.R., 305 ; [1920] A.C., 683). One must remember that the whole basis of business was confidence ; and a lawyer was much more suspicious of fraud than a business man would be. The bank officers dealt with hundreds of cheques a day, and the opportunity of scrutinizing any one of them was small. In estimating the standard of care by the collecting banker, which the statute created for the first time, one must take the standard of a hypothetical bank clerk. In doing so, must one impute to him a knowledge of all the facts, when it was quite certain that he did not know them ?

On the whole he thought he must hold that, if a *prima facie* case was made out against them, the defendants must definitely prove that there was no negligence by their servants. That proof must be very difficult to give in any case, and he thought that in this case the defendants had not succeeded in discharging the burden.

The Legislature had used the words of the section without, possibly, realizing their full extent, but he must take the words as they stood. The defendants, therefore, had failed to establish with regard to each of the 19 cheques that they had acted without negligence, and judgment must be against them. Lawson had paid a certain amount of the money so obtained by him by fraud into his account with the plaintiffs' bank, and as that had gone back into the coffers of the plaintiffs their claim for conversion would be reduced *pro tanto*.

[Solicitors—Messrs. Barlow, Lyde and Yates ; Messrs. Linklaters and Paines.]

Court of Appeal. } 1927.
(Scrutton, Sargant, and Greer, L.JJ.) } Dec. 16.

IN RE APPLICATION OF TILMANSTONE (KENT) COLLIERIES, LIMITED.*

Mines — Coal-mine — Working facilities—Ancillary right—Carrying away coal—Conveyance over land outside lease—Jurisdiction to sanction — Aerial ropeway — Mines (Working Facilities and Support) Act, 1923 (13 and 14 Geo. V., c. 20), ss. 1, 2, 6.

The Court held that under ss. 1, 2, and 6 of the Mines (Working Facilities and Support) Act, 1923, the Railway and Canal Commission had jurisdiction to sanction a scheme for an aerial ropeway for the conveyance of coal from the Tilmanstone colliery to Dover Harbour, on the ground that the scheme was in the national interest.

Decision of the Railway and Canal Commission (43 *The Times* L.R., 795) affirmed.

These were appeals by the Southern Railway Company and the East Kent Light Railway Company from an order of the Railway and Canal Commission (43 *The Times* L.R., 795) sanctioning a scheme to carry an aerial ropeway or railway from the Tilmanstone Colliery, Kent, to Dover Harbour.

* Reported by T. W. MORGAN, Esq., Barrister-at-Law.

The Tilmanstone (Kent) Collieries, Limited, had applied to the Railway and Canal Commission under sections 3 and 5 of the Mines (Working Facilities and Support) Act, 1923, for the sanction of that Court to a scheme for an aerial ropeway or railway from the Tilmanstone Colliery, Kent, to Dover Harbour, a distance of 6¼ miles. The application was made on the ground that the existing railway rates and charges payable to place the applicants' coal free on board at Dover Harbour were excessive and did not enable them to produce coal at a competitive rate. They contended that if the existing rates were continued it would result in the colliery being closed. The applicants said that the scheme for a ropeway was essential for the proper and efficient working of the minerals and the conduct of their business.

As a result of the notices given by order of the Court, a large number of persons appeared in opposition to the scheme. Many of the opponents were landowners, who, after the case had proceeded for a short time, were satisfied with the terms which, subject to the approval of the Court, the applicants were prepared to offer them. Consequently, the opposition had narrowed itself down to that put forward by the Southern Railway Company and the East Kent Light Railway Company, and to certain suggestions made on behalf of the War Department and the Dover Harbour Board.

The application was argued before the Railway and Canal Commission on two occasions. On the first occasion the Court, in a considered judgment (43 *The Times* L.R., 349), refused to sanction the scheme, on the grounds that the plans were inaccurate and illusory, and that, on the evidence, the Railway and Canal Commission were unable to say whether the arrangements at the Dover end were feasible or in the national interest.

The Tilmanstone (Kent) Colliery Company made a second application to the Railway and Canal Commission, producing further plans. The Court, in sanctioning the scheme, overruled an objection to the jurisdiction of the Court.

The Southern Railway Company and the East Kent Light Railway Company appealed.

Sir John Simon, K.C., Mr. Tyldesley Jones, K.C., and Mr. Bruce Thomas appeared for the Southern Railway Company; Mr. Arthur Moon and Mr. H. I. Willis for the East Kent Light Railway Company; Mr. J. G. Joseph for the Dover Harbour Board; and Sir Leslie Scott, K.C., Sir Arthur Colefax, K.C., and Mr. P. Gordon Bamber for the Tilmanstone (Kent) Colliery Company.

Sir John Simon, in opening the appeal on behalf of the Southern Railway Company, said that the appeal raised a question with regard to the extent of the jurisdiction of the Railway and Canal Commission in making orders which would, unless they had statutory authority behind them, be an authorization of trespass over private property. The order appealed against sanctioned, notwithstanding opposition, the construction of an aerial ropeway. The appellants' point was that it was a misunderstanding of the language of the Act of Parliament to suppose that the Railway and Canal Commission had jurisdiction to sanction the building of railways all over England. The Act under which the application in this case was made did not give the Railway and Canal Commission jurisdiction to order that anyone might make railways over the face of other people's property merely because a colliery company satisfied them that the scheme was to the advantage of the public.

Sir Leslie Scott, for the colliery company, contended that the Act of 1923 gave to the Railway and Canal Commission a wide discretion with the object of facilitating the easy working of minerals, and, where it was necessary in the national interests to do so, the rights of private property could be overridden on terms of fair compensation to the owners. The Court had jurisdiction to make the order under appeal.

Lord Justice Scrutton, in delivering his considered judgment, said:—This appeal by the Southern Railway Company against a decision of the Railway and Canal Commission raises an important question as to the jurisdiction of that tribunal. The Tilmanstone (Kent) Collieries, Limited, are lessees of coal at Tilmanstone in the county of Kent. If they desired to send their coal to the nearest port, Dover, it passed over a railway route of 11 miles, partly belonging to the Southern Railway Company. They desired to send the coal to Dover by a ropeway, the length of which would be about seven miles. The cost of doing so would be 1s. a ton less than by the Southern Railway route, without allowing for the extra convenience to them of having control of their whole route.

The Dover Harbour Board and most of the proprietors on the proposed route of the ropeway assented. Some landowners, whose land would be affected by the ropeway, dissented, among them the Southern Railway Company, whose interest in land was confined to the fact that the ropeway crossed at one point a branch of their railway. The colliery company therefore applied to the Commission, under the Act of 1923, for the grant of an "ancillary right" of conveyance by ropeway of coal from the colliery shaft to Dover Harbour. The Southern Railway Company, while not alleging that the proposed protection for their railway line where the ropeway crossed it would be insufficient, objected to the application on the ground that the Commission had no jurisdiction under the Act of 1923 to make an order and grant an ancillary right which was directed rather to marketing than to "working" the Tilmanstone coal, and which was sought to be justified on economical or commercial, rather than legal or physical, difficulties hampering the colliery. The Commission overruled the objection and granted the ancillary right asked for "to erect, lay down, maintain and use an aerial ropeway" according to certain plans which involved crossing the line of the Southern Railway. The railway company appeal on the ground that the Commission had no jurisdiction under the Act of 1923 to make such an order.

The power to grant "ancillary rights" is conferred by section 3 of the Act of 1923. The combined effect of that section and section 1 (2) of the Act is to define "ancillary right" as a facility, right, or privilege which is required in order that minerals may be properly worked, carried away, treated and converted, where the proper and efficient working, carrying away, treating or converting of the minerals is hampered by the failure of the person working the minerals to obtain such right, facility, or privilege.

Instances of ancillary rights are given "without prejudice to the generality of the foregoing provision," and are as follows: "(*a*) A right to let down the surface"; this clearly includes surface not the property of the person working the mine; "(*b*) A right of air-way, shaft-way, or surface or underground wayleave, or other right for the purpose of access to or conveyance of minerals or the ventilation or drainage of the mines"; airway or surface wayleave for the purpose of "conveyance," a very wide

word, may be granted over other people's property ; " (*c*) A right to use and occupy the surface for the erection of washeries, coke ovens, railways, by-product works, or brick making or other works, or of dwellings for persons employed in connexion with the working of the minerals or with any such works as aforesaid." This again applies to other people's property, and includes " railways " over them. Subsections (*d*) and (*e*) give power to grant rights to take water from or drain water on to other people's property.

The Commission, by section 6 of the Act, is to consider whether the requirements of the Act have been complied with, and whether " it is expedient in the national interest that the right applied for should be granted."

It would seem that Parliament intended that minerals should be available for use where the national interest required it, and that if such minerals were unavailable, owing to the unreasonable objection of some person who had the right to object to their proper, convenient, and efficient " carriage away," the Commission might overrule that unreasonable objection by granting an ancillary right of wayleave or conveyance or making and using railways.

The objection of the railway company was based on a very technical use of the term " carry away." " Work," they said, in mining leases means detaching or severing coal from the coal face ; " carrying away " is converting that coal into the lessees' possession. As soon as the coal is " carried away " in that technical sense, the power of the Commission ceases. They were not quite clear where the " carrying away " ceased. Before the Commission, their counsel appears to have argued that it could not extend beyond the land of the lessor. Before us, a different line was taken. It was said that the limit was not geographical, but one of the purpose of the Act. If the carrying was to the first place where the lessee had effective control it was " carrying away " ; further transport was for sale, and marketing was not " working."

But the illustrations given were puzzling. I asked whether, if a new shaft was projected five miles from a shipping port in one direction, and five miles from the nearest railway in the other, and intervening landowners refused all wayleaves so that the coal could not get away except by uneconomical road carriage, the Commission would have jurisdiction to grant an ancillary right of wayleave for a railroad to the nearest port and nearest rail. The answer was " Yes." A similar answer was given to the question whether, if the lessee wanted to get his mineral to works five miles away for the purpose of treating or converting it—*e.g.*, to coke ovens—an ancillary right of wayleave to the works could be granted. Again the answer was " Yes." But I think it was said that the answer assumed that there was no place on the way where the mineral could be reduced into possession or completely controlled by the lessee.

In my opinion, the construction which the railway company seek to put on the statute is too narrow. Parliament, in my view, intended that where it was in the national interest that coal should be available for national purposes, and where the operation of rendering the coal available was hampered by the refusal of persons, whose consent before the Act was necessary, to grant proper facilities for the process of making the coal available, the Commission might override that refusal on terms which it considered proper. It was said that this construction might lead to the sanction of hundreds of miles of railway without any of the precautions ordinarily taken by Parliament to protect private interests. In my view, Parliament has placed confidence in the judicial tribunal concerned both to protect individual interests and to override them if it is in the interests of the nation so to do. The judgment of the Court below proceeds on these lines, and I agree with it.

The appeal in both cases must be dismissed, with costs.

Lord Justice Sargant.—I agree that these appeals should be dismissed.

The first argument of the appellants was that the phrase " carrying away " in section 1, subsection (2), of the Mines (Working Facilities and Support) Act, 1923, was limited to removing or transporting coal within the limits of the lessors' land ; that the phrase " conveyance of minerals " in section 3, subsection (2) (*b*), must have an equally restricted meaning ; and accordingly that there was no power in the Railway and Canal Commission to authorize any easement, by ropeway or otherwise, to convey minerals won by the respondents beyond their boundaries and across the railways of the Southern Railway Company and the East Kent Light Railway Company. In my judgment that argument fails at each step. The phrase " carry away " may no doubt include the removal of coal won ; but no authority was cited to us to show that it was ordinarily or necessarily limited to such removal within the confines of the particular " take " or property where the winning was effected. Even if the phrase " carry away " were *prima facie* so limited in section 1, subsection (2), that is an inadequate reason for placing a corresponding limit on the word " conveyance " in section 3, subsection (2) (*b*). And in addition, the whole character of this argument is of a highly technical and narrow character, which is, in my judgment, quite foreign to the spirit and purpose of remedial legislation such as the Act now in question. Such legislation should in general be read broadly, and should not have its obvious purpose cramped and stultified by finely drawn distinctions and verbal niceties of this kind.

The second argument for the appellants was that section 3 of the Act of 1923 was dealing only with physical difficulties in working minerals and not with economic difficulties at all ; and that in the present case the difficulties to be overcome were purely economic. This argument is more attractive than the first, but I cannot accede to it. I agree with Mr. Justice Sankey in thinking that the phrase " properly and conveniently worked " in its ordinary meaning does not exclude elements of cost, especially when applied to such a business as mining, where the whole possibility of profit, and therefore of initiation or continuance, is dependent on a margin—often a narrow one—of receipts over expenditure. And I do not think that there is any such contrast in section 2 between the words " efficiently " and " economically " as compels one to exclude questions of economy in considering whether " the proper and efficient working of the minerals is unduly hampered " within section 3, subsection (1), of the Act. Certainly, as was pointed out by Sir Leslie Scott at the beginning of the brief argument which we heard from him, economic or commercial considerations are involved in section 6, subsections (4) and (5), section 7 and section 8, subsection (7), of the Act. It is probably true that in mining as in other engineering operations almost any physical difficulty can be overcome, if expense can be totally disregarded. In practical operations it is impossible to leave expense out of the question, and excessive cost, actual or anticipated, may by itself result in " minerals being left per-

manently unworked," and render it "expedient in the national interest" that the Commission should interpose and grant rights to obviate the danger.

A good deal was said for the appellants as to the dangers of holding the Commission entitled to grant rights which might involve the construction of great lines of railway, and as to the absence of those safeguards which Parliament has imposed on undertakers under the Lands Clauses and Railways Clauses Acts. But in this legislation the powers of the Act are confined to an important judicial tribunal; there is nothing anomalous in the Parliamentary grant of an extensive discretion to such a tribunal; and the exercise of the powers of such a tribunal do not need to be safeguarded as in the case of the exercise of powers by private commercial undertakers. It seems to me that the Commission here have taken a sound view of their position and powers under an Act to enable them to override private rights where it is expedient in the national interest. And indeed I should have been satisfied merely to affirm the decision of the Commission without more, but for my desire to show that I had attended to and considered the arguments of Sir John Simon and Mr. Tyldesley Jones.

Lord Justice Greer.—I agree. Colliers go down into a mine not for the purpose of exercising their muscles in a healthy occupation, but for the purpose of earning enough money to keep themselves and their families in decent comfort. Mine-owners and lessees of mines expend their capital by using it for sinking pits and paying wages and installing plant, not for reasons of benevolence nor for the mere purpose of contributing to the national welfare, but in order that they may earn profits for themselves which will justify them commercially for their expenditure of capital. If they cannot get a return for that expenditure the necessary result will be that their mines will be closed, the workmen will be deprived of their opportunity of earning their wages, the mine-owner or lessee will have lost his capital, and the nation will have lost the opportunity of taxing the mine-owners' income and will have to make provision for the men whose employment has been determined. It is accordingly in the interest of everyone concerned, and especially in the national interest, that facilities should be granted that will, if possible, enable the mine to continue to be worked—that is to say, facilities calculated to decrease the risks of loss in carrying on the mining enterprise and increase the chances of profit. This desirable end cannot be achieved by granting facilities to enable the mine-owner to bring his coal to the surface or to his own depôt if he is hampered in carrying it to market by difficulties which can only be overcome by an expenditure that would involve carrying on his business at a loss. It is of no use to the mine-owner to get his coal to the surface if other people's land intervenes between his mine and his market which he either cannot cross at all or can only obtain liberty to cross at a prohibitive price. One would accordingly expect that if Parliament provided for granting to mine-owners facilities for working, carrying away, treating and converting minerals, the facilities to be granted would be such as to enable the mine-owner to increase his chances of carrying on his business profitably, or to diminish the risk of carrying it on at a loss.

In my judgment Parliament has by the Mines (Working Facilities and Support) Act, 1923, section 3, given power to the Railway and Canal Commission to grant facilities, rights, or privileges to overcome hindrances to the carrying out of a mining enterprise. The words "carrying away" in section 1 of the Act are not confined, as was argued on behalf of the railway company, to carrying away from the place where the coal is got to some place where it is effectively in the mine-owner's possession as distinguished from that of the land-owner. I do not think the words are used in the technical sense in which they are generally used in mining leases. Considering the object of the Act, I think the words at least cover the carrying away or transporting of the coal from the place where it is got to any convenient place where it can be treated, converted, or dealt with commercially by sale or delivery to purchasers. I think, for example, that if the nearest railway was seven miles away the Railway and Canal Commission could grant a right to lay down a tramway or a ropeway from the mine to such railway, and I can see no difference in principle between this and granting, as they have done in this case, the right to erect and maintain an aerial ropeway to Dover Harbour. In my judgment the words "carrying away" are wide enough to include the facilities that have been granted by the Railway and Canal Commission in this case.

But it was argued that, even though that be so, still the Commissioners were wrong in law in granting such facilities, because section 3 does not contemplate facilities that are required for economic or commercial reasons. It was argued for the railway company that the privilege was not required for properly and conveniently carrying away the minerals, nor would the proper and efficient carrying away of the minerals be unduly hampered by the colliery company's inability to obtain the right to erect and maintain the ropeway in question. It was said that this section did not contemplate facilities required to overcome economic or commercial difficulties, but only difficulties which physically obstructed the carrying away of the coal. In my judgment this argument puts too narrow a construction on the section. I think, in considering whether a mine can be properly and conveniently worked and the product properly and conveniently carried away, the tribunal is entitled to take into account the cost which it is necessary to incur in the absence of facilities which the mine-owner asks for; and I am further of opinion that the proper and efficient working and carrying away of the minerals may be unduly hampered if the cost of getting them to a convenient place for disposal is, in the absence of such facilities, excessive.

It is quite true that this interpretation of the Act means that very large powers are given to the Railway and Canal Commission to override the rights of property owners, and it may well be that they would have power to authorize a railway 20, 30, or 40 miles long from pit to port, but it is to be observed that the powers are granted to Commissioners presided over by a Judge of the High Court, that the applications for facilities are heard in public, and that the Commissioners have power to impose reasonable conditions (section 6) and to award fair compensation (section 9).

I agree that the appeal should be dismissed.

[Solicitors—Mr. W. Bishop, for the Southern Railway Company; Messrs. F. C. Mathews and Co., for the East Kent Light Railway Company; Messrs. Freshfields, Leese, and Munns, for the colliery company; and Messrs. Mowll and Mowll, for the Dover Harbour Board.]

K.B. Div. } 1927.
(Salter and Talbot, JJ.) } Dec. 20.

HASKELL v. MARLOW.*

Will — Construction — Devise of dwelling-house to life tenant — Direction to keep "in good repair and condition (reasonable wear and tear excepted)"—Failure by tenant for life to counteract natural decay—Liability.

Where in an instrument creating a tenancy for life or for years there is an obligation on the tenant to keep the premises "in good repair and condition (reasonable wear and tear excepted)," dilapidations do not come within the exception unless it is shown that they were caused by normal human use or normal action of the elements and also that they are reasonable in amount, having regard to the terms of the contract to keep the premises in good condition and to the other circumstances of the case.

The exception does not mean that a tenant is not bound to do such repairs as may be required to prevent a defect originally proceeding from reasonable wear and tear from producing other results which such wear and tear would not directly produce.

Where, therefore, a tenant for life under a will containing the above obligation and exception, during a residence in a dwelling-house which lasted for 42 years, while doing nothing actively to injure the premises, omitted almost entirely to repair it and did very little to counteract the natural process of decay,

Held, that she was not protected by the exception but that her executors after her death were liable in damages to the trustees of the will creating her tenancy for life.

Their LORDSHIPS delivered judgment dismissing the defendants' appeal from an Official Referee in this action in which Mr. Harold Burgess Haskell and Mr. Charles Reginald Poole, trustees of the will of William Leach deceased, claimed from the defendants, Mr. William Marlow, Mr. Arthur Monkhouse, and Mr. Reginald Young, executors of the will of Charlotte Leach deceased, damages for the breach by the defendants and their testatrix of their and her obligation to keep in good repair and condition (reasonable wear and tear excepted) a messuage or dwelling-house in Castle-street, Salisbury, and the appurtenances thereto pursuant to the will of William Leach.

The will contained the following provision:—"I devise the messuage or dwelling-house with offices garden and appurtenances thereto and wherein I now reside in Castle-street, Salisbury, aforesaid, together with the use and enjoyment therein of the furniture pictures prints plate and plated articles china glass and other household effects now hereinbefore bequeathed to her which shall be in and about the same at my decease to my said wife [Charlotte] during her life she insuring and keeping the same insured against loss by fire to the full value thereof in the names or name of the trustees or trustee for the time being of this my will and also keeping the same in good repair and condition (reasonable wear and tear excepted), and after her death the same shall fall into my residuary estate." The testator directed that his residuary estate should be divided among his children in equal shares.

The plaintiffs said that Charlotte Leach had occupied the premises in Castle-street from 1884 (when William Leach died) until her death on February 8, 1926, but that, in breach of the terms of the will, she had neglected to keep them in good repair or condition (reasonable wear and tear excepted), and they complained that the defendants refused to remedy the same. The evidence showed that Charlotte Leach had done nothing actively to injure the house, but had done little to counteract natural decay. The defendants denied that Charlotte Leach had neglected to keep the premises in the condition in which she was bound to keep them and denied that any damages were payable by them under the will.

The case came before an Official Referee who gave judgment for the plaintiffs for £550 agreed damages and costs. The defendants appealed.

Mr. Rayner Goddard, K.C., and Mr. F. J. Tucker appeared for the plaintiffs; Mr. Owen Thompson, K.C., and Mr. H. C. Dickens for the defendants.

MR. JUSTICE SALTER delivered the following considered judgment:—This is an appeal by the defendants from a judgment given for the plaintiffs by the Official Referee.

By his will dated March 29, 1884, William Leach devised his house and grounds at Salisbury to his wife for life with remainder to his three children in equal shares. He died in November of that year. His widow occupied the house for 42 years. She attained a great age and died in 1926. After her death the house and grounds were found to be in a condition which was described by the Official Referee in his judgment as follows:—"It is obvious, from the point of view of internal decorations and the outhouses, that it is now very badly kept and in places almost ruinous. The glasshouses have largely collapsed, the bridge has disappeared and the summer houses are a wreck. The whole premises have been allowed to get into a very shocking state of disrepair." It was common ground that the house was in a very good state of repair and good condition at the time of the death of William Leach. The widow during her long life tenancy had done nothing actively to injure the house. She had merely omitted almost entirely to repair it and for this long period of time she had done very little to counteract the natural process of decay.

This action was brought by the trustees of the will of William Leach against the executors of the late Mrs. Leach claiming the sum of £734 12s. by way of compensation for the dilapidated condition of the premises.

It is not necessary to consider what may be the true technical basis of the cause of action. It is admitted that the widow having occupied under this devise is bound by the conditions in the will, and, in my opinion, the words which we have to construe bear the same meaning whether they occur in a will or settlement limiting the interest of a tenant for life or in a lease or other contractual document imposing liabilities on tenants for years. It is further agreed that, since there was here obviously a breach of the covenant to keep these premises in good repair and condition, it rests upon the defendants to show that they come within the exception of reasonable wear and tear. Before the Official Referee counsel came

* Reported by G. F. L. BRIDGMAN, Esq., Barrister-at-Law.

to an agreement with a view to raising a plain issue and avoiding as far as possible detail and expense. In cases where a covenant of this kind has to be considered there is a natural tendency on the one hand to minimize and ignore the exception and, on the other hand, to exaggerate it until it almost destroys the covenant to repair, and it was plain that the true view might lie somewhere between two extremes. To avoid difficulties of that kind, counsel very wisely agreed and the Official Referee approved their agreement and acted upon it, that if the Official Referee should prefer the reading of this covenant put forward on behalf of the defendants, he should give judgment for the plaintiffs for an agreed sum of £97 and the defendants should have the costs of the action, but that if he did not approve the defendants' reading he was to give judgment for the plaintiffs for £550 and costs. He gave judgment for the plaintiffs for that sum, with costs, and the question is whether he was right in fact and law.

I will shortly deal with some cases which were cited to us, in so far as decided cases can afford any help in the construction of particular documents. Apart from the cases, I should have thought that the intention of the testator, as expressed in the passage which I have read, was tolerably clear. There is a plain and dominant intention to protect the interests of the remaindermen as regards both the house and the chattels which were also left for the widow's use. She is to insure the house against fire and that not in her own name but in the names of the trustees of the will. There is a substantial repairing covenant and, even as regards the chattels, there is provision made for seeing that they are not lost or wasted. On the other hand, it is clear that the testator did not wish his wife to be in the position of a tenant for years under a lease. She is not to be responsible for reasonable wear and tear, but that exception is to be construed reasonably so as not to trench unduly on the generality of the covenant to repair or to injure unfairly the interest of the remaindermen.

Turning to the authorities there are many cases in which the net liability imposed by a covenant of this kind has been considered, but only two which have dealt—and those perhaps rather slightly—with the exception of fair wear and tear considered alone and the effect that such an exception has upon the liability to repair under the covenant.

The first case that is often referred to in cases of this kind is the case of *Gutteridge v. Munyard* (7 C. and P., 129). That was a case between landlord and tenant. There was a covenant to keep and leave in a certain condition of repair, "reasonable use and wear thereof in the mean time only excepted," and upon that covenant Chief Justice Tindal first directed the jury: "The main subject of the demise is an old house. Now, when a very old building is demised, it is not meant that it should be restored in an improved state, nor that the consequences of the elements should be averted: but the tenant has the duty of keeping it as nearly as may be in the state in which it was at the time of the demise by the timely expenditure of money and care." That direction was the subject of some criticism in the Court of Appeal in the case of *Lurcott v. Wakely and Wheeler* ([1911] 1 K.B., 905, at p. 912). I think that it is unnecessary to refer to those comments. Whether Chief Justice Tindal correctly expressed what he intended to express is not, I think, very important having regard to what he said in the case of *Mantz v. Goring* (4 Bing. N.C., 451), to which I will refer next. But it is to be observed that the case of *Lurcott v. Wakely and Wheeler* (*supra*) was a case in which there was no exception at all of fair wear and tear and obviously, therefore, there was no criticism of anything which Chief Justice Tindal may have said about a fair wear and tear exception.

Mantz v. Goring (*supra*) was an action by landlord against tenant for damages for breach of the covenant to repair. The covenant was to keep "in tenantable repair, reasonable wear and tear excepted." The buildings were old. There was a verdict for the plaintiff. A rule *nisi* for a new trial was obtained on the ground of exclusion of evidence. The rule was discharged and in giving judgment Chief Justice Tindal, presiding over the Court, said: "Everyone knows what such a covenant means, and the tenant must fulfil it according to the nature of the premises: for it is established by *Stanley v. Towgood* (3 Bing. N. C. 4) and other cases that the same nicety of repair is not exacted for an old building as for a new one. It is clear, however, that justice has been done here according to that principle, for it was proved that it would have cost £155 to put these premises in complete repair, and the jury threw off the £100, probably because they were old." That judgment, like the summing-up in *Gutteridge v. Munyard* (*supra*) seems to deal mainly with the application of a covenant of this kind to an old house.

The next case referred to was *Scales v. Lawrence* (2 F. and F., 289), also a landlord and tenant case. Here there was a covenant so often as need should require, well and sufficiently to repair, uphold, sustain, paint, glaze, cleanse, &c., a house and premises and to leave the premises in such repair, "reasonable wear and tear excepted." It was held that if at the expiration of the lease the tenant had repaired within a reasonable time before leaving, he was only bound, "in addition to the repair of actual dilapidations, to clean the old paint, &c., and not to repaint, &c." Upon that covenant Mr. Justice Willes directed the jury "No tenant is bound to leave, for his landlord, a new house; but the house which he took, in a state of fit repair, as such house. And if he has painted the outside in three years, and the inside within seven years, he is not bound to do it again when leaving, unless so far as is required by actual dilapidations or destruction of the paint; and so of other repairs. He may, if he likes, have the benefit of his repairs, so as to leave the premises in a fit state, reasonable wear and tear excepted. If he painted and papered within seven years, and there is no damage in the way of breaking down or tearing off, then the reasonable construction of the covenant is, that he should 'cleanse' the old paint, &c., (or renew it only where destroyed), and give up the house in a clean and fair condition, and for fair wear and tear he would not be liable. Questions of this sort are questions of fact for you, to be decided on what are the substantial merits of the case rather than on strict rights or extreme law. The landlord is not to claim for every crack in the glass or every scratch on the paint. The reasonable rule probably would be not to charge for a pane of glass merely with one crack in it, and so forth. Such covenants must not be strained, but reasonably construed, on the principle of 'give and take'."

I think that the point to be made for the present purpose from those three cases is that in all of them very little stress is laid on the exception of reasonable wear and tear. The covenant is construed in those cases not quite, no doubt, as it would have been construed, but very much as it would have been construed, if that exception had not been present.

Those three cases I think go strongly to show that this exception is not to be construed as making any great or grave inroad on the general liability to repair.

The first of the more modern cases is *Davies v. Davies* (38 Ch.D., 499). That was a case tried before Mr. Justice Kekewich and it raised the question whether a lease which had been granted by a tenant-for-life went beyond the power of leasing given to such tenants by the Settled Estates Act, 1877. That statute provides that such leases shall not be made without impeachment of waste. In *Davies v. Davies* (*supra*) the lease was granted exempting the lessee from liability for "fair wear and tear and damage by tempest" and the question was whether that exemption protected the tenant for years from any liability which would have rested on him at common law. It was plain that it did. The exception of damage by tempest alone would have been sufficient to invalidate the lease and that being so, it was unnecessary to decide how far the terms of the lease relieved the tenant for years from liability resting on him at common law. The learned Judge's observations therefore which are at page 505 were not strictly necessary to the decision of the case. I do not mean to say by that that I in any way differ from them. What the learned Judge says is: "The result is that the tenant although he is liable to the covenant to repair, is not to be liable for any repairs consequent upon or rendered necessary by fair wear and tear, or by damage from tempest. If those words were not there, any dilapidations found at any time or at the end of the term by reason of the wear and tear, the wearing out of the walls and floors of the public-house, for example, from the constant traffic and so forth, he would be liable to replace, and if unfortunately by a storm his chimney-pot was blown down, or he had his roof broken, he would be bound to put it straight, and restore the place to good and substantial repair. From those things he is rendered free by that exception—that is to say, by that exception he is rendered unimpeachable for waste in those particulars. That is just what the statute says he shall not be, and I think that that shows that the provisions of the statute have not been complied with." Whether those observations are absolutely correct or not, I see nothing in that decision to affect the view which I take of this covenant.

The next case is important because it is one of the only two cases in which the meaning of the exception has been considered. It is the case of *Terrell v. Murray* (17 *The Times* L.R., 570). That was an action by landlord against tenant for breach of contract in failing to deliver up the demised house in the agreed state of repair. The covenant was to deliver up "at the expiration or sooner determination of the said term in as good repair and condition as it is now in, reasonable wear and tear . . . excepted." There was no covenant to repair during the term. At the expiration of the term the lessor claimed for dilapidations including three items, one for painting the outside woodwork of the house, another for repointing the brickwork, and the third for repairing parts of the kitchen floors which had become affected by dry rot. It was held that the lessee was not liable for those three items. The Official Referee had found the liability at £39 which included £12 for painting the outside woodwork of the building, £2 for repointing certain brickwork, and £5 for repairing parts of the kitchen floor. On appeal the Divisional Court found for the appellant, the defendant. Mr. Bonsey, for the plaintiff, went so far as to argue that the words in the exception were mere surplusage and did not, at any rate, apply to the outside of the house. Mr. Justice Bruce said that "it was a little curious that there was no very satisfactory authority as to the meaning of the words 'fair or reasonable wear and tear.' He could not agree with Mr. Bonsey when he said that no meaning ought to be given to the words at all, nor could he agree that they had no operation in regard to the outside of the premises. The meaning of the covenant in his opinion was that the tenant was bound at the end of the tenancy to deliver up the premises in as good condition as they were in at the beginning subject to the following exceptions, that was to say, dilapidations caused by the friction of the air, dilapidations caused by exposure, and dilapidations caused by ordinary use. As he was of opinion that outside painting was not a thing the tenant was bound to do under that covenant, and as the amount due to the plaintiff would thus be reduced to the amount paid into Court, he gave judgment for the defendant." Mr. Justice Phillimore felt some difficulty, but on the whole he concurred. The only points decided in that case were that an exception of reasonable wear and tear is not to be regarded as mere surplusage and that a proper meaning must be given to it and that there there was no liability to do outside painting. That case was much relied upon by the defendants but I find nothing in it to alter the view which I have formed. The next case is *Citron v. Cohen* (36 *The Times* L.R., 560). In that case Mr. Justice Sankey accepted the definition or explanation of "reasonable wear and tear" given in the case to which I have just referred, but the case was decided on other points altogether. It was decided that the dilapidations of which the landlord complained were his own doing.

The next case is *Miller v. Burt* (63 Sol. Jo., 117). In that case the house was old and was moreover in bad repair at the beginning of the term. The covenant was to keep the house in the same state of repair, that is to say, it amounted to a covenant not to allow the house to go from bad to worse, "fair wear and tear excepted." The Court pronounced a formula for the guidance of the arbitrator in these words: "The tenant is responsible for repairs necessary to maintain the premises in the same state as when he took them. If, however, wind and weather have a greater effect on the premises, having regard to their character, than if the premises had been sound, the tenant is not bound so to repair as to meet the extra effect of the dilapidations so caused." That appears to be nothing more than a statement that in dealing with a covenant to keep old premises in the same state of repair as they were in at the date of the lease, the age of the premises and their condition at the beginning of the tenancy must be taken into consideration, but that would equally have been so if there had been no exception of fair wear and tear at all and it appears to me that that formula throws no light at all upon the meaning and effect of a fair wear and tear exception.

The last case referred to was *Manchester Bonded Warehouse Company, Limited v. Carr* (5 C.P.D., 507, at p. 513). There the plaintiffs had demised certain floors in a warehouse to the defendant at a rent and the defendant had covenanted to repair, maintain, and keep the inside of the premises in good and tenantable repair and condition and to deliver them up at the end of the term, damage by fire, storm, or tempest, or other inevitable accident, and reasonable wear and tear only excepted. Five points were discussed and the only one which is now

material was the extent of the liability of the defendant under his covenant. At page 513, Lord Coleridge, C.J., says this: "It only remains to consider whether reasonable wear and tear can include destruction by reasonable use. These words, no doubt, include destruction to some extent, *e.g.*, destruction of surface by ordinary friction, but we do not think they include total destruction by a catastrophe which was never contemplated by either party." That case and the case of *Terrell v. Murray* (*supra*) are the only cases in which the exception has been separately considered, where the wear and tear was defined as meaning the dilapidations by certain destructive agencies rather than those agencies themselves. In my opinion, such words as "fair" and "reasonable" in an exception of this kind qualify both the destructive agencies which do the damage and also the dilapidation which they bring about. Such words can be used no doubt to qualify human user, but they could not be used to qualify forces of nature. It would be impossible to speak of an "unfair rain" or an "unreasonable frost." To bring dilapidations within the protection of such an exception as that in this case, I think that two things must be shown: First, that the dilapidations for which exemption is claimed were caused by normal human use or by the normal action of the elements, and, secondly, that they are reasonable in amount, having regard to the terms of the contract to repair the premises and keep them in good condition and the other circumstances of the case. In the present case, as I have said, there was an omission to repair for a very long period of time. For 42 years the widow was tenant in possession and failed to take any steps to counteract the natural process of decay.

On those facts I have some difficulty in holding that these dilapidations were not caused by reasonable wear and tear, but I am quite clear that they are not reasonable wear and tear on the ground that they are altogether unreasonable in amount and inconsistent with the plain intention of the testator.

For these reasons I am of opinion that the Official Referee was right and that the appeal fails.

Mr. Justice Talbot read the following judgment:—The plaintiffs are trustees of the will of William Leach who died in November, 1884. The defendants are executors of his widow who was tenant for life under his will of a house and premises in Salisbury. She died in February, 1926. The devise provided for repairs of the premises by the tenant for life as follows: "She . . . keeping the same in good repair and condition (reasonable wear and tear excepted)." She was also bound to insure against fire in the names of the trustees of the will. The effect of the words set out is that having accepted the devise and enjoyed the property she is bound in equity by this condition under which it was left to her as if she had covenanted in the same terms.

The action was brought by the trustees to recover damages from her estate for alleged breaches of the condition and was tried by one of the Official Referees. The course which the trial took was that, after evidence for the plaintiffs and argument as to the construction of the condition in the will, figures were agreed as those for which the judgment should be given respectively according as the Official Referee adopted one or other of the rival contentions. He adopted that of the plaintiffs and gave judgment accordingly for £550. If the defendants are right, the agreed figure is £97. These figures were compromise figures and do not represent an exact calculation. It is perhaps unfortunate that the Official Referee does not state very precisely the two constructions of which he chose one. Roughly I think they come to this. The plaintiffs said that, while the tenant for life was not liable for defects directly caused by wear and tear, the exception did not supersede the first part of the condition and she was bound to do such repairs as were necessary to prevent damage, even if originally caused by wear and tear, from producing further damage, or (putting it somewhat differently) that damage caused by reasonable wear and tear meant damage so caused by a tenant who acted reasonably. The defendants said that as to any damage caused by reasonable wear and tear the tenant for life was entitled to do nothing, and simply to be inactive, whatever might be the consequences to the property. It is scarcely too much to say that as to this class of damage the result is to leave the tenant for life liable for voluntary waste only to which she would be liable without any express condition. On the other hand, it is true that the plaintiffs' surveyors admitted that for all practical purposes they had disregarded the exception altogether. It is obviously the duty of the Court to give effect if possible to the whole of the condition and exception and, bearing this in mind, I will state what is, in my opinion, its true construction, which must, I think, be the same as if like words were in a covenant in a lease.

The meaning is that the tenant (for life or years) is bound to keep the house in good repair and condition but is not liable for what is due to reasonable wear and tear. That is to say, his obligation to keep in good repair is subject to that exception. If any want of repair is alleged and proved in fact, it lies on the tenant to show that it comes within the exception. Reasonable wear and tear means the reasonable use of the house by the tenant and the ordinary operation of natural forces. The exception of want of repair due to wear and tear must be construed as limited to what is directly due to wear and tear, reasonable conduct on the part of the tenant being assumed. It does not mean that if there is a defect originally proceeding from reasonable wear and tear the tenant is released from his obligation to keep in good repair and condition everything which it may be possible to trace ultimately to the defect. He is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce. For example, if a tile falls off the roof, the tenant is not liable for the immediate consequences: but, if he does nothing and in the result more and more water gets in, and the roof and walls decay, and ultimately the top floor, or the whole house, becomes uninhabitable, he cannot say that it is due to reasonable wear and tear and that therefore he is not liable under his obligation to keep the house in good repair and condition.

In such a case the want of repair is not in truth caused by wear and tear. Far the greater part of it is caused by the failure of the tenant to prevent what was originally caused by wear and tear from producing results altogether beyond what was so caused. On the other hand, take the gradual wearing away of a stone floor or staircase by ordinary use. This may in time produce a considerable defect in condition, but the whole of the defect is caused by reasonable wear and tear, and the tenant is not liable in respect of it.

It has been said both in reported cases and in text books that there is strangely little authority on

the construction of this familiar exception. What authority there is is for the most part in summings-up at *nisi prius* or in short and imperfect reports of judgments. I know of no case which is at all inconsistent with what is said above. Indeed it appears to me that our judgment in this case is to a considerable extent supported by the case of *Manchester Bonded Warehouse Company, Limited v. Carr* (5 C.P.D., 507). In *Terrell v. Murray* (17 *The Times* L.R., 570) there appears to have been no evidence at all of any defect in the painting not directly due to reasonable wear and tear in the sense explained above and the tenant was accordingly held to be protected by the exception from any liability in respect of painting. This view which I take of the liability of the tenant for life being in substance that submitted by the plaintiffs and adopted by the learned Official Referee, I agree that the appeal should be dismissed.

The appeal was accordingly dismissed with costs.

[Solicitors—Messrs. Taylor, Jelf and Co.; Messrs. J. R. Welch and Son, for Messrs. Turner, Turner and Martin, Ipswich.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)
1927. Dec. 15.

GRAIGOLA MERTHYR COMPANY, LIMITED v. SWANSEA CORPORATION.*

Local Government—Unsuccessful action against local authority—Costs as between solicitor and client—*Quia timet* action—"Act done"—Public Authorities Protection Act, 1893 (56 and 57 Vict., c. 61), s. 1.

Section 1 of the Public Authorities Protection Act, 1893, which directs that a successful defendant shall be entitled to costs as between solicitor and client in an action in respect of "any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority," applies to a *quia timet* action, where the act of the defendant is anticipated, but has not been actually completed.

The plaintiffs brought a *quia timet* action against the defendants for an injunction to restrain them from filling a certain reservoir, it being feared that the water might filter through and damage the plaintiffs' mines. Mr. Justice Tomlin dismissed the action (see 43 *The Times* L.R., 600), directing the plaintiffs to pay to the defendants two-thirds of their costs of the action. The Taxing Master proposed to allow the defendants costs as between solicitor and client, in accordance with section 1 of the Public Authorities Protection Act, 1893, the material parts of which are as follows:—

Section 1.—"Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect. . . .

"(*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client. . . ."

The plaintiffs, however, moved before Mr. Justice Tomlin that only costs taxed in the ordinary way, as between party and party, should be allowed, on the ground that there was in the present action no "act done" by the defendants. The plaintiffs contended that section 1 (*b*) did not apply to a *quia timet* action, where the defendants had done nothing at all, but where it was merely apprehended that they might do something in the future.

Mr. Justice Tomlin refused the application, and the plaintiffs appealed.

Mr. Upjohn, K.C., and Mr. A. T. James appeared for the plaintiffs; Sir Leslie Scott, K.C., and Mr. Holmes for the defendants.

The MASTER OF THE ROLLS, in his considered judgment, after stating the material facts, continued:—

Counsel for the plaintiffs do not dispute that the act threatened to be done and sought to be restrained was in execution of an Act of Parliament. Upon that basis an application was made to Mr. Justice Tomlin for an order under section 1 (*b*) of the Public Authorities Protection Act, 1893, which runs as follows: "Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client. . . ." Mr. Justice Tomlin, after argument upon a motion to vary the minutes of his judgment, confirmed his order that the plaintiffs pay to the defendants two-thirds of their costs of the action to be taxed as between solicitor and client, and also ordered them to pay the costs of the motion to vary the minutes of the order. From that refusal to vary his order the plaintiffs appeal. They claim that the section above quoted does not apply, because it is only applicable to such actions as are comprised within section 1 of the Act, namely, where an action is commenced "for any act done in pursuance, or execution, or intended execution of any Act of Parliament"; and that clause (*a*) imposes a time limit to bringing an action founded upon such an act, as illustrated by *Freeborn v. Leeming* (42 *The Times* L.R., 119; [1926] 1 K.B., 160). They argue that the present action is *quia timet*, before any act has been done, and was instituted by the plaintiffs to prevent any act from being done in execution of the Acts of Parliament referred to, which would have caused injury, and thus there was no "act done" within the section, which demands that there should be an act from which time may be calculated.

There is no doubt that orders for costs as between solicitor and client have been made in *quia timet* actions. Thus in *Harrop v. Ossett Corporation* (14 *The Times* L.R., 308; [1898] 1 Ch., 525) such an order was made where the claim was for an injunction *quia timet*. So also in *Toms v. Clacton Urban District Council* (14 *The Times* L.R., 474), and apparently in *Holford v. Acton Urban District Council* (14 *The Times* L.R., 476; [1898] 2 Ch., 240), and in *Southwark and Vauxhall Water Company v. Wandsworth District Board of Works* (14 *The Times* L.R., 576; [1898] 2 Ch., 603). The last is a decision of the Court of Appeal, but the point now taken does not appear to have been argued. In *Grand Junction Waterworks Company v. Hampton Urban District Council* (15 *The Times* L.R., 412) Mr. Justice Stirling made an order for costs as between solicitor and client in a *quia timet* action, and he rejected the argument that because the plaintiffs claimed a declaration simply, and the action was not brought for some act of the defendants, the

* Reported by G. T. WHITFIELD-HAYES, Esq., Barrister-at-Law.

power to order such costs did not apply. He said that "so to decide would be shutting one's eyes to the facts of the case. The action was not brought to decide an abstract question, but to ascertain whether the defendants would be right or wrong if they carried out their threats and took proceedings before the proper tribunal, as they had threatened to do." This reasoning appears to me to be correct. A *quia timet* action is not based upon hypothetical facts for the decision of an abstract question. When the Court has before it evidence sufficient to establish that an injury will be done if there is no intervention by the Court—it will act at once, and protect the rights of the party who is in fear, and thus supply the need of what has been termed protective justice. It is a very old principle. Sir E. Coke, 2nd Institute, page 299, says that preventing justice excelleth punishing justice, and quotes Bracton's advice : "*Et hoc faciat tempestive, ne per negligentiam damnum incurrat, quia melius est in tempore occurrere quam post causam vulneratam remedium quaerere.*"

In the Smallpox Hospital case, *Attorney-General v. Manchester Corporation* (9 *The Times* L.R., 315 ; [1893] 2 Ch. 87, at p. 91), Mr. Justice Chitty said that where it is certain that injury will arise the Court will at once interfere by injunction, and called attention to the words of Lord Eldon in *Crowder v. Tinkler* (19 Vesey, 617, at p. 622), "extreme probability of irreparable injury" ; and of Lord Brougham in *Earl of Ripon v. Hobart* (3 M. and K., 169, at p. 176) : "Proceeding upon practical views of human affairs, the law will guard against risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage." See also Mitford on Pleading, pp. 171-2. From these authorities it appears that the action of the Court in a *quia timet* action is one rather of procedure when it has become seized of facts which require its intervention. It takes the facts as they must appear to practical men ; but it does require facts, and not mere suggestion. In the present case, therefore, upon the pleadings to which I have referred, it appears to me that the foundation of the action was the acts of the corporation which would be done under their statutory powers. They were regarded by the plaintiffs as acts imminent—and no longer contingent, and forced them to found an action, and to bring these facts to the attention of the Court and require assistance from it.

It is true that in *Fielden v. Morley Corporation* (14 *The Times* L.R., 566, 576 ; [1899] 1 Ch., 1, and 16 *The Times* L.R., 219 ; [1900] A.C., 133), where it was held that the statute does not apply to appeals, Lord Lindley entered a caveat as to what acts do come within the statute. That case, however, does not, in my judgment, modify the observations which I have ventured to make as to the basis on which the Court was invited to act in the present case. In any view, it appears to me that it would be too narrow an interpretation of this remedial statute to cut down the meaning of the words "act done" to an act which had been completed. The threat to proceed is sufficient. I agree with the view of Mr. Justice Romer in *Harrop v. Ossett Corporation* (*supra*, at p. 527) that there is no reason for limiting the scope of the section in a narrow sense.

In my judgment, the order made in the *Southwark and Vauxhall Water Company's* case (*supra*), affirmed in the Court of Appeal, where the Board of Works were about to lower the surface of the street, was a right order. Where the section applies it is directory, and therefore, in my judgment, the order of Mr. Justice Tomlin was right. The appeal must be dismissed, with costs as between party and party.

LORD JUSTICE SARGANT.—I agree that this appeal should be dismissed, and am content to adopt as my own the judgment on this point of Mr. Justice Tomlin. His reasoning has not, in my opinion, been displaced or substantially affected by the criticisms of counsel for the plaintiffs.

LORD JUSTICE LAWRENCE.—This appeal raises a question of general importance—namely, whether a *quia timet* action for an injunction comes within section 1 of the Public Authorities Protection Act, 1893, so as to entitle the public authority to solicitor and client costs as against an unsuccessful plaintiff.

In the present case the act sought to be restrained by injunction was an act which the defendants were intending to do in the execution of their statutory powers and duties as the local authority for the district and borough of Swansea.

On behalf of the plaintiffs it was contended that section 1 of the Act only applies to actions for completed acts and completed neglects or defaults, and that the present action does not come within the section because it is an action to prevent the defendants from doing an act and not an action for an act already done by them.

In *Fielden v. Morley Corporation* (14 *The Times* L.R., 566, 576 ; [1900] 1 Ch., 1), affirmed in the House of Lords (16 *The Times* L.R., 219 ; [1900] A.C., 133), it was held that the section applied to actions for injunctions in the Chancery Division, and Lord Lindley, in delivering the judgment of the Court, after quoting the title of the Act, stated that the key to the enactment was that it was intended, as the title showed, to protect public bodies from expense when they were unsuccessfully sued in respect of acts done or omitted to be done in the exercise of statutory powers or duties. In that case the action was brought to restrain the overflow of water on to the plaintiff's land, but in the judgment there is no hint of a distinction between *quia timet* and other actions for an injunction.

The principle upon which that case was decided, in my opinion, applies as much to actions for an injunction to restrain an act threatened to be done by a public body in the exercise of statutory powers or duties as to actions for an injunction to restrain the repetition of an act which had already been done by such a body in the exercise of such powers or duties. In the latter case as well as in the former the injunction sought is an injunction to restrain future acts. The only difference between the two cases is that in a purely *quia timet* action the burden of proof resting on the plaintiff is far heavier than in an action where an act has already been done and has already caused actual damage. In both cases, however, the issue is the same—namely, whether the act (completed or intended) is an act causing substantial damage to the plaintiff. It would be strange if the protection afforded by the Act to public bodies were to depend upon the precise moment when an action was commenced, and that if the plaintiff should happen to issue his writ before the act was done the public body would lose the protection afforded by the Act, but if the plaintiff were to delay the issue of the writ until after the act had been done the public body would have that protection. In the present case counsel for the plaintiffs had to admit that if the defendants had actually commenced filling their reservoir, instead of first giving to the plaintiffs notice of their intention to fill it, he

could not have contended that this action would not have fallen within the section.

In at least two of the cases cited during the argument it was held that the local authority was entitled to solicitor and client costs on the dismissal of a purely *quia timet* action for an injunction—namely, *Harrop v. Ossett Corporation* (14 *The Times* L.R., 308 ; [1898] 1 Ch., 525) and *Southwark and Vauxhall Water Company v. Wandsworth District Board of Works* (14 *The Times* L.R., 576 ; [1898] 2 Ch., 603). In the former case Mr. Justice Romer, and in the latter case the Court of Appeal (after having reserved judgment), dismissed the action and ordered the plaintiffs to pay the defendants' costs as between solicitor and client. So far as appears, the point taken by the plaintiffs on the present occasion was not taken by counsel in either of these cases, but it is not, therefore, to be assumed that in making the orders the Court was unmindful of the fact that the actions were purely *quia timet* actions. Although these cases were decided upwards of 25 years ago, I am not aware of any case until the present in which it has been suggested that the orders made in these two cases were wrong.

To hold that the operation of the section is limited to actions for an injunction where some act has already been done would, in my opinion, be placing a construction on the language of the section which is too narrow and contrary to the principle upon which *Fielden v. Morley Corporation* (*supra*) was decided. The plaintiffs' contention rests mainly in the use of the past tense in the expression "any act done." Having regard to the collocation in which that expression occurs, I think that the plaintiffs are attributing far too much weight to the past participle "done." The section deals with actions for acts and for omissions, both of a limited kind—namely, acts and omissions in the exercise of some statutory authority or duty—and, in separating acts from omissions and appending the necessary qualification to each, the use of the word "done" is not unnatural in the case of acts as distinguished from omissions, such word not being there used in an essentially temporal signification. In my opinion the expression "for any act done" in the section bears much the same meaning as the expression "for doing any act" and does not operate to exclude *quia timet* actions for threatened acts.

Counsel relied upon clause (*a*) of the section, which, as he rightly pointed out, has been strictly construed by the Courts (see, for example, *Freeborn v. Leeming*, 42 *The Times* L.R., 119 ; [1926] 1 K.B., 160), as showing that *quia timet* actions cannot properly be held to fall within the scope of the section. In my opinion this clause does not support his contention. Clause (*a*) imposes a time limit after the expiration of which no action will lie ; actions for an injunction brought before the act complained of is done are not within the mischief aimed at by the clause, and such actions are not, in my opinion, purported to be prohibited by that clause. The real meaning of that clause is that no action shall lie unless it is commenced *at the latest* before the expiration of six months next after the act or omission complained of. This construction in no way touches or affects the decisions of the Court in cases like *Freeborn v. Leeming* (*supra*).

In the result, I have come to the conclusion that the present action is in substance an action for an "act done" in execution of a statutory power or duty within the meaning of the section. I am fortified in this view by the fact that it accords not only with the decisions in the cases to which I have referred, but also with the view expressed by Mr. Justice Stirling in *Grand Junction Waterworks Company v. Hampton Urban District Council* (15 *The Times* L.R., 412), where that learned Judge held that an action for a declaration brought for the purpose of testing the legality of an act threatened to be done by the local authority if the plaintiffs continued the erection of certain buildings was an action falling within the provisions of the section, and ordered the plaintiffs to pay costs as between solicitor and client.

For the reasons stated I think that the appeal fails and should be dismissed with costs.

[Solicitors—Messrs. Beamish, Hanson, Airy, and Co., for Messrs. Gwilym James, Llewellyn, and Co., Merthyr Tydfil ; Messrs. Peter Thomas and Clark, for Mr. H. L. Lang-Coath, Swansea.]

K.B. Div. (Shearman and Finlay, JJ.) 1927. Dec. 15.

ROE v. RUSSELL.*

Landlord and Tenant—Restrictions—Statutory tenant—Right to sublet—Position of sub-tenant after determination of tenant's tenancy—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 15 (1).

Section 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides :—"A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act. . . ."

The right to sublet possessed by a common law tenant in the absence of prohibition in the agreement or lease creating the tenancy is not a term or condition of the original tenancy within this subsection so as to ensure to the benefit of a statutory tenant.

Therefore, a "statutory tenant" (*i.e.*, a tenant who, after the expiration of his tenancy at common law holds over under the Rent Restriction Acts against the will of the landlord, or any other person who is protected from eviction by the Acts) has no right to sublet a portion of the premises occupied by him to a sub-tenant, although he was not forbidden to sublet in his original contract of tenancy.

A case which raised the question whether a statutory tenant under the Rent Restriction Acts had a right to sublet part of the premises occupied by him came before the Court on appeal from his Honour Judge Hargreaves at Brentford County Court. Their Lordships decided that the tenant had no such right.

In September, 1915, a Mr. Jameson became the tenant of certain premises within the Rent Restriction Acts, of which the rooms which were the subject of the present proceedings formed part. The landlord

* Reported by G. F. L. BRIDGMAN, Esq., Barrister-at-Law.

of the whole premises was then a Mrs. Alders, and under his tenancy agreement Mr. Jameson was not forbidden to sublet. In November, 1919, Mrs. Alders assigned her interest in the premises to the plaintiff, Mr. Percy Davis Roe. In 1921 Mr. Roe served a notice to quit on Mr. Jameson, who thereupon became a statutory tenant of the premises. In November, 1925, Mr. Jameson sublet to the defendant, Mr. William Russell, an omnibus inspector, the rooms which were the subject of the present proceedings. In July, 1926, Mr. Roe obtained an order for possession of the whole of the premises against Mr. Jameson on the ground of non-payment of rent, and Mr. Jameson left the premises in May, 1927, leaving the defendant in possession of the rooms which had been sublet to him. Mr. Jameson had never agreed that a term should be added to his tenancy prohibiting him from subletting.

The plaintiff took proceedings in the county court for the ejectment of the defendant from the rooms occupied by him, and the county court Judge decided in the plaintiff's favour. The defendant appealed.

Mr. Schultess-Young appeared for the appellant; Mr. Sidney Isaacs for the respondent.

Mr. Justice Shearman.—This appeal must be dismissed. It is always wise to define one's terms. In my judgment "statutory tenant," that familiar phrase, does not mean a tenant who occupies a house at such a rental that it comes within the scope of the Rent Restriction Acts, but a tenant who holds over after the expiration of his tenancy against the will of the landlord. That would include anyone who acquires a right under the Acts not to be evicted. In these cases a distinction must always be drawn between a person who derives his rights under the original lease or agreement for a lease which makes him a tenant at common law and a person whose only rights are those which he obtains under the Acts.

The argument addressed to us on behalf of the appellant in the present case and in support of the contention that the tenant, Jameson, had a right to sublet to him the rooms which are the subject-matter of the present dispute is based on section 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. It is contended that the words in that subsection, "a tenant . . . shall . . . be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act," conferred on Jameson the right to sublet to the appellant part of the premises which he occupied as tenant. For a long time the subsection was thought, not by express decision but by tacit assumption, to confer such a right, but, in my judgment, that belief was put an end to by the decision in *Keeves v. Dean* (40 *The Times* L.R., 211; [1924] 1 K.B., 685). In that case the Court held that the right to assign which belongs to a common law tenant in the absence of provision to the contrary in the lease or agreement creating the tenancy was not one of the "terms and conditions of the original contract of tenancy" to the benefit of which a statutory tenant who had not been forbidden to assign by the terms of his lease or agreement was entitled under the subsection.

Before *Keeves v. Dean* (*supra*) there were a number of decisions in which no distinction was drawn between the statutory tenant and the tenant who was still in occupation under his original unexpired lease or tenancy agreement, from the point of view of the rights or estate which passed to executors, trustees in bankruptcy, and so forth. Later, however, the current of the decisions flowed in the other direction and, in my view, *Keeves v. Dean* (*supra*) clears up the matter, although it is curious that section 5, subsection 1 (*h*), of the Act of 1920 as amended by the Act of 1923 was not referred to in the arguments or in the judgments there. I cannot understand how the right to sublet can be considered to be one of the "terms and conditions of the original contract of tenancy" when the right to assign is not.

After *Keeves v. Dean* (*supra*) there was a dictum of Mr. Justice Swift in *Aston v. Smith* (40 *The Times* L.R., 576; [1924] 2 K.B., 143, at p. 146) where he said: "A statutory tenant . . . is a person who has a personal right not to have an order for possession made against him, and that is the only right he possesses. He cannot assign, sublet or demise it or deal with it in any way." Then there was *Wheeler v. Smith* (unreported, May 14, 1926), which expressly decided that a statutory tenant had no interest which entitled him to sublet.

It is, however, argued that *Campbell v. Lill* (42 *The Times* L.R., 397) is contrary to the decision in *Keeves v. Dean* (*supra*), but examination of *Campbell v. Lill* (*supra*) shows that only one question came up for decision, and that was whether the landlord was entitled to possession under section 5 (1) (*h*) of the Act of 1920 as amended by the Act of 1923 on the ground that the tenant had sublet the demised premises without consent. I do not think, therefore, that there was anything in that decision to conflict with *Keeves v. Dean* (*supra*), but if there is any conflict between the two cases I prefer to follow the greater current of authority as expressed in *Keeves v. Dean* (*supra*) and to hold that a statutory tenant has no power to sublet. The result is that the defendant is not entitled to retain possession of the rooms which he has occupied, and that the decision of the county court Judge was right.

Mr. Justice Finlay.—I am of the same opinion, and I desire to add only a few sentences. There is no doubt that these statutes are puzzling and that difficulties arise on the decisions under them—difficulties which are very well illustrated by the fact to which our attention in this case was very properly called, that there are two *dicta* in precisely opposite directions, one by Mr. Justice Greer in *Parkinson v. Noel* ([1923] 1 K.B., 117, at p. 119) and one by Mr. Justice Swift in *Aston v. Smith* (40 *The Times* L.R., 576; [1924] 2 K.B., 143, at p. 146). So far as I am concerned, however, I think that my view of the Act is very well expressed by what Mr. Justice Lush, sitting as a member of the Court of Appeal, said in *Keeves v. Dean* (40 *The Times* L.R., 211, at p. 212; [1924] 1 K.B., 685, at p. 697): "When it is said that a person who, perhaps inaccurately, is called a statutory tenant can assign one necessarily asks oneself what it is that he has got to assign. He has no estate in the premises, that has come to an end, and all that the statute has given him is a purely personal right to be free from disturbance by his landlord. It is a very valuable right, but it is personal to him." That, I believe, accurately expresses the correct view of these statutes, and it seems to me to follow that the statutory tenant, as he has persistently, but very unfortunately, been called, cannot sublet for precisely the same reason—namely, that he has no estate out of which the subletting can be carved.

It was said on behalf of the appellant that we must have regard not only to that decision but also to the subsequent decision of two members of the Court of Appeal sitting as a Divisional Court, in *Campbell v. Lill* (42 *The Times* L.R., 397). I have felt some difficulty with regard to that case, but I think that the decision there is explained by noticing,

as appears from the latter part of the judgment of Lord Justice Bankes, that the Court was there directing its attention to the position created by section 4, subsection 1 (*h*), of the Rent and Mortgage Interest Restrictions Act, 1923. I should perhaps observe that Lord Justice Bankes had in *Keeves v. Dean* (*supra*) explained with very great clearness why he considered that section 15, subsection 1, of the Act of 1920 could not operate to cause the right to assign to be a term or condition of the original contract of tenancy (see 40 *The Times* L.R., at p. 212 ; [1924] 1 K.B., at p. 691). What Lord Justice Bankes there said with regard to the right of a statutory tenant to assign appears to me to apply, *mutatis mutandis*, to his right to sublet.

Lastly, we were referred to *Wheeler v. Smith* (unreported), which was decided about two months after the decision in *Campbell v. Lill* (*supra*). Any difficulty that might be felt with regard to the decision in *Campbell v. Lill* (*supra*) is largely removed by this later decision, which appears to me to be a decision directly in point and one which we are following in arriving at the conclusion to which we have come. Surveying the Acts as a whole, I think that we are putting the proper construction on them, and that, in so doing, we are following the main current of authority. I agree, therefore, that this appeal fails.

The appeal was accordingly dismissed, with costs.

[Solicitors—Mr. H. B. I. Schultess-Young ; Messrs. Abbott and Hudson.]

House of Lords.
(Viscount Haldane, Viscount Dunedin, Lord Shaw of Dunfermline, Lord Phillimore, and Lord Blanesburgh.)
1927. Dec. 19.

THE MOSTYN.*

Ship—Damage by ship to electric cable in docks—Absence of negligence—Whether shipowners "answerable" to dock undertakers—Harbours, Docks, and Piers Clauses Act, 1847 (10 and 11 Vict., c. 27), s. 74—Pilotage Act, 1913 (2 and 3 Geo. V., c. 31), s. 15.

The defendants' steamship, while proceeding from one of the plaintiffs' docks to another, through a communication channel, fouled with her anchor and did damage to certain cables owned by the plaintiffs and used for electric lighting and power in the docks. The plaintiffs alleged negligence on the part of the defendants or their servants, but by an amendment of their pleadings also alleged that the damage complained of was damage done by a vessel to a dock or works connected therewith, and that in any event the shipowners were answerable therefor to the plaintiffs, as undertakers of the said dock or works, by reason of s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847, as amended by s. 15 of the Pilotage Act, 1913. Section 74 of the Act of 1847 provides :—"The owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith ; and the master or person having the charge of such vessel or float of timber through whose wilful act or negligence any such damage is done shall also be liable to make good the same ; and the undertaker may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same : provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of." The Pilotage Act, 1913, by s. 15, abolished the defence of compulsory pilotage and in effect repealed the proviso to s. 74 of the Act of 1847.

Held (Viscount Dunedin and Lord Phillimore dissenting), that under s. 74 the plaintiffs did not require to prove negligence, but had only to show that the action which led to the damage was action attributable to human agency, and therefore that although negligence had not been proved the plaintiffs were entitled to recover.

River Wear Commissioners v. Adamson (2 App. Cas., 743) explained.

Decision of the Court of Appeal (42 *The Times* L.R., 710 ; [1927] P., 25) reversed.

This was an appeal from an order of the Court of Appeal (42 *The Times* L.R., 710 ; [1927] P., 25) affirming an order of the President of the Probate, Divorce, and Admiralty Division (42 *The Times* L.R., 288 ; [1926] P., 46).

The action was brought by the appellants, the Great Western Railway Company, to recover an agreed sum of £226 for damage done by the anchor of the respondents' steamship Mostyn to electric cables which were lying on the bottom of one of the appellants' docks at Swansea. The questions raised by the appeal were, first, whether the damage was caused by the negligence of the respondents ; and, secondly, whether, in the absence of negligence, the respondents were nevertheless, upon the true construction of section 74 of the Harbours, Docks, and Piers Clauses Act, 1847, liable to the appellants for the damage.

The President held (1) that there was no negligence on the part of the Mostyn ; (2) on the authority of *River Wear Commissioners v. Adamson* (2 App. Cas., 743), that in the absence of proved negligence section 74 of the Act of 1847 imposed no liability on the owner of a ship towards dock undertakers whose property had been damaged. The Court of Appeal affirmed the President's decision.

Mr. Raeburn, K.C., and Mr. Wilfrid Lewis appeared for the appellants ; Mr. Langton K.C., and Mr. K. S. Carpmael for the respondents.

VISCOUNT HALDANE.—My Lords : This was an action brought by the appellants against the respondents for damages for the negligence of the latter in so manœuvring the S.S. Mostyn that in navigating a concrete laid channel of communication between the King's Dock at Swansea belonging to the appellants and the Prince of Wales Dock, also belonging to them in common with the channel of communica-

* Reported by H. B. HEMMING, Esq., Barrister-at-Law.

tion, the Mostyn tore up and injured, to the extent of £226 4s. 6d., certain electric cables which crossed the bottom of the concrete laid channel in a horizontal chase-way, open at the top. The claim is based on an allegation of negligence, resulting in liability at common law, and also on the provisions of section 74 of the Harbours, Docks, and Piers Clauses Act, 1847, which it is said does not require proof of negligence in order to render it applicable. The Courts below have agreed in holding that negligence has not been proved, and the Nautical Assessors who have been present to advise us are of opinion that there was no negligence shown. I understand that we are unanimously of the same opinion, and I shall leave it to others of your Lordships to state the facts out of which this opinion has arisen. I wish, however, to guard myself from being supposed to concur unreservedly in the whole of the observations made by the President, Lord Merrivale, who tried the case, and also in all of the reasons given in the Court of Appeal, which affirmed his conclusion. In a case of this kind, tried after a prolonged interval and dealing with circumstances which have been difficult for the witnesses to observe accurately, it generally results that details of what has been said by witnesses are open to criticism. There has been a good deal of such criticism in the course of the argument for the appellants, and some of it was not without foundation. But reading the evidence as a whole, I have come to the clear conclusion that negligent navigation has not been established. In cases like this, Judges and counsel alike are apt to fasten on details, rather than on the whole to which the details belong. The details are sometimes of a kind on which it is not possible to form a trustworthy judgment. If they are not individually vital, the true method seems to me to be to study the evidence as a whole, and to recognize that its individual details cannot be exhaustively estimated. Reading the whole of the evidence in this macroscopic fashion is safer than merely to piece together microscopic estimates of particular incidents, which are misleading, apart from their context. The distinction between the two methods is to-day familiar in scientific investigation, which recognizes that the macroscopic procedure is the only one which can afford a picture that is at all adequate of what has been experienced.

With this observation, I pass to the very serious question of law which is raised by the second branch of the appellants' argument, on the assumption that actual negligence has not been proved.

My Lords, section 74 of the Harbours, Docks, and Piers Clauses Act, 1847, provides that "The owner of every vessel or float of timber shall be answerable to the undertakers" (the persons authorized to construct the dock) "for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith, and the master or person having the charge of such vessel or float of timber through whose wilful act or negligence any such damage is done shall also be liable to make good the same; and the undertaker may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same: provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of."

By section 76 a remedy over is given to the owner who has had to make satisfaction for any such damage wilfully or negligently done by the master or person in charge, or, if the owner has had to pay any penalty or costs by reason of any act or omission of any other person, the person who actually did such damage or committed the offence is to indemnify the owner.

The question which we have to answer is whether, in a case in which neither negligence nor any other act of an unlawful nature has been established against the owners of the Mostyn or those in charge of her, section 74 makes the owners answerable for the damage done in this case to the dock.

I assume that the master and those in charge were not answerable for any wilful act or negligence, inasmuch as none has been proved against them. But in the case of the owner the section does not in terms require any wrongful act to be established as the condition of liability. The words, taken by themselves, are unambiguous. The owner is to be liable for any damage done to the undertaking. My Lords, if the language of this section can legitimately be construed by us who sit here without regard to authority, I should find difficulty in saying that the appellants were not entitled to claim that it applied. It has been said that to take this view is to attribute to Parliament an intention which is hardly conceivable, the intention of making people liable for damage where they have been in no way to blame. But I am unable to attach much weight to this consideration where the words are clear. What the motives of Parliament were we do not know and cannot inquire. It may be that it desired to encourage undertakers of this class by providing insurance at the cost of owners who are in no way to blame. There are instances of such a principle in modern statutes, such as the Workmen's Compensation Acts, and it may be that it was something analogous that was in the mind of the Legislature. I do not know, and I feel myself precluded from even trying to inquire or from speculating.

But we cannot proceed here on this simple view. It has been established by a decision, which is binding on us, of this House that the language must be interpreted as subject to some qualification which is implicit in the words, and the question which alone we are free and bound to examine is what this qualification is, and how far it extends. In the case of *River Wear Commissioners v. Adamson* (1 Q.B.D. 546; and 2 App. Cas., 743) the question related to a vessel which had been driven on shore by a storm in endeavouring to make the port of Sunderland. The crew had been taken off with difficulty, and there was no control of the ship. Being a complete wreck she was driven by the winds and the waves against a pier belonging to the harbour and damaged it. An action was brought by the Commissioners against the owners, and damages were awarded at the trial against them. It was held by the Court of Appeal that the action would not lie. Sir George Jessel, M.R., was of opinion that the general words of the section did not cover a case where the event causing damage occurred by the act of God or the Sovereign's enemies. It would have been equally difficult to hold that there was liability if the damage had been caused by the action of the undertakers themselves. The proviso exempting the owner of the vessel where there was compulsory pilotage showed that the words were not to be interpreted without restriction. As the result he held that the words were to be construed by the analogy of the common law principle that, where a duty is imposed

by a merely generally expressed rule, that rule is not to be interpreted as covering such causes as the act of God.

Chief Baron Kelly thought that the rule of construction was that no one can be made liable, excepting by express contract, for injury occasioned by the act of God, and that this rule applied to the general words of the Act of Parliament before them. But he went further on this language itself, for the section goes on to refer to the master, a person having the charge of such vessel "afloat," and says that if he is negligent he shall "also" be liable. This, and the exemption in case of compulsory pilotage, seemed to Chief Baron Kelly to show that the word "also" imported only the superadding to the negligent act of the person in actual charge a liability of the same kind imposed on the owner.

Lord Justice Mellish agreed. He considered that the statute did mean to extend the liability of the owner beyond that at common law, because apart from such an intention it was difficult to see the object of the section. But he held that it contemplated only a case where the running against the pier was caused "through the act of man." Reading the language as a whole, he said that "it looks as though the Legislature considered that, somehow or other, through the act of man, damage might be done to the pier, and then, in order to get the owner of the pier out of the difficulty of having to prove that it was owing to some particular person's negligence, and that that person was the servant of the owner, they say the owner shall be liable." The Court was therefore jusified in construing the general words, in accordance with the general rule of construction, excluding the act of God.

Mr. Justice Denman agreed that the section exempted the act of God. The words were strong, but they did not, in his view, include a case where the liability was not caused by the owner or his servants, but by the act of God. The words imposing liability on the person in charge confirmed this view, although there might be cases coming within them where the owner would be liable when no person was in charge, but someone ought to have been. But here the act of God was the sole cause.

Baron Pollock concurred, though he said that his reasons were not the same as those of the other members of the Court. He did not know whether damage done by a float of timber arising from a cause not provided against by human providence would in itself be enough for exemption. He was not sure that this could be said to be the act of God. But here the vessel was extraneous to the dock authority and had become derelict. It was only by the force of the elements that she was driven against the pier, and that was not an event against which the statute provided.

My Lords, on these somewhat varying grounds the Court of Appeal reversed the decision below and decided against the Commissioners. It is important to know what was really laid down in this judgment, which was affirmed by the House of Lords. I think that it was only that there having been no human agency as the cause, and the real cause having been the act of God, the case was not covered by the section. The learned Judges were at least agreed on this, that when the cause was not human agency but a *vis major* beyond human control it did not come within the words.

In the case before us there was no negligence, and, on the hypothesis which I am making, there was no breach of duty at all. It is therefore important to see whether the grounds of the decision in this House in the *Adamson* case (*supra*) laid down for us any different principle which was held to take the case outside of the words of the statute. This is not easy to determine, for there was divergence of opinion.

Taking first Lord Cairns's view, I think that he held that it was to go too far to follow the Court of Appeal in saying that, where even a *vis major* had been the operative cause, the case was one which would have been outside the language used in the section. He found it, however, "difficult to suppose that by means of ordinary and routine clauses inserted in private or local Acts, the Legislature, although it might well provide a ready and simple procedure for recovering damages where a right to damages existed by common law, could intend to create a new right and a new liability to damages unknown to the common law." By common law the owner was not liable merely because he was the owner, unless it were shown that those navigating the ship were his servants. All that the section does, according to Lord Cairns, is to take the owner and declare him to be the person who may be sued for the damage done. Under the subsequent words he may recover over against the master or crew for any act of omission. The clause was therefore in substance a clause of procedure only, dealing with the mode in which a right of action already existing is to be asserted, and did not create any new right of action for damages. Although he did not concur in the reasoning of the Judges of the Court of Appeal, he therefore thought that their conclusion was right, and that the appeal should be dismissed.

My Lords, the massive legal intelligence, even of Lord Cairns, does not seem to me to have wholly disposed of the question before us. He was dealing with a case in which human agency had been superseded. Here we are dealing with one in which there was human agency, although there was no breach of duty. I think that he meant to go further, and to suggest that even if there was human agency there would be no liability created, provided that there was no breach of duty at common law. But that question was not before him, and what he suggests was not necessary for the decision of the *Adamson* case (*supra*). It is therefore important to see whether his suggestion was concurred in by the other noble and learned Lords who took part in the decision. The very power of rhetoric which Lord Cairns commanded, when stating his conclusions about matters of legal principle, makes it the more desirable to see that we are following the substance rather than the form of his propositions. Even if we accept his view that the section is one creating a new procedure, that of suing the owner while giving him a right to recover over, I am quite unable to see how this leaves the existing substantive law intact and relates to procedure alone. The owner could not be sued under that law unless he had violated some duty. If he can be sued at all, even with a right to recover over, it must be because some new substantive liability has been imposed on him by the statute. I think, therefore, that it follows that the common law has been altered, and that a new right of action has been created depending on the alteration. This is much more than mere procedure. Did his colleagues who heard the appeal with him accept his view as I interpret it? I think they did not.

I have studied their opinions. Lord Hatherley and Lord Gordon seem to me to have been impressed, as I own that I myself have been impressed, by the difficulty of reading the words of the Act as not

altering the common law by including at least the case of an owner who personally or through his servants was navigating the ship when the damage was caused. Lord Hatherley was a very careful Judge. I think that his disposition here was to hold that the words of the Act were so free from ambiguity that they covered cases in which there was no human agency, though he did not say so in terms. He was content to express his general agreement with the view of Lord Justice Mellish, that the statute only applied where human agency had intervened, and it was because it was absent in the *Adamson* case (*supra*) that he concurred in the judgment of the Court of Appeal. I doubt whether Lord Hatherley himself was ready to accept even this restriction of its scope, but he thought it at least a possible one, and if true it was enough to take the circumstances in the case before him, where there was no human agency, outside the language of the Act. That Lord Hatherley did not in terms dissent from the general result reached by the majority I cannot regard as an important circumstance in ascertaining his opinion. Lord Gordon expressly dissented. At the conclusion of an elaborate judgment he expressed the opinion that the statute ought not to be construed as if it contained any exemption from liability where it occurred even from the act of God. The words appeared to him to be express and unambiguous, and, as they were so, he thought that they ought to be read according to their ordinary construction.

My Lords, there remain to be considered the opinions of Lord O'Hagan and Lord Blackburn, with a view to ascertaining whether these noble and learned Lords concurred in the view which had been expressed by Lord Chancellor Cairns, that no new right of action at all was created, whether human agency was or was not present.

My Lords, upon scrutiny of the words used by Lord O'Hagan, I have come to the clear conclusion that he did not concur in the dictum of the Lord Chancellor, so far as it went beyond the facts of the case before him, that the statute created no new right of action, but was confined in its scope to procedure only. The language, Lord O'Hagan thought, was *prima facie* sufficient to cover all cases, including those in which human agency came in. But he was of opinion that, reading the whole of the section, and particularly the reference to "such" vessel in the words declaring the liability of the master or person having charge of it, an intention was expressed to confine the liability of the owner to vessels "in charge of a master or someone else." On this point he expressed his concurrence with Lord Justice Mellish. The owner is therefore placed in a worse position than he would have been at common law, but not so bad as that in which he would have been had he been made liable when no one had charge on his behalf. The proviso as to the compulsory pilot seemed to Lord O'Hagan to confirm this conclusion. In his view the statute did, as Lord Cairns had said, simply introduce new procedure to the advantage of the dockowner, but it did not enlarge the liability beyond the limits which he had indicated. On the question whether the act of God was excepted it was therefore unnecessary for himself to express an opinion, for it did not arise. In *Dennis v. Tovell* (L.R., 8 Q.B., 10) the vessel was perhaps not derelict and the owner might properly be held liable.

In Lord Blackburn's opinion a statute was an instrument in writing, to be construed on the same principles as other such instruments. He thought that, on every construction of the statute which he had heard suggested, the Legislature had intended to impose on the owner of the ship a liability occasioned by persons for whom he would not have been liable at common law. But he did not think that the Legislature could have meant to shift the burden of a misfortune befalling the owner of the pier from its owner, who at common law would bear it, to the owner of a ship wholly free from blame and involved, without fault of his, in a common misfortune. Lord Blackburn was of opinion that the purpose of the Legislature was to give the owners of the pier more protection than they had. With a view to this it had enacted that the remedy was to be that the owner, who was generally really liable (for the acts of his agents), though it was difficult and expensive to prove it, should be liable without proof either that there was negligence, or that the person guilty of neglect was the owner's servant, or proving how the mischief happened, and this is expressed by saying that the owner shall be "answerable for any damage done by the vessel, or by any person employed about the same" to the harbour. "As to the cases in which the fault was not that of some person not able to make compensation, for whom the shipowner was not at common law responsible, it may have been thought that the cases would occur so seldom, or when they occurred would probably be of such small amount, that the shifting of the loss from the owner of the property to the owner of the ship was not too high a price to pay for the saving of litigation and expense. The cases of a common misfortune befalling both ship and pier, without the fault of either, seem not to have been thought of. At all events, no exemption or proviso to take these cases out of the general enactment is given in express words." He comes to the conclusion that this was the scheme of the Legislature, the mischief being the expense of litigation, and the remedy being that the owner should be liable without proof of how the accident occurred. He dissented from his own judgment in *Dennis v. Tovell* (*supra*) but with great doubt and hesitation. He expressed himself as adverse to the view taken in the Court below that where a statute is enacted which might have expressed, but has not expressed, an exception of the act of God, the Courts should introduce it. He observed that Lord Justice Mellish and Lord Cairns had thought that the words might be construed so as to make the owner of the ship answerable only for damages occasioned by the act of man, damages for which someone is answerable at common law. But he could not see anything in the words to justify what was the opinion of some of the Judges in the Court of Appeal and, he thought, of Lord O'Hagan, that the language was confined to cases in which someone was in actual charge of the ship. Even if it were so this would not, in his view, help the owner in the case before him, for he was in possession of the ship until it was driven on the bank, after which the tide floated it in. The owner was still owner when this ship struck the pier, and it was no mere "congeries of planks," nor was it, in his opinion, a derelict. He had great doubt and hesitation in affirming the judgment of the Court of Appeal, but he would not dissent from the proposal to do so. It was conceivable, as Lord Justice Mellish had thought, that the words referring to "damage done by the ship" might have the restricted sense of *injuria cum damno*.

My Lords, when the expressions used by Lord Blackburn are considered, I cannot find in them concurrence with the dictum of Lord Cairns that no new right of action was created, even where human agency came in, and that the wide words at the beginning of the section were intended to introduce nothing more than what Lord Cairns had spoken of as a new form of procedure, which would indeed assist

the dockowner to pursue a new kind of remedy, but conferred on him no fresh substantive right. On this point the opinions delivered appear to me to leave us under the duty of deciding, unfettered by authority, whether, when the vessel which caused the damage was under the control of the owner's agents, he is liable notwithstanding that there was no breach of the duty not to be negligent on their and his part. I do not think that *River Wear Commissioners v. Adamson* (*supra*) settles the point of non-liability where the vessel was in charge, at the time of the accident, of the owner's agents. It seems to me that the words of the statute are too clear to admit of this conclusion, and that the decision of this House in the earlier case is not in truth any authority for it. We do not know enough of the facts in *Dennis v. Tovell* (*supra*) to enable us to say whether that case was one of a derelict or whether anyone remained in charge of the vessel. If there was no human agency then what I have said does not apply in that case. I comment on the decision in *Adamson's* case (*supra*) on the assumption that, notwithstanding what was said by Lord Blackburn, there was no such human agency. For if there was, that, in my view, brings the case within the uncontrolled words, and would render it analogous to the present case. But on the facts set out in the report I think that the vessel must be taken to have become out of human control.

We appear to me to be bound by the authority of the *Adamson* case (*supra*) to hold that the section in question is not to be read literally, but as applying when the damage complained of has been brought about by a vessel under the direction of the owner or his agents, whether negligent or not. The decision further exempts the owner when the vessel is not under such control but is derelict. When there are facts to which it applies it effects an alteration in the common law which imposes a new liability to be sued on the owner, and to that extent changes not merely procedure but also substantive law.

My Lords, if these things are true I find that on the facts established in the present case we must find the owners liable, reverse the judgments of the Court below in their favour, and give judgment for the appellant railway company for damages, the agreed amount of which is £226 4s. 6d.

The appellants are entitled to the general costs here and below, excepting the costs on the issue of negligence on which they have failed. Those costs they must pay to the respondents.

Viscount Dunedin.—My Lords : I have had the advantage of reading Lord Phillimore's judgment. He has dealt exhaustively with the question whether there was negligence on the part of those in command of the Mostyn and has come to the conclusion that there was none. I agree with his statement and his reasons. I wish, however, to add one remark, because I think the opinions of the learned Judges of the Court of Appeal, who also found that there was no negligence, might be misinterpreted.

There are in those judgments passages which would seem to favour the view that, though the captain knew that it would be negligent to enter the passage way with the anchor down, yet, inasmuch as his command to heave up the anchor was given at a time which would ordinarily have sufficed to take it off the ground before the passage way was reached and as he was only thwarted by the unexpected and unsuspected interference by the Post Office cable, he is thereby excused. That is not my view. If he had been unhampered in his movements, and knew that he had an anchor down, and knew that it would be wrong to enter the passage with it down, I think it would be for him to see that he got it up before he entered the passage and that he could not excuse himself by saying, "I began to heave at such a time as would ordinarily have sufficed." But on the facts here he was not unhampered. His anchor was down without negligence. He was compelled to move on because of the position of the ship and the gale, and, therefore, the position of affairs, as I have just put it, did not arise.

I now come to the point on the statute. The opinions of the noble Lords who decided *River Wear Commissioners v. Adamson* (2 App. Cas. 743) have been analysed again and again. I do not propose to do so because I do not think I could add anything helpful to what has been said by Lord Chancellor Herschell in the case of *The Crystal* (10 *The Times* L.R., 551 ; [1894] A.C., 508) and by the learned Judges of the Court of Appeal in this case. At the same time, I do not agree with the method of treatment which those learned Judges took in dealing with *River Wear Commissioners v. Adamson* (*supra*). I think it quite necessary to say this because there is, in truth, no difference in the position of the Court of Appeal in this matter and that of your Lordships in this House. *River Wear Commissioners v. Adamson* (*supra*) is binding equally on both tribunals. Now, when any tribunal is bound by the judgment of another Court, either superior or co-ordinate, it is, of course, bound by the judgment itself. And if from the opinions delivered it is clear —as is the case in most instances—what the *ratio decidendi* was which led to the judgment, then that *ratio decidendi* is also binding. But if it is not clear, then I do not think it is part of the tribunal's duty to spell out with great difficulty a *ratio decidendi* in order to be bound by it. That is what the Court of Appeal has done here. With great hesitation they have added the opinion of Lord Hatherley to that of Lord Cairns and then, with still greater difficulty, that of Lord Blackburn, and so have secured what they think was a majority in favour of Lord Cairns's very clear view. I do not think that the respect which they hold and have expressed for the judgments of your Lordships' House compelled them to go through this difficult and most unsatisfactory performance. As I have said, our own position is just the same as theirs, and I say unhesitatingly that I agree with Lord Herschell that you cannot extract from the judgments in *River Wear Commissioners v. Adamson* (*supra*) such a *ratio decidendi* as is binding. That, however, is far from wiping that case off the slate. It remains for two purposes : first, for the judgment itself and, second, for the opinions of the noble Lords, which are entitled to the greatest respect. Now, the judgment is binding. What, therefore, I think is our duty on this occasion is to consider the statute for ourselves in the light of the opinions, diverging as they are, and to give an interpretation ; but that interpretation must necessarily be one which would not, if it was applied to the facts of *River Wear Commissioners v. Adamson* (*supra*), lead to a different result. In other words, Lord Gordon's view is not open to us. Then, Lord Gordon's view being gone, there are, in my opinion, just three different *rationes decidendi* on which the case can rest.

There is, first, Sir George Jessel's view, namely, that the words of section 74, absolute in their terms, must be held as having added to them an exception in the case of an act of God, or, in other words, that the exception of an act of God to a duty or a liability cast on a person by the common law is equally true of a duty or liability cast on him

by an Act of Parliament. My Lords, I think that that view was in terms disapproved by their Lordships in this House, and I entirely agree with them. My Lords, I had prepared my opinion so far, but I am bound to add a word or two in view of what is going to be said by my noble friend Lord Blanesburgh. He has taken the view which, although the case of *River Wear Commissioners v. Adamson* (*supra*) has been again and again considered, I do not think has before been taken, that Sir George Jessel's opinion rests particularly on the pilotage exception. I am not at one with my noble and learned friend about that. I think Sir George Jessel's view was this : no doubt he took the pilotage exception, but he took it in this way. What he said amounted to this : "Here you must revert to the general doctrine of law that there is an exception to a duty at common law of the act of God, and if you do that you find the pilotage exception exactly fits." But I do not think it matters whether I am right about that or not, because, whatever Sir George Jessel said, there is no question that Chief Baron Kelly and Mr. Justice Denman put the matter quite clearly that there was the same exception to an Act of Parliament as there is to a duty cast by common law, and that view was undoubtedly disapproved by this House. Lord Cairns, first of all, deals with it, and, after taking the other view of what Sir George Jessel had said, and then adding the Chief Baron and Mr. Justice Denman, he says : "In my opinion these expressions are broader than is warranted by any authorities of which I am aware. If a duty is cast upon an individual by common law, the act of God will excuse him from the performance of that duty. No man is compelled to do that which is impossible. It is a duty of a carrier to deliver safely the goods entrusted to his care : but if in carrying them with proper care they are destroyed by lightning or swept away by a flood, he is excused, because the safe delivery has by the act of God become impossible. If, however, a man contracts that he will be liable for the damage occasioned by a particular state of circumstances, or if an Act of Parliament declares that a man shall be liable for the damage occasioned by a particular state of circumstances, I know of no reason why a man should not be liable for the damage occasioned by that state of circumstances, whether the state of circumstances is brought about by the act of man or by the act of God." Lord Blackburn is just as explicit at page 771, where he says, speaking of the old case of *Paradise v. Jane* (Alleyn, 26) : "The really important part of the decision is that where a contract is made which does not either expressly or impliedly except the act of God, the Courts could not introduce that exception by intendment of law ; and that makes strongly against the supposition that, in construing a statute where the Legislature might have expressed, but did not express, such an exception, the Court should introduce it." My Lords, with these opinions I humbly concur, and I have made this digression because I think it would be very unfortunate that there should be any doubt left that that doctrine has been contemned by the House. My noble friend also says that he would have been content to decide the case upon *Fletcher v. Rylands* (L.R., 3 H.L., 330) and *Nichols v. Marsland* (2 Ex.D., 1). With great deference to him, I think that that analogy is quite a false one. This leaves the other two views—(1) The view of Lord Cairns that damage in the section must be read as confined to actionable damage, and (2) the view suggested by Lord Justice Mellish and favoured by some of the noble Lords, that the action which led to the damage must be an action attributable to human agency but, that being found, that the words of the section remain absolute. It becomes necessary—for I can see no other alternative—to choose between these two views.

My Lords, on very anxious consideration of what is obviously a difficult and obscure question, I have come to be of opinion that the view of Lord Cairns is the preferable view. I am moved by two considerations. First, I think it is easier to interpret a word used, *i.e.*, damage, in a certain sense rather than to read into the section words which are not there, but which are to be gathered from a general view of the section as a whole. Second, I think that the compulsory pilotage exception fits Lord Cairns's view better than it fits the other. It is obvious that the reflected light which this clause gives as to the interpretation of the preceding part in an Act of 1847 cannot be affected by a change of the law in the Act of 1913. Now, the position of the clause to Lord Cairns's view may be found in his own words :—

"This makes the part of the section relating to the employment of a pilot intelligible and consistent with the rest of the enactment. If a licensed pilot is in charge, the owner is not discharged from a possible liability, but everything is left as it would be at common law. If a pilot was in charge of a ship and the owner was at the same time the master navigating the ship, and did an act which caused damage, he would be liable at common law, and the Act leaves him so ; but, in the same case, if, while the pilot was in charge and the owner was navigating the ship, the ship became unmanageable by tempest the owner would not be liable."

On the other view, the effect of the clause is very one-sided and illogical. The vessel is in fault or is not in fault while the pilot is in charge, and then the owner is not liable. But the vessel is in charge of a person for whom the owner is not responsible, *e.g.*, a repairer in dock, and the owner at once becomes responsible, fault or no fault.

In the result, therefore, though I must needs admit that the matter is difficult when so many distinguished persons have differed, I end by agreeing with Lord Cairns that damage must be actionable damage, and that, therefore, in the present case the owner is not liable. It follows that the appeal should be dismissed, and, if your Lordships agree with my view, there will at least be a clear rule for the future. Although I am not in agreement with the majority of your Lordships, who prefer what I have called Lord Justice Mellish's view, I am glad that there will at least be a clear rule, namely, that the action which led to the damage must be action attributable to human agency, but, that being found, that the words of the section remain absolute.

Lord Shaw of Dunfermline.—My Lords : My noble and learned friend on the Woolsack has in his judgment narrated the circumstances in which damage was done by the anchor of the s.s Mostyn to certain electrical cables lying in the bottom of a waterway or communication passage extending between the King's Dock and the Prince of Wales's Dock, Swansea. These works were part of the undertaking of the Swansea Harbour, vested by statute in the appellants. When the misadventure occurred, the vessel had been in no way abandoned ; her officers and crew were all on board.

Your Lordships are agreed that the damage was done without negligence, on the part of either owner

or master or their representatives, in respect of which the common law would attach liability for damage. I entirely assent to that view of the facts.

The appellants, however, raise the further question whether, notwithstanding negligence not being established, the shipowners are, under the provisions of section 74 of the Harbours, Docks, and Piers Clauses Act, 1847, liable to them, the dockowners, for the damage done by the ship to the dock.

That section is in the following terms :—

"The owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith ; and the master or person having the charge of such vessel or float of timber through whose wilful act or negligence any such damage is done shall also be liable to make good the same ; and the undertaker may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same : provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of."

While upon the construction of the words of the statute itself I feel free to confess that I should not personally have found difficulty, yet it has long been plain that most serious difficulty does arise in consequence of the judicial opinions expressed in the House of Lords in *River Wear Commissioners v. Adamson* (2 App. Cas., 743). The solution of that difficulty is of wide importance.

Before that case, the section, when under consideration in Courts of Law, had been construed according to what was held to be the plain and comprehensive tenor of the language used in the Act, and the shipowner was made, according to that language and subject to the pilotage exception, answerable for all damage done by the vessel to the harbour or its connected works in any circumstances. A powerful Court of Queen's Bench, consisting of Chief Justice Cockburn, Mr. Justice Blackburn, and Mr. Justice Quain, decided the case of *Dennis v. Tovell* (L.R., 8 Q.B., 10 ; 27 L.T., 482), and in delivering the leading judgment Mr. Justice Blackburn used these words :—

"The Legislature has put the owner in the same position as a man who keeps a dangerous animal, who must do so at his peril, and be answerable for any injury such animal may do. It enacts simply that the owner shall be liable for whatever damage the vessel may occasion. It appears to me that the Legislature has clearly said so, whether it intended it or not."

This judgment was expressly followed in the case of *The Merle* (2 Asp. M.L.C. (N.S.), 402) decided in the Court of Admiralty in 1874 by Sir R. Phillimore.

If this law was not completely overturned by the House of Lords in *River Wear Commissioners v. Adamson* (*supra*), it must be conceded that it was severely shaken thereby. So long as that House of Lords' judgment stands, the doctrine that the shipowners are liable to the dockowners for all damage to the works caused by the ship, in all circumstances and in whatsoever manner, can no longer be maintained.

Nearly every Judge who has spoken upon the subject, not only in *Adamson's* case (*supra*), but in the various cases thereafter in which *Adamson's* case (*supra*) has been referred to, has admitted that, while the restriction of liability enforced by this House has, of course, to be deferred to, yet the imposition of unrestricted and comprehensive liability appears, nevertheless, to be in entire accord with the plain and express words of the statute. This is a notable fact.

There seems, indeed, no reason, my Lords, to doubt that the learned Judges of the Court of Appeal in the present case would not have reached any restricted view of the statutory words had it not been for the case of the *River Wear Commissioners v. Adamson* (*supra*). All the learned Judges make that pretty plainly appear from the opinions which they have delivered. With regard to the case of *River Wear Commissioners v. Adamson* (*supra*) itself, they also indicate the great difficulty which they have either in reconciling that decision with the statute, or in understanding its scope, or discovering, if any, its *ratio decidendi*. In *The Crystal* (10 *The Times* L.R., 551 ; [1894] A.C., 508) this House, and especially Lord Herschell, plainly found themselves in the same plight. It is the same plight also in which I find myself in this appeal.

The difficulty in regard to *River Wear Commissioners v. Adamson* (*supra*) pointedly arises upon the words used by the noble and learned Earl then on the Woolsack, Lord Cairns. It is, nevertheless, our task to escape, if possible, from the "bewilderment" (to use a not inappropriate expression of Lord Justice Scrutton) caused by the variety of opinions delivered in this House. My own humble efforts have resulted as follows :—

It is beyond all things important in considering the *Adamson* case (*supra*) to bear in mind its very special circumstances. These are concisely given in the Lord Chancellor's own words :—

"On December 17, 1872, the steamship Natalian was attempting, under stress of weather, to enter the Sunderland Docks, belonging to the appellants ; while it was still in the open sea, about 40 or 50 yards from the pier, it struck the ground, canted with its head to the south, and drifted, bodily, ashore. The crew had been rescued from the ship by means of the rocket apparatus. The tide was low at the time ; and as the tide rose the flood and the storm drifted the ship against the pier and caused damage."

As I read the argument for the shipowners, their main reliance was upon this fact—that the ship was no more than a helpless log ; that all aboard her had been rescued by the rocket apparatus, and that she had been abandoned and was derelict. Sir John Holker, for the owners, put that in the forefront of his argument :—

"There may be nothing unreasonable," said he, "in holding the owner of a ship liable for ordinary damage caused in an ordinary way, but the Legislature never could have intended to make him liable for damage occurring when the ship was really no better than a helpless log upon the water, when the master and the crew were with difficulty saved from death, and the owner had not any means whatever of exercising any possible control over the vessel."

In the course of the appellants' argument, the Lord Chancellor, upon *Dennis v. Tovell* (*supra*) being cited, interjected the observation : "The facts there were not the same." It is to be observed accordingly that the one point which was before this House on that occasion was whether such an extremely special case—namely, that of a completely derelict ship—was within the words of the statute ; that is to say, whether the owners could have a liability imposed upon them in the case of a ship abandoned, and beyond all human control, and left to the mercy of the elements.

It would be unnecessary to dwell upon this but for the fact that a careful scrutiny of the judgments delivered seems, to my mind, to point conclusively to this, that every one of the Judges overcomes the misgiving with which manifestly he viewed a pretty apparent infraction of the comprehensive application of the statute by the explanation of this singularity of fact and his conception as to the element of hardship which thus entered the case.

The two main elements of fact were simply : (1) a derelict ship, all means or chance of possible control over which by human agency had disappeared ; (2) damage to a pier by a ship in that state. It was to a case resting on those special facts that the decision of *River Wear Commissioners v. Adamson* (*supra*) applied.

So far as the judgment of the Lord Chancellor was concerned, it is clear that the grounds taken by the learned Judges of the Court of Appeal were grounds in which he did not concur. "I do not concur," said he, "in the reasoning of the learned Judges of the Court of Appeal" ; the noble Earl reached the conclusion which they had reached on a different ground—a ground which has given rise to much disturbance of the legal mind for two generations.

It may be noted in passing that while the noble Earl stated that, if a duty was cast upon an individual by common law, the act of God would excuse him from its performance, yet it was a different case where a man, by contract, accepted the liability ; and he further put a statutory liability on precisely the same ground as that of contract, saying :—

"There is nothing impossible in that which, on such a hypothesis, he has contracted to do, or which he is, by the statute, ordered to do—namely, to be liable for the damages."

Having thus sheared away all reasons for questioning the competency of the statute to impose effectively a comprehensive liability, his Lordship then states the common law obligation resting upon negligence, by which common law obligation owners of vessels and those representing them were bound, and he then adds the crucial words :—

"In my opinion, it was to meet this state of the law that this section [section 74] was introduced. It proceeds, as it seems to me, upon the assumption that damage has been done of the kind for which compensation can be recovered at common law against some person ; that is to say, damage occasioned by negligence or wilful misconduct, and not by the act of God."

Later he adds :

"The clause appears to me to be a clause of procedure only, dealing with the mode in which a right of action for damages already existing shall be asserted, and not creating a right of action for damages where no right of action for damages against anyone existed before."

My Lords, I am of opinion that the question is whether the decision of this House rested upon the special and peculiar circumstances of the case, or whether it rested upon a general doctrine of which the first of those sentences is the expression. If the former, the case does not bind this House, or any Court, by a general principle ; if the latter, it binds all Courts and this House, the statute must be read in accordance with the doctrine so announced, and that doctrine is part of the law of the land until the Legislature be moved to interfere.

The situation accordingly is : Shipowners, as such, are by statute liable to dockowners for "any damage done by such vessel . . . to the harbour, dock, or pier," whereas by the doctrine of Earl Cairns in *River Wear Commissioners v. Adamson* (*supra*) they are not so liable unless the damage was occasioned by negligence ; the statute, in short, does not increase the common law liability.

As I view the case, the doctrine so expressed, constituting this important exception from express statutory liability, neither was necessary for, nor did it truly underlie, the decision of *River Wear Commissioners v. Adamson* (*supra*).

It is a doctrine, I may be allowed to say, very different from that which as lawyers we have been brought up to believe, holding as we do with Blackstone I, 89, "where the common law and a statute differ, the common law gives place to the statute." It is accordingly most necessary to consider whether the doctrine so expressed by the Lord Chancellor as to this statute received the assent of this House at large. I am of opinion that it did not.

Before I consider the utterances of the other noble Lords, I may observe that the judgment of Lord Justice Mellish in the Court of Appeal, which was received with great deference by other noble Lords who addressed the House, itself contained a very striking repudiation of any such doctrine. Said Lord Justice Mellish (1 Q.B.D., at p. 553) :—

"I think, looking at the language of the section, it clearly was the intention of the Legislature to extend the liability of the owners of vessels, in favour of the owners of piers and harbours, beyond the liability which is imposed on them by common law : because, if that is not the intention, it is not easy to see the object of the section at all."

I do not find in any of the other judgments in the House of Lords a repudiation of that view, and yet it is an undoubted repudiation of the view of Lord Chancellor Cairns.

I proceed to the judgment of Lord Hatherley. He says :—

"I cannot concur in the views expressed in the Court below by some of the learned Judges, on the one hand that the damage which was done in this particular case having been caused by what is commonly said to be an accident, but is called in the language technically used in Law Courts, the act of God, namely, a storm, the owner of the vessel would be excused by the section of the Act of Parliament, however construed, from the consequences of that mischief."

That appears to me to be a complete contradiction of the view of Earl Cairns, and a denial of the doctrine laid down by him. "The act of God would excuse the owner under the section," says Lord Cairns. "The act of God would not excuse him," says Lord Hatherley. Lord Hatherley goes further into a separate point in the case, namely, whether there is excuse even in the special circumstances of the vessel having been derelict or abandoned, and he appears to incline to the view that the owners were liable even in the special circumstances of a derelict ship. That, however, is apart from the general doctrine of Lord Cairns to which I have alluded. Lord Hatherley's judgment, along with the judgment of Lord Justice Mellish to which I have alluded, appears to be, in substance, in direct conflict with the doctrine now being investigated.

Lord O'Hagan bases his judgment entirely upon the peculiar circumstances. He says :—

"It does seem hard that the respondent, having had his ship so injured by the winds and waves on the high seas that its crew, to save their lives, abandoned it, and it was derelict, and was forced by the storm against the pier, should not only have lost its value, £10,000—save in so far as it was

insured—but, in addition, nearly £3,000 for mischief done admittedly without fault of his and by the act of God. We must take care that a hard case shall not make a bad law ; but we must also take care that we do not attribute to Parliament the intention of injustice so very flagrant, without coercive necessity."

And he adds :—

"I have come to the conclusion, although not without serious hesitation and misgiving, that there is no such necessity, and that, well considered, the statute is not applicable in the peculiar circumstances before us."

One would have great difficulty as to Lord O'Hagan's judgment ; but that it is an affirmation of the general doctrine laid down by Lord Chancellor Cairns can hardly be suggested in view of his own words where he recurs to the general point in this way :—.

"You may have noted that my reasoning has not been precisely that of the Court of Appeal, and that I have not based it altogether upon the legal doctrine as to the act of God."

Then the opinion winds up in this way :—

"The only case cited as touching the present (*Dennis v. Tovell, supra*) has no application to it."

The House will be pleased to know the reason why. That reason is this :—

"There, the vessel was not derelict, and the owner may have properly been held liable. Here, on the other hand, in the words of Baron Pollock, 'Out on the high seas she met with certain risks and injuries which compelled her crew to leave her, and she became derelict.' And, in my judgment, this ship should be dealt with as if it had been abandoned at the Antipodes, and had been ploughing the ocean, without a crew, for years before it was driven against the pier at Sunderland."

Lord O'Hagan's affirmation gives no ground for an assertion that he attached the weight of his authority to the general doctrine under discussion of the liability of owners only in case of negligence. It only establishes, and it does establish, that in his judgment the owners of the Natalian were not liable in the circumstances because she was a derelict ship.

In the result, at the point which we have reached, I hold that the general doctrine has not only not been adopted by the two learned Lords last referred to, but has been in substance either disaffirmed or shown to be in no way the ground of the judgment to which they themselves ultimately inclined.

The opinion of Lord Blackburn contains much valuable matter, as one would have expected, but it is extremely difficult to extract from it any affirmation of what I might call the Cairns doctrine. It does contain a complete disclaimer of the idea that the statute was not to add, as Lord Cairns's words seem to imply, anything to common law liability. Lord Blackburn said :—

"Reading the words of the enactment, and bearing in mind what was the state of the law at the time when it was passed, it seems to me that the object of the Legislature was to give the owners of harbours, docks, and piers more protection than they had."

The remedy, his Lordship added, against the trouble of fixing particular persons with liability was :—

"That the owner, who was generally really liable (although it was difficult and expensive to prove it), should be liable without proof either that there was negligence, or that the person guilty of neglect was the owner's servant, or proving how the mischief happened, and this is expressed by saying that the owners shall be 'answerable for any damage done by the vessel or by any person employed about the same' to the harbour."

I cannot read that as in any sense confirming the view that this statute was to be interpreted upon the footing that the shipowners escaped all liability, except liability grounded upon negligence. On the contrary, it seems to me to affirm the proposition that a further and separate liability was imposed by the statute, and that it was imposed on the owners *qua* owners. To use the language of a Roman lawyer, the liability imposed is not a liability *ex delicto*, nor is it a liability *quasi ex delicto* ; but it is expressly a liability *ex dominio*. It is laid upon the owner as owner, and it humbly appears to me that this view is in entire accord with the dicta just cited from Lord Blackburn, and is in entire disaccord with the idea that he concurred in the general doctrine which Lord Cairns had laid down.

I am further of the opinion that Lord Blackburn misconstrued the true import of the judgment of Lord Justice Mellish, a topic upon which I understand my noble and learned friend who is to follow me will deliver a fuller opinion.

The final opinion in *River Wear Commissioners v. Adamson* (*supra*) was delivered by Lord Gordon. That learned Lord, after a full survey of the legislative circumstances preceding the Act of 1847, and of that statute itself, dissents from the judgment of the House.

In the result, I am humbly of opinion that the liability of owners for damage done by their vessels to piers and harbours was not limited to damage caused by negligence, and that the dictum of Lord Cairns to that effect was not a part either of the text or of the ratio of the judgment of this House. I do not conceal from your Lordships that I have seldom known a case which has produced so much judicial uneasiness. The very able judgments of the Court of Appeal in this case disclose that. All of these judgments are valuable, and I am not sure that the analysis made by Lord Justice Atkins differs very much from the results to which I have independently come. I think their Lordships, however, erred in treating the dictum of one Judge of the greatest eminence as the judgment of this House, and therefore as necessarily having an effect so general as to include the present case.

It may be asked, If the general doctrine of non-liability except in cases of negligence was not decided in *River Wear Commissioners v. Adamson* (*supra*), what was decided ? To that I reply that *River Wear Commissioners v. Adamson* (*supra*) was a conspicuous instance of a derelict ship from which all human agency had been withdrawn, and it was on that footing, and upon that speciality, and to that extent alone, that the judgment in *River Wear Commissioners v. Adamson* (*supra*) can be applied. I do not say whether or not that can be characterized as a *ratio decidendi*, and I desire to utter no disrespectful word on that subject, but I must in duty declare that this statute seems to me still to abide in its full and comprehensive application of liability to owners, but that the sole exception, plus the statutory exception of pilotage, is the derelict or abandoned ship case. Respect must be had alike (1) to the statute in its express and general effect and (2) to the decision of this House of an implied and particular exception.

Such an exception ought not to be extended or expanded. This House and Courts of Law should resist that. As to *River Wear Commissioners v. Adamson* (*supra*), I would only add that if it were construed in the broad sense which with so much

misgiving it appears to have been taken to have, it would seem to me to form a curious intrusion of the judiciary into the province of the Legislature; for I cannot doubt that it was the Legislature, and the Legislature alone (the plain and clear words of the statute being before us), upon whom lay the duty of cutting into those words by an exception equivalent to a *pro tanto* but a large repeal. The case recalls much older times when the judiciary attempted that. It is recorded that "when counsel in a case in 1305 argued for a certain construction of the Statute of Westminster the Second of 1285, he was cut short by the Chief Justice with the remark: 'Do not gloss the statute; we understand it better than you, for we made it.'"

In these times apparently the statute is to be eviscerated by conceptions *not* of the Judges who made the law, but their conception of what was the true and correct line of policy which must be supposed to have impliedly conditioned the words of those who made the statute. I humbly think this to be both legally and constitutionally unsound, even though it be put forward under the guise of construction. Parliament can and does change its own mind, and it will not under the Constitution allow that the judiciary should change its mind for it.

My Lords, in my opinion, we best adhere to both legal and constitutional principle when we affirm the statute, and decline to accept—unless it be where there is the clearest judicial decision to that effect—a vital and fundamental alternative which would deeply cut into the comprehensive words plainly employed by the Legislature. I agree with the noble and learned Viscount on the Woolsack, and in the motion which he is to propose to the House.

Lord Phillimore (read by Viscount Dunedin).—My Lords: About 10.30 p.m. on October 26, 1923, the s.s. Mostyn was inside the docks of Swansea and about to proceed from the King's Dock to the Prince of Wales's Dock. She was light in water ballast with a high side out of the water, not assisted by a tug but with a dock pilot on board to help the captain, and with an anchor clear and ready to let go, as required by one of the by-laws of the harbour. The wind was blowing a gale from about S.W.

In these circumstances it was observed that a small steamship which was preceding the Mostyn had suddenly stopped, it is supposed because of some breakdown of her machinery. But at the trial nothing was proved with regard to the cause.

The approach to the dock being thus blocked, the Mostyn put her engines astern to take off her way and dropped her anchor to assist in checking herself and to keep herself straight, as otherwise her quarter would have been caught by the wind, and she would have been brought diagonally athwart the entrance. It is not disputed that these were proper and necessary manœuvres. By them the ship was brought up; and then her engines were stopped.

After a short while, the leading steamship was able to move on and out of the way, and the Mostyn proceeded to get her anchor in and at the same time to steam ahead. She had not paid out much chain. The 15-fathom shackle had not reached the windlass. The depth of the water was 30 feet, and there would be several feet from the hawse to the water's edge, so that there would not be much chain dragging on the ground. Now it happens that in these docks, just in front of the communication passage leading from the King's Dock to the Prince of Wales's Dock, there is an electric cable belonging to the Postmaster-General lying along the bottom, which at that part is ordinary gravel or sand; and that in the communication passage some little way in, where the bottom is cemented, there is a bundle of about 10 electric cables which belong to the dockowners and which carry light and power about the docks. They lie in a chase-way and are uncovered, but are not higher than the bottom of the dock.

Shortly after the vessel moved and as the chain was still being got in all the lights throughout the dock went out, and the dockmaster in charge, realizing that the anchor of the Mostyn must have fouled some of these cables, ordered her to go astern and let her anchor down. This she did and tied up against the quay wall in the King's Dock for the night.

Next day the divers went down and found two out of the bundle of 10 cables underneath the claws of the anchor not absolutely broken, but pulled out of their place and so damaged that the electric current was cut off. They also noticed that a third cable had been drawn out of its place, though it was no longer under the anchor. Besides this they found a part of the Post Office cable, which had been absolutely broken, lying on top of the anchor near the shackle.

The Postmaster-General made his own claim with regard to the damage done to his cable, as to which there are certain statutory provisions. The cost of repairing the dock cables came to £226 4s. 6d., and it is for this sum that the Great Western Railway Company, as owners of the dock, brought the present suit.

The plaintiffs put their case on two grounds. First, they said that it was bad navigation and negligence on the part of those in charge of the Mostyn to go ahead before they were certain that their anchor was clear of the ground, and that it was this going ahead and the dragging of the anchor on the ground that caused the fouling of the dock cables. Secondly, they said that, whether it was negligence or not, they were entitled as dockowners, under the provisions of the Harbours, Docks, and Piers Clauses Act, 1847, to have compensation for any damage done to their works by a vessel.

The case was tried before the President, assisted by Trinity Masters. He came to the conclusion that there was no bad navigation, and that upon the authority of the case of *River Wear Commissioners v. Adamson* (1 Q.B.D., 546; 2 App. Cas., 743) the statutory claim could not be maintained; and he therefore dismissed the action.

The case came before the Court of Appeal, assisted by nautical advisers, and the result was the same on both points. The railway company have now appealed to your Lordships' House.

The President was advised by the Trinity Masters that those on board the Mostyn could not properly be found guilty of negligence, and he came to the same conclusion. But he appears to have been brought to this conclusion in some measure because he thought that the sequence of events was that the Mostyn caught the Post Office cable first, catching it apparently when she first let go her anchor, and that this encumbrance afterwards prevented her from getting her anchor off the ground before she began to move forward again, and so weighed the anchor down that it made it catch the dock cables as she moved forward.

This conclusion was attacked because it was founded, at any rate in part, on the view that the first officer had seen the Post Office cable foul of the anchor when the latter was being raised, while he never said this, nor indeed did he say that he sighted the anchor or anything fouling the anchor at all. He

knew that there was something foul of the anchor, but he might very well infer this from the fact that it did not come up in the usual way, or that the chain continued to lead aft.

It remains, therefore, a matter of uncertainty whether the Post Office cable was fouled in the first instance, as the vessel went in, or whether, as counsel for the appellants contended, the Mostyn, when going astern in obedience to the directions of the dockmaster and dragging some of the dock cables with her, then first came into contact with and broke the Post Office cable.

It would seem to me, my Lords, that though the President's conclusion was partly founded upon a wrong premise, it is quite as likely to be right as the conclusion contended for by the appellants. For reasons, however, which I am about to give, it seems to me unnecessary to decide this point.

The President went on to accept the contention that it was *prima facie* negligence to proceed with the anchor dragging on the bottom, or, in other words, to go ahead till they were certain that the anchor was either up to the hawse, or, at any rate, hanging in the water. But notwithstanding this he exonerated the Mostyn because he thought that but for the unexpected incubus the anchor would have been up, and that those in charge of the Mostyn, though in some respects negligent, were not responsible for a consequence of their negligence which they could not have foreseen.

I am not quite sure whether this was the view accepted by Lords Justices Bankes and Atkin in the Court of Appeal. It is one on which I should hesitate to put my judgment. If there was negligence, and that negligence caused damage, I doubt whether it would be a defence to say that the damage was not one naturally to be expected.

I think the matter may be put on a broader ground, which is that which was explicitly taken by Lord Justice Sargant and, as I gather, by the nautical assessors in the Court of Appeal. In my view those in charge of the Mostyn did their best in the circumstances.

They were right, as already said, when they lowered their anchor. When afterwards they had to proceed forward and get their anchor, they were bound to have steerage way as soon as ever the anchor was off the ground. It would be, so to speak, a good fault if they got their way on rather before the anchor ceased to hold. With that gale, and in the position in which they were in the communication passage, it was all important that the ship should be kept heading straight. In difficult circumstances they did their best. This, I may add, is the opinion of the nautical assessors who have advised your Lordships' House, and I therefore conclude that there was no negligence in the navigation of the Mostyn.

My Lords, I have now to consider the claim of the railway company preferred by it as owner of the dock under section 74 of the Harbours, Docks, and Piers Clauses Act, 1847, and I have to construe that section in the light of the construction placed upon it by your Lordships' House in the case which I have already quoted of *River Wear Commissioners v. Adamson* (*supra*).

The literal language of the section would lead me to accept the construction put upon the words by Lord Gordon, namely, that they make the owner of any ship which comes into collision with and does damage to the works of a dock responsible for such damage, whether the collision be a fault of himself or his servants or not; that, in fact, the shipowner is made an insurer.

But the decision of this House, given in conformity with the opinions of the majority of the noble Lords who sat, forbids me to give so wide an application to the section.

At the opposite end of the line comes the suggestion that the section gives no rights to the dock-owner other than those which he possesses at common law and only gives him a power to ensure that those rights shall be fruitful by enabling him to detain the ship till satisfaction is made.

No doubt this by itself would in the year 1847 have been a valuable privilege, because till the Admiralty Court Act, 1861, the Admiralty Court would have had no jurisdiction in such a matter, and therefore the ship could not have been arrested. Neither would the Act 9 and 10 Vict., c. 99, section 41, have helped, because that only gives the power of detention in the case of damage to ships, buoys, or beacons and applies only to foreign ships.

It was not till 1854 that the Merchant Shipping Act of that year, section 527, gave the power which is now reproduced in the Merchant Shipping Act of 1894, section 688, and even so the power of detention is only in respect of foreign ships.

Valuable, however, as this privilege of detention was and still is, at any rate for England and Ireland, it is obvious that the section does more than give this privilege. It does confer rights and create liabilities not known to the common law, and this was clearly the view of the House in the *River Wear* case (*supra*). We must find some halfway position between these two extremes, and the question is where the line is to be drawn.

When the *River Wear* case (*supra*) was before the Court of Appeal, the Judges differed in the reasons which they gave for absolving the shipowners from liability. Baron Pollock decided the case upon a point of his own connected with the special circumstances of that accident.

Sir George Jessel, M.R., Chief Baron Kelly, and Mr. Justice Denman thought that in every Act of Parliament imposing a duty or a liability, however general and absolute the language might be, it was always to be supposed that there was an exception for accidents occasioned by an act of God or of the King's enemies, and that the misfortune in that particular case could be said to have been due to an act of God. This untheological expression is well understood by lawyers, and I should not myself have said that in the *River Wear* case (*supra*) the misfortune was the result of an act of God in its accepted legal sense. It was merely an ordinary case of perils of the seas. But, however that may be, your Lordships' House discarded this reasoning and refused to read into the statute this unexpressed exception.

Chief Baron Kelly and Mr. Justice Denman also relied upon the fact that, at the moment when the vessel made its impact on the pier, there was no one on board, and therefore no one in charge of the vessel; and they thought that the reference in section 74 to the liability of the master or person in charge implied that the owner of the abandoned vessel was not to be made liable for its drift.

But neither did that view commend itself to your Lordships' House. Lord Blackburn pointed out that the ship was not a derelict, and, if in any case a ship by the act of man is brought to such a position that in the ordinary course with tide or wind she will thereafter come into collision with a pier, the fact that she is then left by her master and crew ought not in reason to affect the question of the owner's liability.

There are two ways of reading the judgment of Lord Justice Mellish. According to one view the liability would accrue whenever the accident was due to some act of man. According to the other it would only accrue when the accident was due to the negligent act of some man, it does not matter who. This latter is the view of his judgment taken by Lord Blackburn, though apparently not by Lord Cairns.

However this may be, it seems to me that the *ratio decidendi* in your Lordships' House is to be found in the adoption of the latter view by the Lord Chancellor, Lord Cairns, by Lord Blackburn, and, in very hesitating terms, by Lord Hatherley and not expressly dissented from by Lord O'Hagan, that the shipowner is intended to be made liable in cases where the damage can be traced to the actionable negligence of some person, or, to put it in other words, to negligent human agency, the idea being that in this case the shipowner should be, as it were, the medium through which the dock-owner recovers his damage, that he should directly compensate the dock-owner and bear the loss if it is due to the negligence of himself or those for whom he is responsible, but get reimbursement from any ulterior person who is the real cause of the mischief. For instance, if ship A, by its bad navigation, forced ship B into collision with a pier, the owner of ship B would pay the pier-owner and look to recover over against the owner of ship A ; or if a shipowner has placed his ship in the hands of a ship-repairer, and the ship-repairer or his servants has done damage to a dock, the shipowner would have to pay the dock-owner and seek his remedy against the ship-repairer, while at the same time the right of an employer to recover against his own negligent servants is affirmed.

Lord Cairns calls the section a clause of procedure only, and says that it deals with the mode in which a right of action for damages already existing should be asserted and does not create a new right.

This, speaking with all respect, is a juridical idea of an unusual nature, because a right in A to recover from B is a different right from that of A to recover from C.

But for the purpose of the statute Lord Cairns treats the right as one in the abstract which exists in A and can be transferred from being one against B to being one against C. Actionable human agency is, therefore, according to these judgments, the test. This view receives confirmation, as he says, from the fact that an exception is made in the case of compulsory pilotage.

I read Lord Chancellor Herschell's judgment in the case of *The Crystal* (10 *The Times* L.R., 551 ; [1894] A.C., 508) as putting this construction upon the judgment in the *River Wear* case (*supra*).

The contention of the railway company before your Lordships was that human agency of any kind, though innocent, made a shipowner liable, and if that were so they would succeed in the present suit. But the result of my study has brought me to the conclusion that this is not what is intended by the judgment of the House on the *River Wear* case (*supra*). And as the proof given at the trial in the present case does not indicate that there was negligence on the part of anyone, I think the shipowners are entitled to succeed.

If it had appeared that the leading steamship had been negligent, and that the ultimate misfortune was the consequence of that negligence, then I suppose the shipowners would have had to pay, and to look to recover over against the owners of the leading steamship.

Lord Blanesburgh.—My Lords : I accept with all your Lordships the view just expressed by Lord Phillimore that the master and dock pilot of the Mostyn are to be absolved from all imputation of personal negligence in connexion with the navigation of their vessel on this occasion. I reach that conclusion for the reasons given by my noble friend, and I proceed at once to the inquiry whether in view of that finding the statutory liability of the respondents as owners of the Mostyn is at an end or whether it still subsists.

The hypotheses of fact upon which this inquiry must proceed are now made clear. It is convenient to collect them. They are, first, that at the relevant time the Mostyn was not under compulsory pilotage, or, in other words, that the respondents are not entitled to rely on the pilotage exception in section 74 ; secondly, that the damage done by the Mostyn to the appellants' harbour property resulted from the voluntary act of her master and pilot ; but, thirdly, that it was not due to any negligence on the part either of the respondents, or of the master or pilot, or of any persons on board of or connected with the vessel at the time. I have myself been helped by this statement, for it discloses, as in a flash, the correspondence between the facts of the present case and the words of the section in relation to a state of things to which the section has direct reference. The correspondence is striking, so striking indeed that one is tempted to affirm that had the present dispute been the first to call for judicial determination, it would have seemed that this statutory liability of the respondents was too plain for argument.

The general intent of the section is now, I think, generally accepted. It has been judicially described in varying terms, but with no different result. I take as a specially apt description that of Lord Justice Mellish in *Adamson's* case (1 Q.B.D., 546 ; 2 App. Cas., 743). "I think," he says, "looking at the language of the section, it clearly was the intention of the Legislature to extend the liability of the owners of vessels, in favour of the owners of piers and harbours, beyond the liability which is imposed on them by common law ; because, if that is not the intention, it is not easy to see the object of the section at all." That assertion begs no question as to the precise limits of the extension of liability effected by the section, but it does warn a Court of construction against the danger of denying its plain meaning to any expression found there, merely in order to avoid the imposition of a liability upon owners of vessels which had not hitherto been part of the law of the land.

Thus duly warned, I find on referring to the words of the section that the owner of every vessel is thereby made "answerable to the undertakers for any damage done by such vessel . . . to the harbour . . . or works connected therewith," and if there be any doubt as to the generality of that liability, in relation, at all events, to the presence or absence of negligence, with which alone the House is, in the present case, concerned, that doubt is, I suggest, resolved by the contrast to be found in the words which immediately follow, "and the master or person having the charge of such vessel . . . *through whose wilful act or negligence* any such damage is done shall *also* be liable to make good the same." The meaning of these latter words is surely quite clear. It is that the master or person having charge of the vessel is by them only made liable if the damage done is attributable to his wilful act or negligence. That such is the case is the view, amongst others, of Lord Cairns expressed in his judgment in *Adamson's* case (2 App.

Cas., at p. 753), of Lord Hatherley (at p. 753), and of Lord Justice Mellish (1 Q.B.D., at p. 553). I fortify myself by reference to these authorities only because of the somewhat different signification attributed to the words by Lord Justice Sargant here.

It is now possible to arrive at the full effect of the section so far as it applies to a case like the present. It is that the owner of a vessel as such, without any qualification in regard to the presence or imputation of negligence on his part, is made answerable for damage to harbour property done by his vessel ; that the master or person having charge of the vessel is *also* fixed with liability to make good the *same* damage, but, in his case, only if the damage be due to his wilful act or negligence, and not otherwise. And, my Lords, I would here observe that this contrast in the nature of the liability which by the section is imposed upon the owner on the one hand, and upon the master (using that term compendiously), on the other, is heightened by the terms of the pilotage exception, to which some reference must now be made. That exception, it will be remembered, extends to the "owners" only. It does not touch the "master," clearly, in my suggestion, because the liability of the owner under the section exists apart from any question of fault on his part ; while in the case of the master his liability is conditioned on personal negligence, not to be excused by the presence of any pilot on board.

And this leads me here to add one further statement as to the section, more general in its application. It is that this statutory liability is confined to two classes of persons and to them only : first, the owner, secondly, the "master," with, in his case, the qualification just stated. There is nothing on the face of the section to indicate that the owner's liability is in any sense representative. It is, so far as the section is concerned, as final and as personal as is that of the master. The significance of this, together with the fact that his liability presupposes no fault on his part, will emerge later.

And by these statements progress is made in resolving the one further difficulty which, so far as the present case is concerned, seems to be presented by the wording of the section. That is as to the connotation of the word "damage" as there used. The word, I venture to think, is employed to denote physical or material damage or injury to the harbour or works. If there were any doubt as to its signification when used in relation to the owner, there can, I suggest, be none when in reference to the same "damage" the master is required "to make it good." And not only by this indication is it shown that the word is being used in a material sense and not as a juridical term. Section 74 is one of a fasciculus of clauses (69-76) grouped under the heading : "And with respect to the protection of the harbour, dock, and pier, and the vessels therein, from fire or other injury, be it enacted as follows." And just as that heading refers to "fire or *other* injury," so it will be found that the penal sections, 69-73, are all directed to the protection and safeguarding of the harbour and shipping against physical injury of one kind or another. Accordingly, I cannot myself doubt that this word "damage" where it occurs in section 74 is used in that sense also.

In the result I can see no escape from the conclusion that, on the plain words of the section, the liability of the respondents thereunder for the damage here sued for is, in the circumstances now disclosed, clearly established.

And at this point I would observe that in the case of liability imposed upon an "owner" by section 56 of the Act, upon words not more express than the words of section 74, where also an unqualified construction is not assisted by such a contrasted provision as is found in section 74, a majority of this House in *The Crystal* (10 *The Times* L.R., 551 ; [1894] A.C., 508) held that an owner was thereby made liable without negligence on the part of himself or of his servants for damage for which, apart from such negligence, he was at common law under no liability at all. I use this case only to indicate that, if your Lordships do finally attach liability to the respondents in the present case, you will to this extent merely be bringing section 74 of this statute into line with section 56, as already interpreted in this House.

But, my Lords, while such a decision would involve no new principle and while it is necessary fully to appreciate, as applied to the facts of the present case, the unambiguous clarity of provisions which must be ignored if the respondents here are to escape liability, I necessarily recognize that the real difficulty which confronts the House now is to keep within its proper limits, as applicable to the facts here, its own decision in *Adamson's* case (*supra*). For I agree, of course, at once, that by the *ratio decidendi* of that case—if it can be discovered—and by the decision itself—whether its *ratio decidendi* can be discovered or not—your Lordships are as much bound as is at least every English Court.

There is, however, one circumstance in *Adamson's* case (*supra*) not yet alluded to which may require your Lordships in the present case to regard that decision from a very special point of view. Curiously enough—helpfully enough perhaps one ought to say—three of the noble Lords out of the four who there decided that there was, under section 74, no liability on the owner concurred at the same time in the view that on the true construction of the section an owner, *on the facts of the present case*, would be and remain liable for the harbour damage. That conclusion is clearly implied in Lord Hatherley's speech in the two middle paragraphs of page 753—which I refrain from setting forth only in the interests of economy of space. It is expressly so stated by Lord O'Hagan and by Lord Blackburn.

At page 760 of the report Lord O'Hagan says :—

"The Legislature may have fairly said, that greater protection was due to [the undertakers] than they derived from the law which had grown up before that commerce and those works had been created, involving the necessity of safeguards theretofore uncalled for and unknown. Accordingly, the Legislature made the owner—a person easily and always to be found—'answerable' *as* owner, and dispensed with the proof of negligence or any other proof, save of the fact of injury by the vessel—in all the cases contemplated by the Act."

And amongst these cases, as Lord O'Hagan had previously held, was the case where, as here, the vessel was in charge of a master at the time of the damage done. But Lord Blackburn is the most express of all.

At page 768 he says :—

"My Lords, reading the words of the enactment and bearing in mind what was the state of the law at the time when it was passed, it seems to me that the object of the Legislature was to give the owners of harbours, docks, and piers more protection than they had. It seems to have occurred to those who framed the statute that in most cases where an accident occurs it is from the fault of those who were managing the ship—and in most cases those are the servants of the owners—but that these were matters which in every case must be proved, and consequently

that there was a great deal of litigation incurred before the owner, though he really was liable, could be fixed : and with a view to meet this, the remedy proposed was that the owner, who was generally really liable (though it was difficult and expensive to prove it), should be liable without proof either that there was negligence, or that the person guilty of neglect was the owner's servant, or proving how the mischief happened, and this is expressed by saying that the owners shall be 'answerable for any damage done by the vessel or by any person employed about the same' to the harbour."

My Lords, when you find that three out of four noble Lords who were at one in exempting from liability the owners in *Adamson's* case (*supra*) are there equally in agreement in the view that owners in the circumstances of this case would be liable, does it, for present purposes, matter what the *ratio decidendi* of all or any of them was ? I greatly doubt. In any case, at the least, these views so expressed strengthen the conclusion at which I should have arrived independently, that Lord Cairns alone in *Adamson's* case (*supra*) committed himself to what I may call the "procedure" view of the section, the only view of it adequate to protect the respondents here from liability. From this consideration this consequence also follows—that if your Lordships, following Lord Cairns, are minded now affirmatively to treat this section as a section of procedure, thereby exonerating the respondents, you must be prepared also to dissent from the views of the section, as applied to such a case as the present, taken and expressed by a majority of the House in *Adamson's* case (*supra*) itself. For myself, for reasons already given, I am not prepared to do anything of the kind ; and to avoid being under that necessity, I am encouraged to examine with a freedom which otherwise I should have regarded as presumptuous the view that section 74 is a procedure section only.

My Lords, an examination of Lord Cairns's judgment shows that he was led to this conclusion in the expectation and belief that two main results were thereby attained. First, the undertakers were relieved of the burden of finding, for the purposes of suit, the real wrongdoer. The owner in every case was the only necessary defendant, and that was a great concession to the undertakers. Secondly, the owner was not seriously embarrassed by the burden so placed upon him, because section 76 gave him a right over against the actual wrongdoer, whoever he might be.

My Lords, if Lord Cairns had had the opportunity of weighing and considering some of the observations since made upon his judgment, he must, I think, have found that neither of these expectations was realized by the effect which he attributed to the section. He must, I think, have seen that so far as the undertakers were concerned the advantage presented to them was almost illusory, and he would have realized that, so far as the owner was concerned, to call the section merely a procedure section was to speak of peace when there was no peace. But in my view, if I may respectfully state it, the main objection to the procedure theory is that it is really denied to a Court of construction by the very terms of the section itself.

My Lords, I will deal with these points in their order. As to the first, Lord Justice Atkin has pointed out with striking force that negligence cannot be treated as a thing separate from the person alleged to be guilty of it. May I for myself add how difficult both for plaintiff and defendant, and how unprecedented it would be, to conduct and frame a suit in which negligence had to be proved against him but to which the actual wrongdoer need be neither party nor privy ? The section on this view of it, while it would apparently sanction a procedure altogether novel, would really be of no advantage to the undertakers.

Now take the position of the owner. Lord Cairns's view was that the statute in every case gave him his right over against the wrongdoer, and this conclusion encouraged him to read the section as he did so far as it related to the owner. But here, if I may most respectfully say so, Lord Cairns overlooked the fact that, just as the section itself imposes its statutory liability only upon the owner and, subject to conditions, upon the "master," so by section 76 it is, as you would expect, only against the negligent "master" that the owner is given a right of recourse. If the negligence causing the damage was that of anyone else—the hirer, the ship-repairer, anyone on board but not in charge—the section on this procedure view of it would leave the owner to bear the burden himself, a consequence not anticipated by Lord Cairns. And is there not to be found in this consideration the strongest argument of all against this procedure view of the section ? That section, as an enactment, imposes liability for the benefit of the undertakers on two classes exclusively, viz., owners and masters of vessels. Section 76 adjusts the incidence of that liability between these two, and it goes no further in the way of adjustment because there is no other liability to adjust.

But lastly, my Lords, the procedure view of the section is, I very respectfully suggest, not open on the construction of the section itself. The procedure construction gives no weight to the distinction in this matter of negligence drawn by the section between the liability thereby imposed upon the owner and that imposed upon the master. That construction requiring also, as it does, personal or imputed negligence on the part of the owner in every case gives the go-by to the limited terms of the pilotage exception already alluded to. Lastly, it does not inquire how the conception of unrestricted representative liability is, on construction, permissible, when by the section itself the statutory liability is confined to the owner and the master exclusively.

For all these reasons, my Lords, treating this matter as one open to the House to determine, I express the view, with the utmost reverence for any opinion of Lord Cairns, that this procedure construction of the section is not admissible.

But I may properly be asked whether in saying this I loyally recognize that the House is bound by its own order in *Adamson's* case (*supra*), and whether I have governed myself accordingly. My Lords, I am glad to be bound by the decision in *Adamson's* case (*supra*). Had I then been a member of this House I should have agreed entirely with the view of the majority. Accepting, in the words of Lord Cairns, the position that the injury in that case was one that could not have been prevented by any human instrumentality, but that it was occasioned by a *vis major*, namely, by the act of God in the violence of the tempest, I should have reached the conclusion that the owners were free of liability on two separate grounds, each quite satisfactory to myself. The first would have been that the liability imposed by the section on the owner in relation to his ship was of the type in *Fletcher v. Rylands* (L.R., 3 H.L., 330) and was subject, as that liability always is, to the reservation that the damage is not attributable to an act of God, being what Lord Blackburn in *Adamson's* case (*supra*) called a common misfortune. Alternatively I should have arrived at the same conclusion

on the ground stated by Sir G. Jessel, to which, as I read his judgment, no answer has, so far as I can find, ever been given, and which is to me quite satisfactory.

My Lords, Sir George Jessel—and I refer to him alone and I except from the reference both Chief Baron Kelly and Mr. Justice Denman—found the key to the section on this point, not, as has been so often supposed, but as I venture to think under a misapprehension of his meaning, in the words of substantive enactment alone, but in those words taken in connexion with the pilotage exception. My Lords, here I entirely agree with my noble friend Lord Dunedin, if I may respectfully say so, that this House in *Adamson's* case (*supra*) must be taken to have been of opinion that an exception of an act of God could not be read into the words of enactment here standing alone. But Sir George Jessel, unlike Chief Baron Kelly and Mr. Justice Denman, did not find the exception in these words alone ; he found it in them taken in connexion with the pilotage exception. He pointed out that under that exception where a vessel in charge of a pilot was overwhelmed by tempest there would be no liability either on the owner, by reason of the exception, or on the pilot under the law. In that case, therefore, any damage done by the vessel to the harbour would have to be borne by the undertakers. Could it in these circumstances be supposed that the Legislature had in the same event by the substantive words of the clause imposed a liability on the owner for the irrelevant reason that there was no pilot on board ? The same view might perhaps be expressed thus. As Lord Blackburn said in *Adamson's* case (*supra*), the exception of an act of God may be implied in the terms of an instrument imposing the liability ; it need not be expressed. Is not such an exception necessarily implied in this section by the presence there of the pilotage exception ? The Legislature has exempted the owner from liability when his vessel at the time of doing the harbour damage is in the hands of a pilot to whose appointment he has had to submit by the constraint of temporal authority. Is it to be supposed that the Legislature when giving this exemption was not proceeding upon the footing that under the section, apart from the exception, the owner was already immune in a case where the navigation of the ship had been taken out of the owner's control, not by a mere pilot imposed upon him by administrative constraint, but by an irresistible and unsearchable Providence nullifying all human effort ?

My Lords, the announcement by some of the noble Lords in *Adamson's* case (*supra*) to the effect that the Court of Appeal had been too ready to imply from a liability imposed by statute an exception in favour of an act of God may preclude me from expressing, as now permissible, the first of the reasons above given. But I do not find that what Sir George Jessel really, as I believe, said has ever been dealt with adversely by anyone in this House, and it seems to me that Lord Blackburn and Lord O'Hagan were in no way opposed to his view, while Lord Justice Mellish's human agency limitation was *merely a paraphrase* of it stated as a result. I believe, therefore, that I am still entitled to hold and express it.

But if I must, in view of the decision in *Adamson's* case (*supra*), cherish both of these grounds only for my own private and personal satisfaction, I have still remaining a sufficient justification for the opinion which I hold that a decision in favour of the respondents here is quite consistent with the decision in *Adamson's* case (*supra*). I find that justification in the fact that it was the opinion also of three of the noble Lords who concurred in the decision in *Adamson's* case (*supra*), and I am not required to particularize the reasons which they gave for that conclusion.

The result, in my view, is that the owner of a vessel has, under this section, been made answerable to the undertakers for the damage referred to in the section, with no obligation on the part of the undertakers to prove more against him than that the damage was done by his vessel and that he was her owner at the time. To such a claim when so far proved only two defences are open to the owner :—

(*a*) The pilotage exception ;

(*b*) that the damage was in fact attributable to the agency of what, in the language of a simpler age, is known to the law as an act of God.

The object of the section being to provide exceptional protection for the undertakers, I do not myself think that the enactment on this view of it imposes on owners of vessels a burden that can fairly be regarded as oppressive.

On the whole case I concur in the motion made by the noble Viscount on the Woolsack.

[Solicitors—Mr. A. G. Hubbard ; Messrs. Ingledew, Sons, and Brown, for Messrs. Ingledew, Sons, and Crawford, Swansea.]

Prob., Divorce, and Adm. Div. (Hill, J.) 1927. Dec. 12.

THE JANERA.*

Ship—Collision—Motion to stay proceedings.

A collision having occurred in Egyptian waters between a British steamship and a German steamship an action in respect thereof was instituted by the owners of the British vessel in the Egyptian Courts against the German shipowners, who in due course put in bail. Subsequently the German shipowners also issued a writ in the Egyptian courts against the British shipowners, but eventually they abandoned their proceedings in Egypt and issued their writ in the present action. On a motion by the British shipowners to set aside the writ and stay all subsequent proceedings on the ground that the action in this country was in the circumstances vexatious and oppressive,

Held, that the fact that a plaintiff in the English Courts was a party, as defendant only, to proceedings elsewhere, was not a ground for depriving him of his undoubted right to sue in this country, and the motion must be refused.

This was a motion by the defendants, the Anglo-Egyptian Oilfields, Limited, to set aside the writ and stay all proceedings in an action *in personam* brought against them by the plaintiffs, the owners of the German steamship Masconomo. The ground of the motion was that the proceedings were vexatious and oppressive.

Mr. G. P. Langton, K.C., and Mr. H. G. Willmer appeared in support of the motion ; Mr. C. R. Dunlop, K.C., and Mr. R. H. Balloch for the plaintiffs.

Mr. LANGTON said that the matter arose out of a collision in Egyptian waters between the Masconomo

* Reported by A. W. GRANT, Esq., Barrister-at-Law.

and the defendants' steamship Janera, on July 8, 1927. On August 16 the Anglo-Egyptian Oilfields, Limited, issued a writ in the Egyptian Courts and in due course obtained bail from the defendants in that action, the owners of the Masconomo, who were Germans resident in Hamburg. On August 20 the owners of the Masconomo issued a writ in a cross-action against the owners of the Janera. Meanwhile, the Egyptian Courts had appointed an expert to investigate the cause of the collision, and that expert reported in favour of the Janera. Thereupon the German owners discontinued their cross-action in Egypt, and on October 18 issued the writ in the present action, and the defendants were now seeking to set it aside.

MR. JUSTICE HILL.—Is there any authority for saying that you can stop a plaintiff from proceeding here merely because he has been made a defendant in proceedings elsewhere ?

Mr. LANGTON.—No, my Lord. My point is that both parties entered upon the proceedings in Egypt with their eyes open ; that those proceedings can be most conveniently tried in Egypt, all the witnesses being at hand ; and that the further proceedings in this country, to which the Janera never comes, are unnecessary, and, therefore, vexatious and oppressive.

Counsel went on to suggest that the German plaintiffs had abandoned their cross-action in Egypt and issued a writ in this country merely for tactical reasons—they had, presumably, no assets in this country, and the owners of the Janera, having obtained bail in Egypt, could not demand bail again in this country. He submitted that the Court had power to stay proceedings under section 41 of the Supreme Court of Judicature (Consolidation) Act, 1925.

Counsel for the plaintiffs were not called upon.

MR. JUSTICE HILL.—In my view this motion fails. It is a motion to stay an action *in personam* brought by the owners of the German steamship Masconomo against the defendants, the Anglo-Egyptian Oilfields, Limited. The ground of the application is that it was vexatious of the plaintiffs to issue their writ and that they ought not to be allowed to sue here. The collision happened somewhere near Egyptian waters, and the present defendants, the Anglo-Egyptian Oilfields, Limited, began an action in the Egyptian Courts against the Masconomo, the steamship of the present plaintiffs. At some stage of those proceedings the present plaintiffs issued in the Egyptian Courts a cross-writ against the owners of the Janera, but I have to deal with the matter as it stands now. While these proceedings and this motion were pending the present plaintiffs withdrew their writ, and therefore they are not parties, as plaintiffs, to any proceedings in Egypt. They still remain parties to proceedings in Egypt as defendants in the action by the Anglo-Egyptian Oilfields, Limited, against the owners of the Masconomo. It seems to me quite clear that the Court ought not to stay a plaintiff in the Courts of this country on the ground that he happens to be a defendant elsewhere. Therefore, as things are at present, I see no ground at all for staying the plaintiffs' action. It is said that I ought to stay the action here because up to a point the plaintiffs took part in the proceedings in Egypt and themselves at one time were plaintiffs out there. I do not think I ought to do more than consider the state of the proceedings in the one country and the other at the time when I am asked for a stay. If the plaintiffs have brought proceedings in Egypt which they have since abandoned it is to be presumed that the Mixed Tribunal in Egypt will be able to give the Anglo-Egyptian Oilfields, Limited, all the costs that have been thrown away by these proceedings of the German owners which have been abandoned. The Anglo-Egyptian Oilfields, Limited, have bail in a sum which appears to be in excess of the damage which they have suffered, and it seems probable that they will be able to apply in Egypt for any costs that they have incurred by reason of the present plaintiffs having commenced the proceedings which have now been abandoned. Therefore, I cannot think that I ought to stay an action properly brought in this country solely because the people who have brought that action are defendants in proceedings in Egypt relating to the same collision. I have asked for authority on the subject and the defendants cannot find any, and in that position I can see no justification for staying the present action. In general, if the proceedings on the part of the present plaintiffs were still continuing in Egypt I think the proper course would have been to put them to election, but as they have already elected and acted upon their election and abandoned the proceedings in Egypt, and there are no proceedings by them any longer anywhere else than in this country, it seems to me that I cannot interfere to deprive them of a right, which undoubtedly they possess, to sue in this country. The motion must be dismissed with costs.

[Solicitors—Messrs. Waltons and Co. ; Messrs. Thomas Cooper and Co.]

House of Lords.
(Viscount Haldane, Viscount Dunedin, Lord Shaw of Dunfermline, Lord Phillimore, and Lord Blanesburgh.)
1927. Dec. 19.

BOW'S EMPORIUM, LIMITED v. A. R. BRETT AND COMPANY, LIMITED.*

Principal and Agent — Agent's commission — Sale of business—Claim for commission from purchaser — Concurrent findings of Courts below.

Although commissions on sales are usually paid by the vendor, an express bargain may throw the commission upon the purchaser.

Where an agent is employed to make inquiries about a particular business with a view to his employer's acquiring it, on the terms of his being paid by the purchaser a commission on the purchase price if business is transacted, and where the parties are brought together through his agency, he is entitled to commission, even where the actual purchase is ultimately effected through the intervention of another agent, provided that his services are really instrumental in bringing about the transaction.

In an action by an agent for a claim for commission from the purchaser on the sale of a business, the Lord Ordinary found on the facts that the agent had earned his commission and his decision was affirmed by the First Division of the Court of Session in Scotland.

Held (Lord Phillimore and Lord Blanesburgh dissenting), that the concurrent findings of the Courts below ought not to be disturbed.

* Reported by H. B. HEMMING, Esq., Barrister-at-Law.

This was an appeal from an interlocutor of the First Division of the Court of Session in Scotland adhering to an interlocutor of the Lord Ordinary, Lord Morison.

The respondents, who carried on business at Manchester and Birmingham as agents for the sale or purchase of businesses, estates, &c., on commission, sued the appellants, who were outfitters of Glasgow, for commission on a transaction by which the appellants acquired as a going concern in September, 1925, the business of R. Wylie Hill and Company, Limited, of Glasgow. The negotiations were conducted by Mr. Fairhurst, who was the manager of the respondents' Birmingham business.

According to the respondents' case, the respondents were advertising certain businesses for sale and, as the result, the appellants communicated with them, and on November 14, 1924, an interview took place in Glasgow between Mr. Fairhurst and Mr. R. W. Bow, who represented the appellants. At that interview Mr. Bow stated that the businesses in question, being English, did not interest him and suggested that Mr. Fairhurst should submit for his consideration other businesses of the kind which he indicated, and he mentioned the business of Wylie Hill and Co., Limited. Mr. Fairhurst's version of that interview was that Mr. Bow, on behalf of the appellants, engaged the respondents, as agents, to inquire regarding the businesses indicated by Mr. Bow and submit particulars with a view to purchase, but this was denied by Mr. Bow.

Mr. Fairhurst then communicated with Wylie Hill and Co., Limited, and ascertained that their business might be acquired, and he obtained from them a balance-sheet. On December 4, Mr. Fairhurst called on Mr. Wylie Hill, who had a controlling interest in the business in Glasgow, and mentioned Mr. Bow's name. Later, on the same day, he called on Mr. Bow and informed him that Mr. Wylie Hill was willing to entertain proposals for the purchase of the business. The question of commission was mentioned and Mr. Fairhurst intimated that his company expected a commission of 2 per cent. Mr. Bow replied that he would treat him fairly in the matter. After some correspondence on that point Mr. Bow wrote in February, 1925, that he was definitely off the idea of purchasing the Wylie Hill business, but in the following September the appellants, through the immediate intervention of an actuary employed by the purchasers and the vendors, acquired the business.

At the trial there was some conflict of evidence between Mr. Fairhurst and Mr. Bow, but the Lord Ordinary preferred the evidence of Mr. Fairhurst. In the result he held that the appellants had come under an obligation to pay a reasonable commission on the purchase price of the business and allowed a commission of 1 per cent.—namely, £1,350—as being a reasonable commission. No question was now raised as to the amount.

The First Division (the Lord President, Lord Sands, Lord Blackburn, and Lord Ashmore) affirmed the decision of the Lord Ordinary.

Mr. Graham Robertson, K.C., Mr. King Murray (both of the Scottish Bar), and Mr. R. A. B. Powell (of the English Bar) appeared for the appellants; Mr. Craigie Aitchison, K.C., Mr. Arthur P. Duffes (both of the Scottish Bar) and Mr. Dewar Gibb (of the English and Scottish Bars) for the respondents.

VISCOUNT HALDANE.—My Lords: In this appeal the question before us has been one mainly of fact. Two Courts below have examined the facts, and have arrived at conclusions which are substantially identical and turn on the evidence of witnesses and certain relevant letters. In the circumstances, I think that one ought to be reluctant to reverse the decisions so come to unless there is clear reason for dissenting from them. I do not myself find any such clear reason in this case. The restriction on our freedom does not arise from any statute or common law principle. It is due to a convention of the Constitution which has several applications of varying stringency. The Supreme Court of the Empire does not generally hold itself free to review the findings in a criminal trial in the Dominions or India, nor will it usually review concurrent findings of fact by two Courts below. As a rule, it will only rarely and reluctantly interfere where successive Courts below have concurred in a conclusion of fact based on evidence. In the present case I think this last rule applies, and that the burden lies heavily on the appellants to discharge themselves from its effect. But while I do not find that in the circumstances before us that burden has been successfully discharged, it is by no means only on that ground that I have arrived at a conclusion. On the evidence and correspondence I think that the conclusion arrived at by the Court of Session on the merits was the true one.

My Lords, the question which we have to decide is whether the respondents, who carry on business as agents for the sale and purchase of businesses and other properties, are entitled to commission on a transaction. The appellants, who are a company carrying on a large business as outfitters in Glasgow, acquired in 1925 as a going concern the similar business of R. Wylie Hill and Company, Limited, in that city. The respondents to some extent were instrumental in bringing about this result. If they were entitled to a commission at all, its amount has been restricted to £1,350, and the amount itself is not now in question.

The Lord Ordinary, before whom a proof was conducted, found that the appellants employed the respondents to make inquiries with the view of the appellants' acquiring the business of Wylie Hill and Company, and that the employment was made at a meeting between Fairhurst, the respondents' manager, and Bow, the managing director of the appellants. The Lord Ordinary also found that the appellants afterwards took advantage of the respondents' initial services and introduction, and that these were the real foundation on which the ultimate purchase of the business by the appellants rested. He applied the principle that where an agent first introduces the purchaser to the vendor he is entitled to a commission if, as he held, the bargain was that the purchaser was to pay the commission.

My Lords, no doubt it is true that where a sale is negotiated by an agent his commission is usually paid by the vendor. But this is a rule which yields to circumstances. It may well be that, where the agent is employed to approach the owner of a particular business in order to negotiate its sale by a vendor who is to be thus set in motion, the parties may bargain, or be taken to have bargained, that the commission is to be paid by the purchaser on whose behalf the agent has succeeded in setting the vendor in motion.

What the evidence showed was this. Fairhurst, who was the manager of the Birmingham branch of the business carried on by the respondents with its head office in Manchester, sent the respondents' October catalogue, with their lists of businesses for purchase or sale, to the appellants. It was received

by Mr. Bow, who appears to have had some idea of extending the business of his company. The latter cut out of the catalogue entries relating to two of the businesses in it, and sent them to the respondents requesting full particulars. Fairhurst proceeded to Glasgow a few days later, and on November 14, 1924, called on Bow. The latter, on finding that the two businesses were in England, said that they did not interest him. But he added that among other businesses there was one, Wylie Hill's, of which the man who ran it was over 70 and had no sons to carry it on, and that he (Bow) had the feeling that some new management would be bound to take it over. According to Fairhurst, who knew nothing of the Glasgow firms, he asked Bow whether there was any chance of getting hold of Wylie Hill's business or of another the name of which Bow did not mention. The latter replied, according to Fairhurst, that this was what he wanted Fairhurst to find out for him.

Fairhurst then got into confidential communication with Mr. Hill, the managing director of the Wylie Hill Company, and ascertained that the business, with the shares and debentures in the company, might be acquired. He was given the last balance-sheet and report. He next arranged to meet Hill in Glasgow on December 4, 1924. In anticipation of this visit Fairhurst wrote to Bow on November 28 that he had particulars of a good business in the North which he thought might be of interest to him, and that he would be glad if Bow were willing to pay his commission—namely, two per cent. on the purchase price—but only if business were transacted. Bow replied on the 29th that owing to his Christmas trade he had no time to go into the matter, but that all the same he should be pleased to see Fairhurst on the following Thursday. Fairhurst went to Glasgow and first saw Hill. They discussed the contemplated sale to the appellants, and Fairhurst was shown over the premises. He told Hill that the appellants were his clients and that he had no reason to think that they were not in a position financially to take up the transaction. Fairhurst then saw Bow, told him of the interview with Hill and of the latter's willingness to negotiate, and handed him a copy of the Wylie Hill balance-sheet. The Lord Ordinary finds that what followed was that Bow thanked Fairhurst for the information, and promised to let him know further on the matter. Fairhurst explained that, if the transaction went through, his firm's usual commission was two per cent., and asked Bow to give him a written note on the subject. This Bow declined to do, but said that the respondents need have no fear about their commission, as the appellants would treat them fairly in the matter of commission. Mr. Bow admits in his evidence that he may have said, "You need not worry about commission," but says that "we never discussed commission," and that his whole desire was to "get finished" with Fairhurst.

The Lord Ordinary, after finding the facts as above stated, says that he accepts Fairhurst's evidence, which was in his own opinion sufficiently corroborated by the correspondence. His conclusion was that the respondents duly carried out their mandate, on the footing agreed to by Bow that they were to be paid a fair commission for their services. They tendered these services to the appellants with a view to carrying out the purchase, but the appellants, as they were entitled to do, declined these services. As the sale went through on the basis of what Fairhurst did, the respondents were, in the learned Judge's opinion, entitled to commission as contracted for.

Bow received letters from the respondents after the New Year asking how matters were progressing and for a written guarantee of the commission. On January 12, Bow replied that, "owing to the illness of our chairman, I have not been able to raise this question with him. At the same time, I may say that I am now rather off the idea altogether. Regretting the trouble you have been put to in the matter," &c. The Lord Ordinary points out with reference to this letter that Mr. Bow, having obtained valuable information from Fairhurst, so far from being in the frame of mind indicated in what he wrote, was about to negotiate through another channel for the purchase of the Wylie Hill business. The auditor both of that business and of Mr. Bow's business was a Mr. Taylor. The Lord Ordinary finds that, without disclosing his intention as to acquiring the business, Mr. Bow, taking advantage of the information given to him by the respondents, on February 11 approached Mr. Taylor and asked if he had heard that the Wylie Hill Company were disposing of their business. Taylor replied that he had not, but would inquire at the first opportunity.

My Lords, this proceeding on Mr. Bow's part becomes the more significant because it is inconsistent with a letter that he wrote about this time. On February 12, having been asked by Fairhurst by letter whether he had finally decided against the Wylie Hill purchase, and requesting him in that event to return the balance-sheet in order that they might put it before another client, he replied that he was definitely off the idea, and returned the balance-sheet as requested. Now it was on the day before he wrote this letter, on February 11, that Mr. Bow had approached Taylor, the auditor of the Wylie Hill business as well as of his own. Taylor, some days thereafter, told Hill that he had clients who were inquiring whether his business was for sale. Hill asked at once whether the appellants were the clients, and Taylor admitted that they were. Hill informed Taylor that he was willing to consider a reasonable offer for his business, and to give him some account of his previous communications with the respondents in December. Four days after this Taylor reported this conversation to Mr. Bow, but the latter took no immediate step. In September Hill appears to have got an offer for his business from an English syndicate. He thought it a good thing, remembering the introduction of the negotiation which the respondents had effected, to ask Taylor if the appellants were "still interested." Taylor then approached Bow. This was the opportunity which, in the Lord Ordinary's opinion, the latter desired, and, after a brief negotiation, the appellants purchased the Wylie Hill business for £135,000. The Lord Ordinary has held that the appellants employed the respondents to make inquiries with the view of acquiring that business; that the employment was made at the meeting of November 14, 1924, and confirmed at the meeting which followed on December 4. He went on to hold that the employment was acted on by the respondents and that they implemented their contract by obtaining Hill's consent to negotiate, tendering their services to Bow in order that the transaction might be concluded. It was, in the learned Judge's view, clear that the appellants were to pay a commission. Bow had said to the respondents that he would "treat them fairly," and where there is an agreement to pay (the mere amount is not really in

dispute in this case) the agent who has got an agreement to be paid the commission, and who has introduced the purchaser, is entitled to it, even where the actual sale is not ultimately effected through him. The question is whether the services of the agent were really instrumental in bringing about this transaction.

The conclusion to which the Lord Ordinary came was based on his view of the credibility of the witnesses. He says that he has no hesitation in preferring, where there was a conflict, the testimony of Mr. Fairhurst to that of Mr. Bow. It is said that Fairhurst used expressions in certain of his letters which, so far as they go, amount to deliberate misstatements. I think that this is true, but the misstatements do not concern the point on which the Judge decided in his favour. On the other hand, Mr. Bow made a much more serious misstatement in the letter of February 12, when he said that he was definitely off the idea of the purchase at the very period when he was instructing Taylor to inquire for him. Possibly he thought that he might in this way get out of paying commission. Anyhow, it is clear that he was not candid on a most material subject, and the Lord Ordinary appears to have been justified in laying stress on this when he rejected his testimony as a witness.

The learned Judges in the Inner House were unanimous in adopting the decision of the Lord Ordinary on what was really no more than a question of fact. It is quite true that they decided as they did with some reluctance. They thought that even the reduced commission as agreed on was a large sum to pay for very little work. That may have been why Lord Blackburn said that he could not help feeling that justice was not being done in the case. But not the less he was clear that the judgment of the Lord Ordinary must be affirmed. He thought Fairhurst an unduly plausible person. But the conclusion come to about the evidence he thought that a Court of Appeal could not ignore.

My Lords, I am for the reasons that I have stated of opinion that it is our duty to affirm the judgment and dismiss the appeal with costs. The point in issue is purely one of legal right, and sentiment must not be allowed to enter into its consideration.

Viscount Dunedin.—I concur in the judgment which has been read by my noble friend on the Woolsack and also in the judgment about to be read by my noble friend Lord Shaw.

Lord Shaw of Dunfermline.—My Lords : The respondents carry on business as agents for the sale and purchase of properties, businesses, &c., on commission. The whole question in the case is whether, in the circumstances about to be narrated, they earned commission.

If they did so, there is no dispute as to the amount due ; the parties have agreed that it should be 1 per cent. upon the sale.

There was oral evidence in the case that was heard by the Lord Ordinary, and it appears to have been most carefully reviewed also by the First Division of the Court of Session. The Lord Ordinary, having had Mr. Fairhurst, of the respondents' firm, and Mr. Bow, the managing director of the appellants' firm, before him, says expressly that he has no hesitation in preferring the testimony of Mr. Fairhurst to that of Mr. Bow, and gave a decree for the agreed sum in favour of the respondents. The First Division, acting as I think both on sound principle as well as on authority, declined to disturb this judgment, as the Lord President concisely puts it, conceiving their duty to be "not to disturb the Lord Ordinary's findings on the matters of fact involved in the dispute, unless there be room for holding that he has drawn a wrong conclusion from the facts found to be established." They went, in my opinion, farther than that, and with some doubts, but after having carefully investigated the evidence they appeared to reach the same conclusion upon it as was reached in the Outer House.

Lord Blackburn, however, goes so far as to make the conjecture that the Lord Ordinary had been misled by the plausibility of a witness. I think it would be unfortunate if the verdict of a Judge who heard and saw a witness and believed him were to be weakened or upset by another Judge sitting on appeal, who had not these advantages but made a conjecture of the kind described.

Beyond that incident this is an ordinary case of a conflict of testimony in which the Courts in Scotland concur in the same conclusion. It would be a notable infraction of the practice of this House to upset the Courts below on a matter of fact (*e.g., Clarke v. Edinburgh and District Tramways Company, Limited* [1919] S.C. (H.L.), 35). I am accordingly of opinion that both in substance and in its grounds the judgment of the First Division was right.

A strenuous argument of a twofold character was presented to this House. The Lord Ordinary was criticized for calling Mr. Fairhurst a candid and accurate witness. There is force in the criticism to this extent, that undoubtedly he was a pushful person who took quick advantage of an inquiry made to his firm by the appellants as to some other businesses, and that he seized the occasion to get into touch personally with the appellants by visiting Glasgow on November 14 and seeing Mr. Bow. He, Fairhurst, was clearly anxious to extend his business connexion into the Glasgow district. But when these parties met it is established that Mr. Bow mentioned that the Wylie Hill business might possibly come into the market, and I hold it proved that he did entrust Mr. Fairhurst with the business of making an approach to Messrs. Wylie Hill. Mr. Fairhurst did make that approach and made it with success. He found the crucial fact in the case, namely, that the firm would be willing sellers, that the business was open to be bought, and, armed with that information and certain facts to be derived from the balance-sheet, he returned to Mr. Bow and informed Mr. Bow as to how matters stood. This is cardinal : a relation between a willing buyer and a willing seller was begun ; it might ripen into a transaction. A purchase of that business was afterwards made by Bow from Hill.

The case of Bow is that the transaction of purchase had no relation to the information thus gathered and communicated by the respondents ; that if they did anything, it was just to put a question and get an answer, and that the respondents were mere messengers and had no ground for more than the trivial fee which would be a messenger's due.

The Lord Ordinary's judgment, while expressed as a preference between two witnesses who flatly contradict each other, of course involves not only that he believed Mr. Fairhurst but that he disbelieved Mr. Bow. The argument of the appellants' counsel was that your Lordships should upset the Courts below and the practice to which I have alluded by reason of the correspondence which passed. I admit that that correspondence is valuable, but I agree in holding that it does not support but, on the contrary, strongly refutes the appellants' case.

After the interview in Glasgow on November 14 the respondents were not idle. On the 19th they wrote to Messrs. Wylie Hill inquiring "whether you would be open to dispose of your interest in the lease or freehold of the above premises" and offering to go into the matter. On the 20th they received an answer from Mr. Wylie Hill, "the business as a going concern might be acquired"; and on the 25th and 28th they wrote to Mr. Hill asking for an appointment. On the latter date they also wrote to the appellants that their representative would call on December 4. The letter contains the enigmatic sentence, "I have particulars of a good business in the North which I think might be of interest to you"; this was the Hill business, and, although Mr. Bow says that he did not know what the language referred to, that was made clear enough when the parties met on December 4. In the same letter of November 28, however, Mr. Fairhurst writes, "I shall be glad to know if you are willing to pay our commission, namely, 2 per cent. on the purchase price." He says that he had, without success, mentioned that to the vendor as a possible charge upon the latter; and I think this statement of his to be very doubtful. Then came the interview of December 4 and there can be no doubt whatever that commission was then mentioned between Mr. Fairhurst and Mr. Bow. Mr. Bow admits that it was mentioned and further admits that he assured Mr. Fairhurst that he would treat him fairly. This had no other meaning than fair treatment in the matter of commission, and (secondly) it disposes of the suggestion that the respondents were to look for commission from the seller.

Then on December 11 the respondents wrote to the appellants per Mr. Fairhurst:—

"As I told you last week, it is usual for us to get a written guarantee from the prospective purchaser to pay our commission, namely, 2 per cent. on the purchase price if business is transacted."

This is plain beyond all question, and it deserved, as did the previous letter, a plain answer. The matter is put to Mr. Bow quite properly in cross-examination and the thing culminates in this way:

"*Question.*—If the suggestion there contained in that letter was absolutely a false suggestion, why didn't you reply to Mr. Fairhurst and say so?"

"*Answer.*—Well, I replied to very few of his letters. I just shoved them aside; I was not really interested in anything he was writing about."

It now turns out, however, that the true state of matters is that Mr. Bow was, in fact, very deeply interested. So much was this the case that, while he was endeavouring to shoulder off the respondents, he was at the very same time opening negotiations through another quarter, namely, through the joint auditor of the two businesses, and that he was putting Mr. Taylor, the auditor, in possession of the fact that Messrs. Wylie Hill wanted to sell their business, and, as the events show, he wished confirmation of the fact that Messrs. Wylie Hill were still open as willing sellers. On January 12 he answered the letter of the 11th, in which the respondents desired a written guarantee for the 2 per cent. on the purchase price if business resulted, and in this answer he says, "I might say that I am now rather off the idea altogether." It now appears that this is entirely inaccurate; he was very much on the idea; and inquiries and negotiations were already set on foot the previous day and Mr. Taylor was charged with the matter.

It is clear that, if the correspondence be fairly looked at, it is a correspondence which largely confirms the evidence of Mr. Fairhurst and quite destroys the evidence of Mr. Bow. Three things stand out as plainly established. First, Mr. Fairhurst was, to the knowledge of Mr. Bow, acting as a commission agent; secondly, he had been promised to be fairly dealt with as such; and thirdly, a willing buyer having been procured, for him a willing purchaser, Mr. Bow ultimately bought the business in a transaction of which the material and crucial element was that Mr. Bow and Mr. Hill were brought together through the agency of Mr. Fairhurst.

One is unwilling to characterize further the part played by Mr. Bow on January 11-12. Thereafter there was a lull of events, it being, possibly, clear enough to Mr. Bow that to push the transaction on the seller would lift the price; but the matter was ultimately arranged and in the fall of the year the business was bought.

The appellants' counsel seemed to maintain that no commission was due because there was not an "introduction" of the two parties, seller and buyer, to each other. My Lords, such transactions may be conducted and concluded without any introduction, in that sense, whatsoever. Introduction is not a *vox signata*; all that is meant is that the agent shall have been the means of bringing a willing seller and a willing buyer into relations with each other in regard to a business transaction, and that a business transaction results.

Much was made by the appellants of the case of *Moss v. Cunliffe and Dunlop* (2 R., 657), a case in which the Second Division of the Court of Session reversed the Lord Ordinary, Lord Curriehill, in which the Lord Justice-Clerk Moncrieff dissented, and in which on very special facts it was held that the order to build a ship was not the direct result of a certain shipbroker's intervention. My Lords, I would only say of that case that, if it went further than its own special facts, it was a very doubtful decision. In particular, certain expressions of Lord Gifford seem, in the light of modern practice, to be somewhat surprising. "The claim," says he, "is for introduction and recommendation—for the use, so to speak, of the agent's influence or intervention in bringing the parties together and then leaving them to make their own contract, and this is not the ordinary way in which a commission is earned." The learned Judge had laid down that "in general commission is due to the agent as recompense or payment for his skill, trouble and responsibility. In the present case, the claim for commission is somewhat peculiar; it is not laid upon skill, or work, or trouble, in the special transaction. The agent did not carry through the contract of sale. He did not even initiate it." I leave the case with the observation that, if it ever comes to be cited as illustrating this branch of the law of agency, it will have to be very carefully considered.

In Scotland, later decisions appear to me to have come exactly into line with the acknowledged law of England. I refer to *Walker, Donald and Co. v. Birrell, Stenhouse and Co.* (11 R., 369), and to *Kennedy v. Glass* (17 R., 1085, at p. 1087)—and in particular to the judgment of Lord Adam, in which the common sense of the matter is put as a principle of law:

"It is a known principle that if one man uses another for the purpose and with the effect of doing business, the ordinary rule is that the person employed is entitled to some remuneration."

This was a case in which remuneration was granted to an agent who was not a professional broker. I

desire, however, with your Lordships' leave, to adopt the judgment of Lord Dundas in *Walker, Fraser and Steele v. Fraser's Trustees* ([1910] S.C., 222, at p. 229). "Shortly put," says Lord Dundas, "I think the test is whether or not the ultimate sale of Balfunning was brought about, or materially contributed to, by actings of the pursuers, as authorized agents of the defenders. Actual introduction of the purchaser to the seller is not a necessary element in a case of this sort; it is enough if the agents introduce the purchaser to the estate, and by their efforts contribute in a substantial degree to the sale."

It comes in the end back exactly to the line which has been so long adopted in the law of England, which is thus expressed by Chief Justice Erle in *Green v. Bartlett* (14 C.B., N.S., 681, at p. 685):—

"The question whether or not an agent is entitled to commission on a sale of property has repeatedly been litigated; and it has usually been decided, that, if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission although the actual sale has not been effected by him."

There is no difference whatsoever, as it appears to me, between the law thus laid down by Chief Justice Erle and by Lord Dundas. (1) When it is proved—and it must, of course, be proved—that parties to a transaction are brought together, not necessarily personally but in the relation of buyer and seller through the agency of an intermediary employed for the purpose, the law simply is that if a transaction ensues, then that intermediary is entitled to his reward as such agent; (2) nor is he disentitled thereto because delays have occurred, unless the continuity between the original relation brought about by the agent and the ultimate transaction has been not merely dislocated or postponed but broken; and (3), finally, the introduction by one of the parties to a transaction of another agent or go-between does not deprive the original agent of his legal rights, and he cannot thus be defeated therein.

Lord Phillimore (read by Viscount Dunedin).—My Lords: The discussion of this case turned largely upon the question of the respective accuracy and credibility of the two principal witnesses, Fairhurst (the representative of the pursuer company) and Bow (managing director of the defender company). But as a result of the long debate I have come to the conclusion that it does not much matter whether your Lordships agree with the Lord Ordinary in preferring Fairhurst or whether you do not.

It is true that, if you do not agree with the Lord Ordinary, the case is settled at once in favour of the defenders, and that it takes more trouble in working out the matter if you take the other view. But in my judgment the ultimate result is the same.

The pursuer company sues upon a contract made by word of mouth on November 14, 1924, and at no other or later date. Upon it lies the burden of proving the contract. Let us take the few happenings before and on November 14 and see what they come to.

My respectful complaint of the Lord Ordinary is that he has taken these happenings as being only outlines and filled in a picture which is the result not of the evidence but of the imagination and desires of Fairhurst.

The company which Fairhurst represents acts as commission agents. It published a circular in which it offered for sale three large and costly drapery businesses. The circular reached Bow, who cut out the page and sent it back with an inquiry, no doubt showing by his action that he was a possible purchaser.

Fairhurst thereupon wrote to him and followed up his letter by a visit to Glasgow. Bow inquired where the businesses were, and learning that they were in England said they did not interest him. Thereupon a general conversation ensued, and Bow said that there was a firm called Wylie Hill in Glasgow which might be inclined to sell its business, and in the end—I am accepting Fairhurst's story—told Fairhurst to inquire whether it was likely to sell and to report the result. This is all that Fairhurst said in his examination-in-chief.

In cross-examination, he expanded this into saying that he was to try and get the business. No doubt (if the terms were satisfactory), but in what capacity? He had come there as a seller's agent. If he had gone round Glasgow and picked up a firm, and, knowing that Bow had a purchasing mind, introduced that firm to Bow, and business had resulted, he would have claimed commission from the selling firm. If he had found Wylie Hill, this would be so. Is he to make a claim upon Bow because Bow saved him the trouble of finding Wylie Hill? It must not be forgotten that there are purchases and purchases. Bow may be taken as willing to purchase at a price. But he showed no inclination to purchase *coûte que coûte*. And now I have narrated all that happened on November 14.

Fairhurst went away and got into touch with Wylie Hill and performed his mandate, if it may be so called. It was a mandate that he was probably very glad to have, because it enabled him to go to Wylie Hill and escape being kicked out as impertinent, as he could always say: "If you, Mr. Wylie Hill, have any idea of disposing of your business, I think I know a client who would be ready to buy." That is a way in which commission agents get into touch with vendors. As to retainer for the unusual position of purchaser's agent to be paid by commission on the price, the evidence falls short of such a contract.

It might be natural for Bow to employ a stranger to act as a feeler and find out whether his fellow-townsman was likely to sell; but to suppose that a Glasgow man would entrust a perfect stranger, of whose character he knew nothing, to effect a bargain for him, putting in his way the temptation of making the price against him, is, I venture to think, unreasonable.

Fairhurst's subsequent action does not lend colour to his story. When he wishes to announce that he has made progress with Wylie Hill, he writes a letter in general terms to Bow, saying that he has found a good business in the north which might interest him. He gives a lame excuse for putting the matter in these general words, but I pass that by. If, instead of its being Wylie Hill's business, it had been the business of somebody else whose name had never been mentioned on November 14, the words would be equally appropriate, and yet in such a case it would be clear that it would be the seller that would pay the commission. It might just as well have been another business, and Bow might well have thought so.

Again, when he wishes to get Bow into the unusual position of paying a commission as purchaser, he tells an untruth as to what had passed between him and Wylie Hill.

My Lords, by the conclusion of the debate we had, I think, all agreed as to what usually happens as to commissions upon sales. They are usually paid by the vendor. But an express bargain might throw the commission upon the purchaser.

If a millionaire wants a Raphael or a Turner, he might in this way stimulate the activity of someone who is a *persona grata* to the owner, or has special capacity, if he thinks it is worth his while to pay any sum to procure the desired object. During the argument an illustration was well put, if I may say so, by the noble Lord on the Woolsack—the procuring of a ship at certain periods during the late war. Even so, however, the usual thing would be to offer a large fee, because even a millionaire does not want to increase the price against himself or to pay more than he need. A purchaser may often pay to his agent a fee, and a handsome fee ; but a percentage commission is a different matter.

Your Lordships also had some discussion on the point out of whose pocket the commission comes. That depends on circumstances. If an owner is not eager to sell, and he has a price in his mind in round hundreds of pounds below which he will not go, and he is told that he will have to pay a commission of 2 per cent. to the agent, he fixes each £100 at £102, or, if strictly mathematical, at £102 and some pence. Then it may be said that in this case the purchaser in the long run pays the commission, because if there had been no agent to remunerate he would only have paid clean hundreds.

But if a vendor needs to sell and is told that the purchaser will not spring, will not go beyond a clean sum of hundreds, he has to take that and pay the commission out of it and go away with so many sums of £98.

My Lords, I have not gone into the further question in this case—namely, whether upon the general well-established rules of law the action of Fairhurst may be taken to have been the efficient cause of the ultimate sale or not. It is a matter upon which I have not made up my mind, as in the view which I take it is of no importance. I should be for reversing this judgment, because I think that the alleged contract by the purchaser to pay commission was not proved.

Lord Blanesburgh.—My Lords : It may well be, as Lord Phillimore has just shown, that the respondents' case here does not succeed even if Mr. Fairhurst's evidence is accepted at its face value. But if his evidence is discredited, their case fails altogether. The burden of proof is upon the respondents, and the conflict between him, their only witness, and Mr. R. W. Bow is complete. How is such a situation to be resolved ? The House had to deal with that question in *McKenzie v. British Linen Company* (6 App. Cas., 82, at p. 107) and Lord Watson's statement there of the true method of inquiry is so apposite here that I venture to quote it, trite though it be :—

"In estimating the relative weight of their conflicting statements," he says, "it is of course necessary to take into account the whole facts and circumstances of the case established by evidence independent of the testimony of these . . . witnesses, and also to consider the degree of probability attaching to their respective statements."

In the present case, there is no indication on the face of the Lord Ordinary's judgment that before reaching his conclusion of fact in favour of Mr. Fairhurst he had gone through the process so outlined by Lord Watson. The conflicting evidence is certainly not examined from that angle in any judgment of the Inner House. I have accordingly thought that I might properly enough make the examination for myself, and I have found the exercise illuminating.

The position of the parties is not without its suggestiveness. The appellants are a private limited company with a board of four directors. On 1924, Mr. Bow, senior, was chairman and managing director. Mr. R. W. Bow was one of the three ordinary directors only. On December 4, long before any dispute arose, he told Mr. Fairhurst, so the latter deposes, that he had of himself no power to bind his company even to a commission note. Its business is that of house furnishers and warehousemen. It has so far been carried on only in Glasgow.

The respondents employ themselves differently. In their list of businesses, to be mentioned in a moment, they describe themselves as "outfitters, valuers, fire assessors, and agents for the sale of businesses." This description has been somewhat expanded when in the record they make any reference to themselves. The word "purchase" in conjunction with the word "sale" creeps in there a little insistently. This, however, is merely a passing observation. I have no doubt that their memorandum of association is wide enough to enable the respondents, when they are so minded, to act as agents for the purchase as well as for the sale of businesses, or indeed of anything else. It just happens that in no disclosed documents of theirs of date prior to the summons is this particular activity referred to. Thereafter it is not forgotten. Their registered office is at Manchester. They have a branch office at Birmingham, and of that branch Mr. Fairhurst is the manager. In 1924 they had apparently no business interests in Scotland. They had certainly done no business in Glasgow up to that time. Mr. Fairhurst's call upon Mr. Bow on November 14 was his first call there. He had never been in Glasgow before.

The respondents' list just referred to is a list of businesses of which they are agents for sale. They circulate it half-yearly. Each business included is particularized sufficiently to indicate its nature generally, but not sufficiently, of course, to disclose its identity. In October, 1924, one of their then current lists reached the appellants. It was opened and read by Mr. R. W. Bow.

This was the beginning. Three businesses on the list—your Lordships will note the number—attracted Mr. Bow's attention. They were all of them drapery businesses—not businesses, therefore, which had so far been within the range of the appellants' activities. He wrote for particulars of them. Nothing came of the inquiry. The businesses turned out, all three of them, to be in England and of no further interest on that ground alone to Mr. Bow. He indicates in his evidence that this whole incident was by the way ; I do not know that it matters whether it was so or not. It is, however, well to note here that the interview with Mr. Fairhurst, directly traceable to this inquiry of Mr. Bow's, and on which everything now turns, was at the time so lightly regarded by him that it did not become even a subject of conversation with his co-directors. This was his statement, and it was not challenged. But the inquiry, for whatever reason made, apparently suggested to the respondents the possibility of business with the appellants, and accordingly Mr. Fairhurst was despatched to Glasgow to interview them.

In a letter from Birmingham of November 13, 1924, Mr. Fairhurst announced his intention of calling upon the appellants at 10.30 next morning, and he arrived about half an hour after his letter. Mr. Fairhurst said in evidence, with reference to this visit, that he came to Glasgow on the instructions of the appellants. No one suggests that that state-

ment was true. I note the fact now, that he made it in the witness box. It was at the respondents' own instance that Mr. Fairhurst came to Glasgow on this occasion. To Mr. Bow he was a complete stranger. Before their list came to his hand a month or so earlier he had never heard of the respondents, and he knew nothing of them then beyond what that list told him.

Such was the situation of the two parties to the interview of November 14, and such are the circumstances in which it took place. It lasted only a little over half an hour, and Mr. Fairhurst's final story with reference to it is that before it was over he had been definitely instructed by Mr. Bow on behalf of the appellants to acquire for them, and as their agent, not one only but either of two large Glasgow businesses both previously entirely unknown to Mr. Fairhurst, but whose names and addresses were then given to him by Mr. Bow. It is important to note that two Glasgow businesses, and not one only, were included in the mandate deposed to at the trial by Mr. Fairhurst. The significance of this fact as one by which the truth of his whole statement may be tested has, I think, been overlooked in the Court of Session.

My Lords, it is only at the latest stage, as will hereafter appear, that an agreement in such terms is evolved by Mr. Fairhurst, and even if the case had stopped with Mr. Fairhurst's final statement of this mandate, I should have hesitated long before accepting that statement. My feeling would have been that there must be some mistake somewhere. That Mr. Fairhurst, a complete stranger to Mr. Bow, with no previous knowledge of or business connexion with Glasgow, English himself and representing an English company, should have been definitely selected by Mr. Bow, himself merely one of four directors, without having or seeking any opportunity for consultation with his chairman or any of his colleagues, to acquire on behalf of the appellants either of two large Glasgow businesses from Scottish owners, to whom he was entirely unknown, would have struck me as being almost fantastic, imaginary altogether, or capable only of the explanation that Mr. Bow had been misunderstood, or that he, a Glasgow man in a large way of business, was in no way true to type. I have read and re-read his evidence to see whether it discloses any unusual mentality. I have not found any, and when I discover Mr. Bow, in language too forcible to be feigned, branding Mr. Fairhurst's story as a lie, I feel that his own account of the interview will indeed be an odd one, if, as Lord Watson would put it, he is not to have, at any rate, the probabilities on his side.

What, then, is Mr. Bow's account of the interview? It is that when it appeared that he had no interest in any business on the respondents' list, Mr. Fairhurst explained that this was his first visit to Glasgow, and that he would like to do a little business there. He asked the names of the principal business streets, about Glasgow businesses generally and whether any of them were likely to be soon for sale. Mr. Bow mentioned several businesses by name—not confining himself to the two to which Mr. Fairhurst has since alone referred. As to these two, he spoke of the first, the business of Boness, Limited, as being one that from trade talk he thought might soon be for sale, and he spoke of the Wylie Hill business as another that might also come into the market because Mr. Wylie Hill was advancing in years and he had no son to succeed him. It was in the above connexion that the question of the possible sale of either business was referred to. That he either directly or indirectly employed Mr. Fairhurst or gave him authority to act for the appellants as their agents to purchase or negotiate for the purchase of any business, Mr. Bow hotly denied.

Now, my Lords, it is at this interview, if at all, that the agreement now sued on was made, and you have there the conflict as to it between the two witnesses. The Lord Ordinary accepted the story of Mr. Fairhurst. He gave his reason for doing so. Mr. Fairhurst appeared to him to be both a candid and an accurate witness. He accepted his evidence, as appears from his judgment, almost textually—even in its inaccuracies—to the extent, for instance, of Mr. Fairhurst's statement, more than once repeated, that Mr. Bow's original inquiry was about two businesses, whereas, in fact, it was an inquiry about three—a small matter certainly, but serving to indicate that the Lord Ordinary's acceptance of Mr. Fairhurst was quite uncritical.

Now, while the improbabilities in Mr. Fairhurst's story already alluded to might well have made the Lord Ordinary pause, if he considered them, it is of course quite clear that, having regard to his definite finding, this House would not reject Mr. Fairhurst's story on such a ground alone. If it is now to be rejected, it must be for some more definite cause not dealt with by the Lord Ordinary : as that his story is contradicted by his own subsequent actings : that his evidence is not only in conflict with Mr. Bow's as to the interview, but that it is as to later matters in direct conflict with that of another witness, whose veracity is unquestioned : that, instead of being the candid and accurate witness described by the Lord Ordinary, he stands convicted on his own admission of being neither. If these things are shown, as I think they can clearly be, then, even if Mr. Fairhurst is discredited only to the extent already intimated by the noble Viscount on the Woolsack, I believe your Lordships would have the Lord Ordinary himself with you in rejecting his testimony, for he has become a witness neither candid nor accurate. Add to this the unlikeliness of his tale, and there is nothing of it left. It will have become as untrustworthy as it always was inherently improbable.

What, then, did Mr. Fairhurst do with his alleged mandate? This is the matter to which I would first direct the attention of the House. It related, so he says, to two businesses. As to Boness, Limited, he did nothing at all, and in reference to it he made in his evidence two apparently quite inconsistent statements. In chief he said that on December 4 he gave Mr. Bow particulars of that business and that he turned it down and said it was too much money, the stock being too heavy for one thing. In cross-examination he seems to say exactly the opposite. He did not try to tempt Mr. Bow with the business, and Mr. Bow did not turn it down. Mr. Bow, on his side, does not remember the business being then mentioned at all. So far there may be room for adjustment, although it is not easy to find it. But as to this business there remain two assertions which can be made with certainty. The first is that, as Mr. Aitchison agreed on the point being put to him, Mr. Fairhurst's alleged mandate on November 14 with reference to the Boness business was as immediate and as serious as that with reference to the Wylie Hill business. "He asked me to get that business for him," Mr. Fairhurst told the Court (page 150). Yet there is not in the papers or elsewhere a trace of his having done anything whatever in relation to it. Most certain in any case is it—and this is a consideration which will prove to be, as I think, completely destructive of his veracity—that by November 28,

when he wrote the letter presently to be mentioned, he had made to Mr. Bow, in relation to this business, no communication at all.

But what did Mr. Fairhurst do with reference to the Wylie Hill business? The answer is, nothing until his return to Birmingham. From there, five days later, on November 19, he wrote a letter addressed to the managing director of that company—he evidently did not even know his name—headed "20, Buchanan-street," stating that his firm had received a special inquiry for "business premises" in that thoroughfare, and begging to inquire whether his correspondent "would be open to dispose of his interest in the lease or freehold of the premises."

It seems a little strange that the terms of the inquiry are so remote from those of the mandate he now alleges he was then fulfilling. But he received from Mr. Wylie Hill the following reply, dated November 20, addressed from Perthshire, and headed "20, Buchanan-street, Glasgow."

"I am chairman and managing director of R. Wylie Hill and Co., Ltd., who are the occupying owners of the above premises.

"The business as a going concern might be acquired. If you have any proposal to make it might be placed before the shareholders. The shares and debentures are mostly held by myself and family.

"I enclose the last balance-sheet and report.

"Any further communications should be sent to this address."

Now, if Mr. Fairhurst's story is true, this letter was, of course, the appellants' property. It ought at once to have been handed or its contents communicated to them. Nothing of the sort was done. Instead of doing either of these things—in itself a most significant omission—Mr. Fairhurst, on November 28, a week later, wrote to Mr. R. W. Bow personally a letter which supplies, as it appears to me, the most decisive test available of the truth or untruth of his story. The letter is as follows:—

"Dear Sir,—I hope to call upon you on Thursday next, December 4, about 2.30 p.m. I shall be glad to know if this is convenient to you. [I have particulars of a good business in the North which I think might be of interest to you.

"I shall be glad to know if you are willing to pay our commission, namely, 2 per cent. on the purchase price.]

"I mentioned this to the vendors, but they say that they would only have to put our commission on to the purchase price which would work out to the same thing.

"This, of course, is only if business is transacted and provided we do not obtain our commission from the vendors.

"I shall be glad if you will let me have a reply by return as I leave for the North on Monday evening.

"Assuring you at all times of our best service and attention.—We are, &c.,

"A. R. Brett and Co., Ltd.,

"R. Fairhurst, Manager."

It is regrettable that the considerations arising from this letter to which I now propose to advert are not in any way dealt with by the Lord Ordinary. Your Lordships cannot therefore know what his mind upon them was or would have been. To the Lord Ordinary the letter is merely part of the narrative, throwing no light or shadow on Mr. Fairhurst's credibility, and he confines himself to reading without comment as he passes along the two sentences from it which I have set in square brackets.

My Lords, it is only from the whole letter that its full significance on this inquiry can be gathered, and that significance is great.

If Mr. Fairhurst's story is true, what was his position at that moment? He was the mandatory of the appellants to acquire for them if he could one of two named and specified Glasgow businesses. If Mr. Bow's story is true, Mr. Fairhurst was not the mandatory of the appellants for any purpose whatever. He remained the representative of a company engaged in the sale of businesses with reference to three of which Mr. Bow had previously made inquiries, and a person from whom he might quite well be expected to inquire again in relation to a business not in England. With which of these two positions is the letter most consistent? Is it consistent with Mr. Fairhurst's at all?

My Lords, on the face of it, this is the letter of an agent for sale intimating his intention of placing before his correspondent "a business in the North" of which he then had particulars and which had not previously been the subject of conversation between them. It is the letter of such an agent endeavouring to arrange in advance for payment of his commission by the proposed purchaser in the event of the vendor's adhering to his refusal, then operative, to provide the commission for his own agent. And it is nothing more. And so the letter was read by Mr. Bow, as he said in his evidence; and his reply on the next day was: "At the moment I really have not the time to go into a matter of this kind owing to the Christmas trade, but all the same will be pleased to see you on Thursday next at 2.30 p.m."

My Lords, I should have thought that reply was entirely consistent with the position of a man who had read the letter of the 28th in the only fair sense of its wording, and I am a little surprised that two of the learned Judges in the Inner House have apparently found in this reply of Mr. Bow some justification for their reluctant adherence to the Lord Ordinary's interlocutor. It is suggested that Mr. Bow should have repudiated the letter of the 28th. For myself, I do not know what repudiation he could have made. The letter asks for a bargain in relation to an entirely new proposition. I cannot see what there is in it to repudiate.

But, my Lords, significant as all this is, the importance of this letter does not end there. Whether you take the letter itself or the evidence by which Mr. Fairhurst sought to turn its terms to bear a meaning which then suited him, the whole incident is a lamentable exhibition. I begin with the admission which he had to make in the box that his statement that the vendor had refused to pay commission was entirely untrue; he had had no communication with any vendor as to commission or at all; and he could give no answer, except one which he withdrew, to the suggestion that he untruly stated that the vendor had refused to pay commission in order to induce Mr. Bow to agree to provide it. His evidence as to the reason why he referred, as he said he did, to the Wylie Hill business by the remote description of "a good business in the North" was no less disastrous. He said he used this phrase because Mr. Bow would know the business he was referring to; and he refrained from specifically mentioning it lest the letter should be seen by the staff. Neither explanation will serve him. Mr. Fairhurst, in giving his first reason, forgot that his mandate, according to his own story, extended to two businesses and not to one only. How, even on his own explanation, could Mr. Bow know which of the two was meant? And the solicitude indicated in the second explanation was

strangely absent on December 4 when at an interview with Mr. Wylie Hill he, without permission or authority so to do, told him that the appellants were the inquirers referred to in his letter of November 19.

Now, my Lords, when that letter of November 28 was written the whole service in respect of which the respondents now claim in this action had been rendered. The justification for their demand for £3,000, put forward by Mr. Bauville, the governing director of the respondent company, is that "they claimed to have induced Mr. Wylie Hill to sell," that is, to write his letter of November 20, for that is all he ever did at their instance. All that they had done was to write their strange letter of the 19th.

But Mr. Fairhurst later, on December 4, had an interview with Mr. Wylie Hill, by arrangement and before he went on to see Mr. Bow on the same day. Here we find Mr. Fairhurst again in a conflict of testimony, but this time with Mr. Wylie Hill. He attributes to the latter at that interview, amongst other particulars, the statement that their stock in their business premises was much larger than that shown on the balance-sheet. Mr. Wylie Hill gave no figure, but he called it "hidden stock." This alleged conversation was put to Mr. Wylie Hill. His answer was that Mr. Fairhurst got nothing more from him than the balance-sheet, a public document, that he told Mr. Fairhurst, who asked for details, that he could not go into details until he had got into closer communication. But as to his alleged statement that he had hidden stocks, he replied: "That is nonsense." He had never done that; he had never said it.

My Lords, this account by Mr. Fairhurst of his interview with Mr. Hill is a notable instance of his apparently inveterate habit of improving the occasion regardless of truth in order to magnify the extent of his services.

It has not been suggested that any agreement was reached between Mr. Fairhurst and Mr. Bow at their only other interview on December 4, and I pass on to some later correspondence in order that I may say a word with reference to a letter of Mr. Bow's which, it is contended, shows that he was no more trustworthy as a witness than was Mr. Fairhurst.

On January 19, Mr. Fairhurst writes to Mr. Bow referring to the Wylie Hill business—

"I shall be glad if you will give the matter your careful consideration and let me have your final decision before I offer it to another syndicate who are waiting."

There was no other syndicate waiting. This was another flourish of Mr. Fairhurst's as he admitted in the box. The important point, however, is that he is still, in relation to this Wylie Hill business, regarding his firm as agents *for sale*.

On February 10 he again writes to Mr. Bow:—

"I shall be glad to hear if you have finally decided *re* Messrs. R. Wylie and Co., Glasgow. Should you have decided against same will you kindly let me have balance-sheet so that I can place same before a London syndicate."

Still agents for sale. And again, there was no such syndicate, but of course Mr. Bow did not know that, and on February 12 he answered—

"In reply to your letter of the 10th inst. *re* R. Wylie Hill and Co., we are definitely off the idea and enclose balance-sheet as requested."

Now, if Mr. Bow's idea in writing that letter was to intimate quite clearly to Mr. Fairhurst that the appellants were not standing in the way if he wanted to offer the business to a London syndicate or to anyone else he liked, Mr. Bow could not have chosen a better way of saying so. But it is urged that the letter cannot bear this innocent construction because it is shown that on February 11, the very day on which he received the letter of the 10th, in conversation with the appellants' auditor, Mr. Taylor, who was calling on other business and who happened to be the auditor also of Messrs. Wylie Hill, Mr. Bow asked him whether he had heard that Wylie Hill's were disposing of their business; to this Mr. Taylor replied that he had heard nothing whatever of the subject, but that he would take an opportunity of asking Mr. Wylie Hill the first time he saw him. Mr. Taylor, who was called by the respondents, said that the conversation was entirely casual, not in any way in the nature of a business approach; that his own impression was that Mr. Bow's attitude was one of curiosity that there should be such a thing as Wylie Hill's being in the market and that it was not a question of his having any serious intention of acquiring any share in it at all. Mr. Taylor did not see Mr. Hill until nearly a month later, on March 9, and he reported to Mr. Bow on the 13th what Mr. Hill had said. What that was does not appear in the evidence but, whatever it was, nothing was done upon it by Mr. Bow. It was not until September that the matter was revived and then, as is common ground, not at the instance in any way of the appellants but at the instance of Mr. Wylie Hill himself, who—being unwilling to sell his business to a syndicate who were inquiring about it—desired to find out whether the appellants might be possible, as they would be preferable, purchasers. This inquiry may have been the result of a service rendered by the respondents to Mr. Wylie Hill when Mr. Fairhurst on December 4 informed him that the appellants were the inquirers, but it had nothing to do with any service rendered to the appellants, for it was Mr. Bow who gave Mr. Fairhurst the information as to Mr. Wylie Hill, and it was not otherwise.

Now, my Lords, I do very earnestly suggest that no charge, either of bad faith or untruthfulness, can be brought home to Mr. Bow on the strength of these facts. That he was definitely off any idea of buying Wylie Hill's business in February is, I submit, clear. He would have been neither surprised nor disappointed if Mr. Fairhurst's London syndicate had in due course materialized.

My Lords, I do not go into the later details of the story. Your Lordships know how, following the purchase in October, 1925, of the shares in the Wylie Hill business by the appellants and some of their own shareholders, this action was commenced on December 21.

It is important, however, to note how the agreement, finally alleged by Mr. Fairhurst in evidence, was gradually evolved in the proceeding.

In paragraph 3 of the condescendence the allegation is that on November 14, 1924, Mr. Bow suggested "that Mr. Fairhurst should submit for his consideration other businesses of a class suitable for acquisition by the defenders which he indicated to Mr. Fairhurst. At said interview Mr. Bow on behalf of the defenders engaged the pursuers as agents for them to inquire regarding such businesses and submit particulars with a view to purchase."

This is a long way off the agreement finally set up.

At the trial, in chief, Mr. Fairhurst's statement of his alleged agreement was that Mr. Bow said to him:

"If you could get for me the business of Mr. Wylie Hill or another [mentioned] I should be very glad."

Mr. Fairhurst then asked: "Is there any chance of getting these businesses?"

Mr. Bow replied : "That is what I want you to find out for me."

Only later in his evidence did Mr. Fairhurst reach the statement of the unqualified agreement now set up.

My Lords, has he proved it ? The burden is on the respondents, and his is their only evidence.

The examination of that evidence which I have made demonstrates, I suggest, that Mr. Fairhurst in this matter is a witness who cannot be trusted to speak the truth either in the box or in his correspondence. His evidence is contradicted not only by his own acts, but by the reliable testimony of at least one other witness. Some of his assertions upon oath—for example, his assertion that the first of his two visits to Glasgow was made on the invitation of the appellants—show that in his evidence, no more than is admittedly the case in his correspondence, is he at pains to tell the truth when an untruth seems better to suit his purpose. If candour be indicated by an aggressive readiness to admit detected falsehood, then Mr. Fairhurst may be entitled to the description of a candid witness, but the examination of his evidence which I have made demonstrates, I submit, that his testimony is not that either of an accurate or of a candid witness in any commendatory senses of these terms, but is the evidence of an experienced and, where the supposed interests of the respondents are concerned, an irresponsible witness.

My Lords, this, I believe, is one of the rare cases in which it is better for a Judge of fact not to see the witness. I do not doubt that Mr. Fairhurst was one of the most plausible beings who ever entered a witness-box. I have been a Judge of first instance myself, and I know from experience how readily, under the glamour of an attractive personality or of consummate art, the hard facts may be hidden from him. In such a case the truth or falsity of a story may be better discerned, perhaps can only be discovered, by the calm consideration of the printed page tested at every point by the probabilities of the thing, the inferences flowing from the witness's own acts, the contradictions of other witnesses, and, perhaps beyond all, by the witness's admitted or established mendacity in important parts of his evidence.

Tried by those tests Mr. Fairhurst's evidence, I submit, disappears. The Lord Ordinary did not so try it, and it, in my judgment, became the duty of the Inner House to bring it to that acid test. They, too, refrained, and now it is, I believe, incumbent on this House to do so for itself.

One word more. This is a case of an alleged agent for purchase claiming, by agreement, commission on the basis of purchase price. I do not doubt that such an agreement is possible. With Lord Phillimore, I believe it to be very unusual and it is one which, when it exists, is almost invariably in writing. Be that, however, as it may, it is an agreement under which the agent is put in a position in which his interest may conflict with his duty, and it is accordingly one to be established by evidence on which a Court feels that it can safely rely. I venture to suggest to your Lordships that the uncorroborated testimony of such a witness, as Mr. Fairhurst has been shown to be, cannot be sufficient for such a purpose.

For these reasons I am of opinion that this appeal should be allowed.

I desire, however, to add that if the appeal must be decided on the basis on which Lord Phillimore proceeds, then I am entirely of the opinion expressed by him on that view, and I concur with him in the conclusion which he has reached on the case as so regarded.

[Agents—Messrs. Herbert Smith and Co., for Messrs. Manson and Turner Macfarlane, W.S., Edinburgh ; Messrs. H. H. Wells and Sons, for Messrs. Wright, Johnston and Orr, Glasgow, and Messrs. Balfour and Manson, S.S.C., Edinburgh.]

Prob., Divorce, and Adm. Div. (Hill, J.) } 1927. Dec. 15.

THE TOURAINE.*

Ship — Damage to cargo — Bill of lading incorporating the Sea Carriage of Goods Act, 1924 (Australian statute)—Neglect or default in management of the ship — Surrender of statutory immunity.

Cargo, consisting of bales of opossum skins, was shipped at the port of Sydney, New South Wales, under bills of lading which, pursuant to s. 6 of the Australian Commonwealth Sea Carriage of Goods Act, 1924, contained the following :—"Paramount Clause.—This bill of lading is to be read and construed as if every clause therein contained which is rendered illegal or null and void by the Sea Carriage of Goods Act, 1924, had never been inserted therein or had been cancelled and eliminated therefrom prior to the execution thereof, and is issued subject to all the terms and provisions of and to all the exemptions from liability in such Act."

By Art. IV., Rule 2, of the Schedule to the above Act, "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (*a*) act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship . . ."

During the voyage a seaman, by using an iron rod for the purpose of clearing an obstruction in a lead pipe, which carried off waste water from the crew's wash-house to the ship's side, pierced or cracked the pipe, with the result that water leaked into the ship's strong-room and did damage to the opossum skins which were stored therein.

Held, that the act of clearing the pipe of an obstruction was the management of an essential part of the crew's accommodation and therefore of the ship ; that the use of an iron rod with such force as to pierce or crack the pipe was negligence on the part of the seaman ; and that therefore the damage to the cargo was due to neglect in the management of the ship for which the carrier was exempt from liability.

By Article V. of the schedule, "A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or

* Reported by A. W. Grant, Esq., Barrister-at-Law.

to increase any of his responsibilities under the Rules contained in any of these Articles, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper . . ."

Inasmuch as the bills of lading expressly stated that "the carriers are not to be responsible for faults or errors of navigation," but no mention was made therein of responsibility for faults of management, it was contended by the cargo-owners that the carrier had impliedly surrendered the immunity in respect of faults of management.

Held, that the surrender of a statutory immunity must be clearly stated and was not to be inferred from the needless repetition of another immunity.

This was an action brought by the owners of nine bales of opossum skins laden on board the steamship Touraine at Sydney, New South Wales, for delivery at Hamburg, to recover the damage sustained by the said skins during carriage. The defendants were the owners of the Touraine.

The skins were shipped in October, 1926, under bills of lading which, in compliance with section 6 of the Commonwealth of Australia Sea Carriage of Goods Act, 1924, contained an express statement that they were to have effect subject only to the provisions of the Rules as applied by that Act.

Rule 2 of Article IV. of the Schedule to the Act of 1924 declares that "neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (*a*) act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."

Article V. says :—"A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under the Rules contained in any of these Articles, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper."

The bills of lading contained, among a number of express exemptions, the following :—"The carriers are not to be responsible for faults or errors of navigation." There was no express reference to liability for faults of management.

The skins in question were carried in the strong-room of the Touraine. Above the strong-room was the crew's wash-house, which had a cement floor. The crew were in the habit of washing themselves and sometimes their clothes in buckets in the wash-house, the water afterwards being poured on to the cement floor so that it might run down a leaden pipe which passed from the wash-house, through the strong-room, to the ship's side. During the voyage the waste pipe became choked by refuse, and in order to clear it and so free the floor of the wash-house from water, a seaman used an iron rod, and used it with so much force as to pierce or crack the leaden pipe at a bend inside the strong-room. In consequence of the leak so caused a large quantity of waste water found its way into the strong-room, doing the damage complained of.

The plaintiff cargo-owners alleged, *inter alia*, that the Touraine was unseaworthy, that the strong room, by reason of the presence and character of the waste pipe, was unfit for the reception and carriage of the skins, and that the carriers had failed to exercise due care and diligence to make it fit. They denied that the damage to the skins was caused by any act, neglect, or fault in the management of the ship, so as to come within the exemptions in Rule 2 (*a*) of Article IV., and further contended that the carriers, by expressly exempting negligence in the navigation of the ship, had impliedly surrendered their immunity in respect of faults of management.

The defendants, on the facts set out above, denied the allegations of unseaworthiness and unfitness and contended that the damage resulted from neglect in the management of the ship and they were therefore exempted from liability.

Mr. C. R. Dunlop, K.C., and Mr. L. F. C. Darby appeared for the plaintiffs ; Mr. G. P. Langton, K.C., and Mr. J. St. C. Lindsay for the defendants.

Mr. Justice Hill, in a considered judgment, said :—This is a claim under five bills of lading in respect of bales of opossum skins shipped in Sydney in October, 1926, for delivery at Hamburg, and delivered damaged. The damage was by water, whether fresh or salt is immaterial. It was water which entered the strong room in which the skins were stored from without. The defendants say that the damage was caused by negligence for which they are not responsible. That is the first question to be decided. The plaintiffs, while denying such cause, say that the cause was the unseaworthiness or unfitness of the ship. That is the second question. If the defendants fail on these points, they say that (*a*) they are not liable at all for furs, or (*b*) they are liable only to the limited extent per bale fixed by the Act. That depends on the bill of lading read in the light of the Act. The Act applicable is the Sea Carriage of Goods Act, 1924, of the Australian Commonwealth.

I have come to a clear conclusion as to how the damage was caused. The skins were the only cargo stored in the strong room. The strong room was aft and between the main and shelter decks. Above it, at its fore end on the starboard side, was the sailors' wash-house. This wash-house was on the shelter deck. It had a cement floor. Waste water was carried from the floor of the wash-house to the ship's side by a leaden pipe which passed through the strong room. There was a hole in the cement communicating through a hole in the shelter deck with the upper end of the pipe, which was fitted by a flange to the under side of the shelter deck. At the lower end the pipe was fitted by a flange to a hole in the ship's side, which was fitted with a storm valve. There were two bends in the pipe. The upper one was a sharp bend a little below the upper end of the pipe. The pipe, and also a pipe from the w.c.'s adjoining the wash-house, were cased in with a wooden casing, the object of which was to protect the pipes from injury. On the floor of the strong room were scuppers leading to the bilges. The only access to the strong room was by a trunk hatchway opening on the poop deck. Before the skins were loaded there was no sign of moisture in the strong room. During the voyage, before the ship reached Aden, some scraping work was done in the trunk-way and the skins were shifted to the fore part of the strong room, and thereby brought nearer to the pipe. At this time nothing wrong was noticed. There was no water in the strong room. At Hamburg the skins were found wet and very seriously damaged. There was water on the floor of the strong room, sufficient to have shifted the dunnage wood. The scuppers were choked and the water had to be baled out. The water had entered the strong room by a hole or crack in the lead waste pipe at the bend a little below the shelter deck. The

water had come from the wash-house. It is, in my judgment, impossible to suppose that this hole or crack existed before the voyage began. It must have come into existence during the voyage. The wash-house was in regular use. It contained a shower bath. It also contained basins, which seem not to have been used ; but the sailors brought into the house pails of fresh water and there washed themselves and sometimes their clothes. The pails were emptied on to the floor. The wood casing in the strong room was not water-tight. Had the hole or crack in the pipe been in existence during the earlier part of the voyage, water must have got into the strong room and some signs of water must have been obvious when the chief officer was in that room in connexion with the scraping work and the bales were shifted. It was suggested that the hole or crack might have been there all along, but plugged by refuse. I cannot believe that any refuse which could get down the pipe could have so effectually stopped an existing crack as to prevent the percolation of any water.

How was this hole or crack which came into existence during the voyage made ? I find it proved that it was made by the seaman Olsen. He found the pipe choked and that there was water on the floor of the wash-house, and he used an iron rod to clear the obstruction, and used it with such force as to pierce or crack the lead of the pipe in the neighbourhood of the bend. It is true that in the log the leak was stated to be due to a break in the pipe caused by straining of the ship ; but at that time the pipe had not been seen by the master or the chief officer. The carpenter reported a crack and made the pipe water-tight with a stocking of marlin and red lead. It was not until after the next round voyage that the pipe was taken out and examined by surveyors, and the real nature of the damage to it ascertained. The sailors were then questioned. Naturally, until questioned, they had not volunteered information which might reflect upon Olsen, and indeed may not have supposed that what they had seen Olsen doing had damaged the pipe.

In my judgment, upon these facts, it has been proved by the defendants that the cause of the damage was the negligence of the seaman in making the hole or crack in the pipe ; and in my judgment such negligence was "neglect in the management of the ship." It was neglect, for it was negligent to use an iron rod, and to use it with such force as to pierce or crack the pipe. The wash-house and the waste pipe therefrom were essential parts of the crew's accommodation, and therefore of the ship. The act of clearing the pipe of an obstruction was a management of that part of the crew's accommodation and therefore of the ship. If I need authority. I have it in *The Rodney* (16 *The Times* L.R., 183 ; [1900] P., 112). It was contended that Olsen was not doing an act of management because he was clearing the obstruction only for his own benefit. I do not agree. It was done in order to put the wash-house floor in a proper state. Mr. Dunlop, for the plaintiffs, contended that the defendants were not entitled to rely upon an exception of negligence in management. The argument was this : The bill of lading contains a very large number of exceptions, including this : "The carriers are not to be responsible for faults or errors of navigation." In accordance with section 6 of the Act it also contains an express statement that it is to have effect subject to the provisions of the Rules as applied by the Act. The section is in the following terms :— "Every bill of lading or similar document of title issued in the Commonwealth which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the Rules as applied by this Act."

By the Rules, Article IV. (2) : "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (*a*) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship " ; but by Article V. a carrier is at liberty to surrender any of his immunities under the Rules, provided such surrender is embodied in the bill of lading. Now, says Mr. Dunlop, by retaining the exception of faults of navigation the carrier has impliedly surrendered the immunity in respect of faults of management. I do not accept that argument. The immunity is created by the statute and the surrender must be embodied in the bill of lading. In my opinion, the surrender of a statutory immunity must be clearly stated. It is not to be inferred from the needless repetition of another immunity.

There remains the question whether the ship was unseaworthy or the strong room unfit or unsafe for the carriage of the skins, and whether the damage arose or resulted from such unseaworthiness or unfitness. The allegation in the statement of claim was that the pipe was fractured. As the case developed other charges were made and were embodied in amended particulars. The attack was still in the main upon the pipe, and I will deal with that first. There was nothing unusual in the construction of the pipe or in the fact that it was carried through the strong room. A lead pipe is more usual for sanitary purposes, and is indeed more costly than iron. The material of the pipe was good. The size of the pipe was sufficient. It had been fitted with a rose sunk in the cement ; but the rose was broken. Mr. Camps said it was a matter of opinion whether a rose was advisable—many ships had no rose to such a pipe. No one gave evidence to the contrary. It is obvious that, rose or no rose, some refuse from the wash-house—soap and bits of rag and so forth—might get down the pipe, and that more refuse might get down if there was no rose. It was also possible that such refuse might accumulate at the bend and cause an obstruction to the flow of the water from the wash-house. It is the sort of thing with which we are all familiar. It happened on board the Touraine and had happened before the voyage in question. But the choking of the pipe by itself would not cause water to flow into the strong room. The water would accumulate on the floor of the wash-house until it rose above the sill and then would flow on to the deck and away to the ship's side. When the pipe choked, the seamen would be likely to do their best to clear the obstruction. They had on previous occasions cleared the obstruction by using a wire. If such an instrument were used the pipe could not be pierced or cracked. If a stiffer instrument, such as an iron rod, were used, and used with sufficient force, the pipe might be pierced at the bend, as happened when Olsen used the iron rod. I cannot, however, think that anyone concerned with the ship ought to have anticipated that so foolish a means to clear the pipe would be used, or that the sailors ought to have been warned not to act in such a way.

The question which I have to ask myself is that indicated by Lord Gorell in *The Schwan* (25 *The Times* L.R., 742 ; [1909] A.C., 450, at p. 463), and it is this : Was the vessel in respect of this pipe "reasonably fit to be worked in the way which might ordinarily be expected " ? I think it was. If so, then in respect of the pipe the ship was not unseaworthy nor the strong room unfit or unsafe.

There is, in my judgment, no substance in the

matters alleged by the plaintiffs. Had they been set forth in the statement of claim the defendants might have obtained further evidence; but upon the evidence as it stands I do not think the plaintiffs have made good any case of unseaworthiness or unfitness. To take them in their order the allegations are: (*b*) No means of ascertaining whether any water did get into the strong room. It is not usual to have sounding pipes in such a compartment, which lies high above the load line. There is no necessity for them, for water is not expected to find its way into such a space. (*c*) The scuppers were choked or likely to get choked. It is true that they were found to be choked when examined after the voyage, but I see no reason at all to suppose that they were choked before the voyage in question began. The strong room had been examined before the skins were shipped. A choking of the scuppers would be a natural consequence of the water from the washhouse, carrying some refuse with it and collecting more from the floor of the strong room and from the wrappings of the bales. But over and above this I doubt if a strong room such as this would be unfit for the bales of skins even if it had no scuppers. There was no reasonable probability that water would enter the strong room. Scuppers in such a place are provided mainly to carry off water when the compartment is washed out. They also serve to carry off moisture from a cargo liable to sweat. The scuppers were amply sufficient to carry off any such condensed moisture. (*d*) Ventilation. There was in fact sufficient ventilation, and indeed, with the quantity of water in the strong room, it made very little difference whether there was ventilation or not. (*g*) The point about a storm valve was not insisted on. There was a storm valve and the water came from the washhouse and not from the sea. The other points (*a*), (*e*) and (*f*) I have already sufficiently dealt with.

The result is that, in my judgment, the ship was not unseaworthy nor the strong room unfit or unsafe. The question of due diligence therefore does not arise. In view of these findings it is not necessary to decide upon the remaining answers of the defendants or the reply thereto of the plaintiffs. As at present advised I should have had great difficulty in reconciling with the Rules either a total exemption in respect of furs or the plaintiffs' argument that Article IV., Rule 5, did not fix a limit per bale of £100. There must be judgment for the defendants.

[Solicitors—Messrs. Waltons and Co., for the plaintiffs; Messrs. Wm. A. Crump and Son, for the defendants.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) } 1927. Dec. 20.

BARKWELL v. BARKWELL.*

Probate—Evidence—Lost will—Parol evidence of revocation clause — Earlier wills revoked by revoked last will—Intestacy—Wills Act, 1837 (1 Vict., c. 26).

Parol evidence is admissible to show that a will, presumed to have been destroyed *animo revocandi*, contained a revocation clause revoking all anterior wills, thereby creating an intestacy.

In this action the plaintiff, Mr. William Samuel Bryers Barkwell, of Toronto, asked for a grant of probate of the will of his brother, the late Dr. Richard Herbert Barkwell, a medical practitioner, formerly of Lavender-hill, S.W., who died at Bournemouth on October 26, 1926, aged 73. He claimed as the sole surviving executor of a will dated July 26, 1891, and asked that a grant of letters of administration of the estate obtained by the defendant, Mr. Herbert Bryers Wood Barkwell, the testator's son, on December 2, 1926, should be revoked.

The defendant put the plaintiff to proof of the due execution of the will of 1891, and said that, if properly executed, it was revoked by a later will, and that this will and subsequent wills were revoked by a will of 1925, which could not be found and was therefore presumed to have been revoked. He said that his father died a widower and intestate, and asked the Court to pronounce against the will of 1891 and that the letters of administration be handed out to him as the only person entitled to the estate on intestacy.

Mr. Cotes-Preedy, K.C., Mr. Bush James, and Mr. V. O. Williams appeared for the plaintiff; Sir Patrick Hastings, K.C., Mr. Bayford, K.C., and Mr. Walter Frampton for the defendant; and Mr. T. Bucknill watched the proceedings for Mr. Oliver Cromwell Barkwell, a nephew of the testator.

Due execution of the will of 1891 was proved, and evidence was given by the defendant that there was no foundation for his father's belief in 1925 that he (the defendant) was leading a prodigal life. Several witnesses testified to the testator's having obtained at Bournemouth in 1925 will forms each containing a revocation clause, to his having written what he described as his will on one of them, which will was duly executed, and to his having spoken in that year of having recently made a new will. One of the witnesses to this document said that the form used was similar to the one produced containing a revocation clause. The will was not found on the testator's death, and correspondence was read purporting to show that the testator, who had during his life made a number of wills, towards the end of his life indicated that he had revoked the 1925 will. The rest of the evidence, so far as it is relevant to the issues, is discussed in the judgment.

Mr. Cotes-Preedy claimed that the defendant had adduced no evidence to satisfy the requirements of the Wills Act, 1837, as to the due execution of the 1925 will or that it had revocatory effect. He said that there was no decided authority on the question of parol evidence being allowed as to *animus revocandi*. He referred to *Hellier v. Hellier* (9 P.D., 237) and cited the following passage from the speech of Lord Herschell in *Woodward v. Goulstone* (11 App. Cas., 469, at p. 474):

"Nothing can be more dangerous, I think, than to accept as any evidence, to carry with it weight, of the contents of a will the evidence of persons of statements made to them of bounties which they are to receive after the death of the person who made those statements. . . . Of course I do not say that in no case can a will be established by parol evidence. . . . I think that in order to support a will propounded, when it is proved by parol evidence only, that evidence ought to be of extreme cogency, and such as to satisfy one beyond all reasonable doubt that there is really before one substantially the testamentary intentions of the testator."

Counsel cited a passage from Williams on Executors in support of his argument that parol evidence was not admissible as to the execution or contents of the will of 1925, and he referred to *Brown v. Brown*

* Reported by William Latey, Esq., Barrister-at-Law.

(8 E. and B., 876) and *Newton v. Newton* (12 Ir. Ch. Rep., 118).

LORD MERRIVALE.—The principle is mostly discussed in cases where it is sought to set up a lost will, but the defendant does not seek to set up the lost will of 1925. I might find that there was a will but it did not contain a revocation clause.

SIR PATRICK HASTINGS and Mr. BAYFORD, replying on behalf of the defendant, argued that there was abundant evidence upon which the Court could find that the testator made a will in 1925 containing a revocation clause.

LORD MERRIVALE.—What authority is there to show that a statement by a testator that he has executed a will can be received in evidence ?

SIR PATRICK HASTINGS.—You can give secondary evidence of a will as well as of any other written instrument. If I can give secondary evidence of the contents of a will, cannot I give secondary evidence of its proper execution ?

He said that this was the sort of case of great testamentary difficulty such as was referred to by Lord Russell of Killowen in *Atkinson v. Morris* (13 *The Times* L.R., 83 ; [1897] P., 40) when he said : "No one can doubt that this lady intended to revoke her will, and the Court ought to be astute to give effect to that intention, if it can do so consistently with the established and settled principles of law." He relied on *Sugden v. Lord St. Leonards* (1 P.D., 154) in support of the contention that parol evidence was admissible in this case to show that the lost will of 1925 revoked all previous wills.

LORD MERRIVALE delivered the following considered judgment :—

In this suit legal questions of considerable importance were raised and I thought it advisable to give considered reasons for the conclusions at which I have arrived. The deceased, whom I will call the testator, died at an advanced age, possessed of property estimated as of the gross value of about £16,000. He was a man of eccentric habits, and very pronounced views on many subjects, was much addicted to what may be called testamentary exercises, and very apt to change his testamentary intentions upon sudden provocation. In his later life he also showed himself apt in correspondence with his relatives overseas to attract them to him upon a prospect of benefits to be secured to them by will. During the time under review the testator's differences with his wife, and in recent years an unfavourable view that he had taken of his son, the defendant, were powerful incentives in his decisions about the disposal of his estate. The plaintiff is a brother of the testator. He seeks to establish a will, made in July, 1891, before the birth of the defendant, but in the midst of his father's disagreements with his mother. The plaintiff lived in Canada and the will was sent to him there. He is the survivor of two executors named in the will. The plaintiff has brought in a will of 1888—apparently holograph. It commences with a revocation clause, and besides some exiguous gifts to the wife, consists mainly of dispositions in favour of the plaintiff and others of his family. The will propounded by the plaintiff also begins with a revocation clause of like tenor with that of 1888.

By written and oral evidence it was established that in 1901 the testator declared that he had recently made a will leaving all that he possessed to his son, the defendant. In 1902, his solicitor, Mr. G. A. Nichols, drafted a will to dispose of all the testator's property which he suggested should take the place of an instrument which the testator had apparently forwarded to him, and as to which the solicitor wrote : "The inconsistent statements and directions which you made in your so-called will would only lead to the whole matter being thrown into Chancery for the protection of your trustee." Amongst the testator's papers there was found at his death the draft copy of a purported will in his handwriting disposing of all his estate, bearing date August, 1908, and representing itself to have been signed by the testator and two witnesses. Nothing was known of this document, however, except what appeared on its face. In April, 1910, the testator produced to Mr. D. N. Forbes, who was called before me, a paper signed by himself, which he described as his will and as to which he said that he had thereby made Mr. Forbes his executor and left him one-fourth, and his son the remaining three-fourths of his property. As described by Mr. Forbes the paper appeared to be in the form of a will with the attestation clause in the usual position.

In 1925 the testator identified as a will, in the making of which he was engaged, a writing upon a will form recently purchased at his direction, and after he had completed the writing he signed the document in the presence of two witnesses, Alfred Day and Emily Whilde, who duly attested his signature, and one of whom was called as a witness. Upon this instrument the questions between the parties mainly depend. After the death of the testator search was made and, no will being found, the defendant as next of kin made the necessary affidavit for obtaining letters of administration, and a grant was made thereupon in the usual course. Shortly afterwards the plaintiff arrived in England and produced the will of 1891 for which he claims probate.

At the hearing proof was given of due execution of this will propounded by the plaintiff, and the substantial question in the case came to be whether it had been revoked. Counsel for the defendant submitted that, whatever else was in doubt, there could be no doubt that the testator at all material times intended to revoke the will of 1891 and to leave it revoked. They also claim to have proved the contents of a will of August, 1908, and the contents and execution of a will of 1910, each of them revocatory of every anterior will. They likewise contended that they had shown that in the spring of 1925 the testator made a will which expressly revoked any earlier will. Finally, as no such will could be found on the testator's death, and as many letters which he wrote in 1925 discussed his testamentary position on the footing that this will had been revoked, they submitted that intestacy was proved.

On the plaintiff's behalf two main contentions were made. It was argued that on a correct view of the authorities *ex post facto* declarations of the testator as to the various wills said to have been made by him after 1891 were inadmissible. It was also urged that inasmuch as the alleged will of 1925 was asserted by the defendant's pleadings to be a revoked will no secondary evidence of its contents could be admitted. The question what declarations of a testator are admissible in evidence to establish testamentary acts stands to-day where it was left by the statement of Lord Herschell, Lord Chancellor, in the House of Lords, in *Woodward v. Goulstone* (11 App. Cas., 469) upon consideration of the judgment of the Court of Appeal in relation to this matter in *Sugden v. Lord St. Leonards* (1 P.D., 154, at pp. 226-228), that is to say, it remains doubtful and difficult concerning the admissibility of statements of a testator as to the contents of an intended will made before the execution

of the will. In *Sugden v. Lord St. Leonards* (*supra*), which confirmed numerous earlier decisions, the Court of Appeal held that certain statements made by the testator in that case after the execution of a will were admissible, and as matters stand, notwithstanding the doubts expressed in *Woodward v. Goulstone* (*supra*), the judgment in *Sugden v. Lord St. Leonards* (*supra*) must be regarded as having declared the law so far as it has been authoritatively declared.

As to the application of the rule which was considered in *Sugden v. Lord St. Leonards* (*supra*), two well-known principles are always to be borne in mind. Inasmuch as the Wills Act, 1837, denies all effect to any will unless it shall be made in writing and executed in the prescribed manner, that statute plainly ought not to be evaded by the admission of parol statements, made after the event, to make out execution. Under the common law, however, which since 1857 has governed proceedings in this jurisdiction, a fact which is in issue may, subject to the provisions of the Wills Act, 1837, be proved by any kind of lawful evidence, provided that it be the best available. To exclude a subsequent statement of a testator as to the fact of execution of a will is one thing. To exclude or to admit his statements as to the contents of a writing no longer in being is another. It may be that the observance of this distinction will some day help in the decision of the vexed question what statements of the testator can be given in proof.

In the present case it is not pretended that there is legal proof of due execution of any will of the testator in 1901, 1902, or 1908. A negative finding on the allegations of the defence as to the wills suggested to have been made between 1891 and 1910 is not resisted. As to the paper produced to Mr. Forbes in 1910, there are reasons for believing that it was a duly executed will. It bore the testator's signature. It had what appeared to be an attestation clause. It was described as his will by a man uncommonly versed in such matters. I think a verdict of a jury that it was duly executed might be sustained, but I do not make such a finding because no signatures of witnesses were made out, and I am not convinced that they were there. The case depends then upon the view to be taken of the alleged will of 1925. As to this instrument there is the evidence of one of the witnesses of the fact of execution. There is a good deal of testimony as to statements of the testator before and during the preparation of the document, and after the date when it was signed, concerning the contents or effect of what he called his will. Counsel for the plaintiff, however, contended that, apart from the question of admissibility raised in *Woodward v. Goulstone* (*supra*), none of this material is available by reason that the will, if it ever existed, is declared by the defendant to have been revoked in the lifetime of the testator.

To the proposition that a revoked will must be treated as non-existent there are obvious limitations. No one would doubt, I suppose, that after the death of the testator a document executed by him as a will but afterwards revoked could be used to show his knowledge during life of matters of fact of which it contained evidence. Again, in a suit wherein due execution, validity, revocation, and republication come in question as to one will, its origin and its contents might be among the main facts for the consideration of the Court. Further, in the case of a testator who has made successive complementary dispositions by will or codicil, and has revoked some of them by a will, subsequently itself revoked by cancellation, the ascertainment of the true effect of these several testamentary acts would be impossible if the rule were as is contended, even though every material document were in being. Yet no rule of evidence under the common law, so far as I know, presents any such impediment to the administration of justice. What is said for the plaintiff is that the rule contended for has been established by various decided cases based upon the Wills Act, 1837, and it is set forth in text-books of recognized authority. The citation mainly relied upon, which does seem to be in point, is that made from Williams on Executors (11th edition, p. 258) in the words following: "Since a will which has been destroyed *animo revocandi* cannot be revived by a subsequent codicil, for not being in existence it cannot be incorporated in, or republished by such codicil by reference, it follows that secondary evidence of what the contents of the destroyed will were is not admissible."

None of the cases cited in Williams is a direct authority for the proposition therein enunciated. Indeed they seem on the whole to impugn it. In the Irish case of *Newton v. Newton* (12 Ir. Ch. Rep., 118), which is one of these decisions, Mr. Justice Keatinge, who tried the action, said this at p. iii of the Appendix: "If, indeed, the deceased had made no will or codicil subsequent to the will of the 4th February, 1858 [the execution of which was proved], and if on his death that will could not be found, and if there was no evidence to rebut the presumption that he had himself destroyed it, and that consequently parol evidence could be given of its contents, and if it became necessary to go into such evidence . . . to show that it contained a clause of revocation . . . then the draft might be good evidence of what was contained in it at the time of its execution."

There is, moreover, something like direct authority against the proposition made on behalf of the plaintiff. *In the Goods of Hodgkinson* (9 *The Times* L.R., 650; [1893] P., 339) is a case in point. There a will had been revoked by the testator by cutting off his signature. Evidence of its contents was received which showed that this will had revoked some only of the dispositions in an earlier will. In this Division and in the Court of Appeal the effect of the revoked will upon the earlier will was adjudicated upon. Here it was held that the earlier will stood entire and unaffected by the will made later and revoked, but the Court of Appeal decided that the revoked will had effectually rescinded the dispositions to which it related in the earlier will, and that probate of the earlier will must be limited to the parts of the testator's estate to which the second will did not relate.

The view taken in *Hodgkinson's* case (*supra*) is entirely in accordance with the judgment given in the well-known case of *Brown v. Brown* (8 E. and B., 876), decided in the Court of King's Bench in 1858. There an heir-at-law was claiming realty upon an intestacy and he was held entitled, in support of an allegation of intestacy, to give evidence of the contents of the will which he alleged to have been revoked, in order to show that that will contained a clause revocatory of an earlier will.

It is proper to say that the passage in Williams which is relied upon has not the authority of Sir Edward Vaughan Williams and has no place in the editions of his work which were published during his life.

Looking at the matter on principle, there can, I think, be no doubt as to the rule. A question of fact is in dispute—namely, whether the will of 1925 contained a revocation clause. The document cannot be found, and presumably it was destroyed by the testator. Apart from statute, the evidence to be

required is what is called in the opening sentences of Roscoe's Nisi Prius Evidence : "The best evidence, or rather the highest kind of evidence of which the nature of the case admits." The only relevant statute is the Wills Act, 1837. Section 9 of that Act enacts that no will shall be valid unless it shall be in writing and executed in the prescribed manner. Sections 18 and 20 prescribe the means whereby a will may be revoked. Section 22 directs that no revoked will shall be revived otherwise than by re-execution or by a codicil duly executed showing intention to revive. All that the statute really requires here is that I should see whether what the defendant seeks to do is to revive the will of 1925. In my judgment he does not. What he seeks is to show that when the testator attached his signature to the document of 1925, it was, within the terms of section 20 of the Wills Act, 1837, "another will or codicil . . . or . . . some writing declaring an intention to revoke." Section 24 of the Act has no relevant effect. The language of this section is plain. A will is to be "construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

The intention which appears by this will was that upon its execution previous wills should be revoked. Cases beyond number have made it clear that words of revocation contained in a will operate immediately upon its execution so effectually, that without some express act of revivor the revoked testament has thenceforward no existence as a will. The principle is illustrated in *Brown v. Brown* (*supra*) and *In the Goods of Brown* (1 Sw. and Tr., 32).

What remains is to ascertain whether the writing of the testator witnessed by Alfred Day and Emily Whilde of 1925 was expressly or by implication a will which revoked any will previously in being. I know as to the substance of the transaction many material facts. The testator, for a substantial period before his signature was witnessed, had been engaged, according to his own statements, fortified by abundance of corroborative circumstances, in the preparation of a will. He wrote upon a printed form what he said was his will. He named persons whom he intended to benefit. He concluded the document with sentences expressive of pious opinions such as he had often before expressed in the like connexion. The printed form was one of two brought to him by his messenger from a shop of a firm of law stationers at Bournemouth, and it contained a revocation clause in absolute terms. Bearing in mind the practical experience of the testator, the knowledge that he had of will making, and the numerous occasions on which he had demonstrated it, I am satisfied that the document witnessed by Mr. Day and Miss Whilde was the will of the testator, and that he thereby in express terms revoked all earlier wills.

Having ascertained the fact of revocation, I have no concern with the declarations of the testator, sooner or later, as to the contents of the will in question, or with any statements concerning subsequent testamentary acts or intentions. No later will appears and in respect of all these matters the extent of the rule of law which excludes some declarations and includes others becomes immaterial.

The defendant is entitled to judgment in the action. I therefore pronounce against the will propounded by the plaintiff and direct that the letters of administration granted to the defendant in his proceedings in common form be handed out to him.

On the question of costs, his LORDSHIP said that he must apply the ordinary rule in the Probate Division, that where the conduct of the testator had necessitated the inquiry as to what in truth were his testamentary dispositions the costs must come out of the estate. In this case the testator left his affairs in confusion after making a variety of testamentary dispositions, raising questions of revocation and dependent relative revocation. It was a matter of public concern that the testamentary act of a deceased person should be ascertained, and the costs of all parties would come out of the estate.

[Solicitors—Messrs. Barrow, Rogers, and Nevill ; Messrs. Reid, Sharman, and Co. ; Messrs. Walmsley and Stansbury.]

K.B. Div. (Shearman and Finlay, JJ.) 1927. Dec. 21.

STOTT AND ANOTHER v. SHAW AND LEE, LIMITED.*

Bills of Sale—Validity — Consideration — Contemporaneous mortgage forming part of contract—"Defeasance or condition"—Bills of Sale Act, 1878 (41 and 42 Vict., c. 31), ss. 8, 10 (3).

By the Bills of Sale Act, 1878, s. 8 : "Every bill of sale . . . shall set forth the consideration for which such bill of sale was given." By s. 10 (3) : "If the bill of sale is made or given subject to any defeasance, or condition, or declaration of trust not contained in the body thereof, such defeasance, condition or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void."

The grantor of a bill of sale for £1,000 was being pressed by other creditors and approached the grantee for further financial assistance. It was ultimately agreed that the grantee should pay the other creditors a sum of £600, and receive a new bill of sale from the grantor for £1,600, the old bill being cancelled. The new bill of sale stated : "In consideration of the sum of £1,600 paid to [the grantor] by [the grantee] (the receipt of which sum [the grantor] hereby acknowledges) [the grantor] doth hereby assign, &c."

Held, that although the sum referred to had not in fact passed from the grantee to the grantor the consideration for the bill of sale was truly stated within the meaning of s. 8 of the above Act.

Credit Company v. Pott (6 Q.B.D., 295) followed.

Contemporaneously with the bill of sale, and as part of the same bargain, a mortgage instrument was executed by way of collateral security. The bill of sale provided for the repayment of the principal "on the 24th day of December

* Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.

next," and the mortgage instrument provided as follows : "The mortgagor . . . covenants with the mortgagee to pay to him on the 24th day of December next the sum of £1,600 . . . and it is hereby agreed and declared that (subject to the right of the mortgagee to require repayment of the said principal sum on the 24th day of December next according to the foregoing covenant by the mortgagor or at any time thereafter) the principal money secured shall be repaid by instalments of not less than £20" on agreed dates.

Held, that the above agreement in the mortgage instrument merely gave the grantee an additional right to sue at his option *in personam* for a separate portion of the principal debt, and, as that particular personal covenant did not affect either the right of the grantor to redeem or the right of the grantee to seize the goods under the bill of sale, it did not amount to a "defeasance or condition" not contained in the body of the bill and accordingly invalidating it under s. 10 (3) of the above Act.

Edwards v. Marcus (10 *The Times* L.R., 255 ; [1894] 1 Q.B., 587) explained and distinguished.

This was an appeal from the Judge of the Salford County Court who had given judgment in favour of the claimants in an interpleader issue. The claimants, Messrs. Stott and Another, were the executors of one Albert Stott (hereinafter called "the deceased"), who died on December 10, 1926, and the appellants, Messrs. Shaw and Lee, Limited, were a firm of moneylenders who held a judgment against one Robert Thornley. In 1910 Thornley had been minded to build a laundry at Flixton, Lancashire, and he bought some land from the deceased for that purpose. As Thornley was unable at that time to find the whole of the purchase money, it was arranged that a mortgage of £150 in favour of the deceased should be left on the land, and by 1912, as the result of a further series of loans, Thornley's indebtedness to the deceased had been increased to £600. In 1913 the deceased lent Thornley a further £400, taking as security to cover the entire £1,000 a bill of sale dated May 30, 1913.

In June, 1925, Thornley was being pressed by the appellants in respect of a series of loans which they had made to him on various occasions, and he again approached the deceased for further financial assistance. On June 24, 1925, the deceased found a further £600, which he paid direct to the appellants to clear Thornley's debt to them. It was agreed between Thornley and the deceased that the former securities should be withdrawn and that Thornley should give the deceased a new bill of sale on the machinery and chattels in the laundry to cover the entire £1,600 owed by him, and also a mortgage for the same sum on the building as a collateral security. The material portions of the bill of sale, which was dated July 1, 1925, were as follows: "In consideration of the sum of £1,600 paid to Robert Thornley by Albert Stott on the 24th day of June, 1925 (the receipt of which sum the said Robert Thornley hereby acknowledges) . . . Robert Thornley doth hereby assign unto . . . Albert Stott, his executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule . . . and the said Robert Thornley doth further agree and declare that he will duly pay to the said Albert Stott the principal sum aforesaid with the interest then due on the 24th day of December, 1925. . . ." By the mortgage instrument, which also was dated July 1, 1925, the mortgagor covenanted "in consideration of the sum of £1,600 paid by the mortgagee to the mortgagor on the 24th day of June, 1925, being the amount already advanced by the mortgagee to the mortgagor on the security of a bill of sale dated the 1st day of July, 1925," to "pay to [the mortgagee] on the 24th day of December next the sum of £1,600 with interest thereon" ; and it was further provided that "subject to the right of the mortgagee to require repayment of the said principal sum on the 24th day of December next according to the foregoing covenant by the mortgagor or at any time thereafter, the principal money hereby secured shall be repaid by instalments of not less than £20" on agreed dates.

In January, 1927, the appellants seized the chattels of Thornley in order to satisfy a judgment for £157 9s. 6d. which they held against him. The executors of the deceased paid that sum into Court, and on an interpleader summons they were made claimants and the present appellants were made respondents. It was contended on behalf of the execution creditors that the bill of sale of July 1, 1925, was invalid, first because the collateral mortgage constituted a defeasance or condition, which was not written on the same paper or parchment as the bill before registration, as required by section 10 (3) of the Bills of Sale Act, 1878 ; and secondly, because the consideration for the bill of sale was not truly stated in the bill. The County Court Judge held that the bill was not invalidated on either ground, and that therefore the claimants on the issue were entitled to judgment.

The execution creditors appealed.

Mr. E. W. Wingate-Saul, K.C., and Mr. J. C. Jolly appeared for the execution creditors ; Mr. J. E. Singleton, K.C., and Mr. J. Lustgarten for the claimants.

Mr. Justice Shearman.—The argument in this case on both sides has been very good and the questions arising are difficult. I am delivering the judgment that I am about to deliver with much hesitation because I do not think that this particular case is covered by any other decision, although there are numerous decisions touching both points which have been submitted to us. But in giving my judgment, which is that this appeal must be dismissed, I say at once that I give it with great hesitation, and I trust with modesty, because I think the issue is very difficult and I should be very glad that it should be considered elsewhere if either party so desires.

The two points which arise in the case and the facts on which they arise are very short, and I will endeavour to summarize them. The grantor, at the time of the execution of the bill of sale, which is now attacked on two grounds, owed a sum of exactly £1,000 to the grantee which was due at that particular time under a previous bill of sale. At the same time he also owed to other creditors, the present execution creditors, another sum on another bill of sale. The grantee was asked to lend some more money to relieve the grantor of his difficulties, and what eventually happened was that the grantee paid off the other creditors, the exact sum being £600. It was agreed, on one day and in pursuance of one bargain, that the grantee should pay the creditors

£600 and take a bill of sale from the grantor for £1,600, the £1,600 being made up of the two sums, the existing debt of £1,000 then due and payable at that moment, and the £600 paid to the creditors as part of the transaction and part of the bargain. The grantor, therefore, remained indebted at that moment, and in consequence of those considerations, in the sum of £1,600, for which he granted a bill of sale in the statutory form.

To deal with the first point (and I am going to take it very shortly) the bill of sale stated the consideration in these simple words : "In consideration of the sum of £1,600 paid to . . . Thornley by . . . Stott on the 24th day of June, 1925 (the receipt of which sum . . . Thornley hereby acknowledges) . . . Thornley doth hereby assign," &c. Now, it is perfectly clear that, strictly, that was untrue ; and it is argued that the consideration was not truly stated, and that that avoids the bill. It is true that not one halfpenny was paid to the grantor on that date ; but it is perfectly clear that the bargain was : "I will give you this bill of sale because I owe you this very day £1,600, for which you can sue by writ," and if the £1,600 had been produced in notes and had been handed over and £1,000 had gone back to the grantee, then it would have been paid and repaid. And similarly, though there was no evidence of it, it was stated that the grantor was actually present when the creditors were paid, and it is quite clear that he would not have signed the bill of sale unless his debt had been in fact cleared off ; and that constitutes a request in law. If the £600 had been paid to the grantor and immediately handed to his creditors, the result would have been the same.

Now, once upon a time the question whether the consideration was truly stated was being argued in one of the Courts of this august building every day of the year, and a number of cases (the important ones) are reported in the quasi-official reports and others are reported in local newspapers, and altogether the number of cases reported runs to scores. There have been waves of feeling, one way and the other—sometimes the matter was regarded as one to be considered strictly and sometimes otherwise. But there is one case that has always been regarded with great respect in all the cases, and that is the case of *Credit Company v. Pott* (6 Q.B.D., 295). I do not wish to prolong this judgment, but it has been pointed out over and over again in these cases that, on the principle of *lex neminem cogit ad vana seu impossibilia,* if the legal effect of the transaction can be derived from the words used, one must not palter with small objections ; if the legal or business or commercial effect of the transaction is the same as that described, then the Courts will hold the consideration to be truly stated. In that case Lord Selborne used these words, citing a *dictum* of Lord Justice Mellish in *Spargo's* case (L.R., 8 Ch., 407) : "It is a general rule of law that in every case where a transaction resolves itself into paying money by A to B, and then handing it back by B to A, if the parties meet together and agree to set one demand against the other they need not go through the form and ceremony of handing the money backwards and forwards." In *Credit Company v. Pott* (*supra*) the words used were "in consideration of £7,350 now paid." I think that case (I need not refer to the other cases which have followed and been distinguished from it) decided that, if both sums are due, one can say "now paid" or "then paid," and the same applies just as much if the grantee hand a sum to a third person at the request of the grantor. It seems to me that that case is a cardinal and leading case on the subject, and that, therefore, this objection that the consideration was not truly stated fails. I may add that I do not doubt that one may find in other cases *dicta* which are inconsistent with my decision in this case, but those *dicta* must always be looked at with regard to the facts of the case in which the words were used, and that is the reason why they do not, and cannot, in my view, be held to override the main principle laid down in *Credit Company v. Pott* (*supra*).

Then a second objection was taken, which was dismissed by the County Court Judge, but that, to my mind, raises much more difficult considerations. The facts are these. Contemporaneously with and as part of the same bargain as this bill of sale, a second document was executed containing a clause relating to repayment of the principal, and this clause was not included in the bill of sale, which was simply made in the statutory form. That second document was a mortgage of certain other property as collateral security, and it contained this expression with regard to the consideration : "£1,600 paid by the mortgagee to the mortgagor . . . being the amount already advanced . . . on the security of a bill of sale" ; and also this clause : "The mortgagor hereby covenants with the mortgagee to pay to him . . . £1,600 with interest." There is the same date for payment of the principal as in the bill of sale ; the same amount of interest as in the bill of sale is fixed, and then comes this expression, which does not appear in the bill of sale : "And also (by way of separate covenant) so long after that date"—that is, after the due date of repayment of the principal—"as any principal money remains due under this mortgage to pay to [the grantee] interest thereon at the same rate." Then the covenant goes on to say "by equal quarterly payments on the 24th day of March, the 24th day of June, the 24th day of September, and the 24th day of December," and then occurs a clause which does not appear in the bill of sale : "It is hereby agreed and declared that (subject to the right of the mortgagee to require repayment of the said principal sum on the 24th day of December next)"—those are the opening words that govern the words which follow, "the principal money hereby secured shall be repaid," and then four usual quarter days are given, and the first payment is "to be made on the 24th September, 1926, and the aforesaid interest shall be payable on the balance of the principal money remaining owing on this security." Now it was argued before us that those words mean nothing—that as, according to the provisions of the deed, the principal was subject to be repaid on a certain date and interest was payable after that date on the whole as long as any part of the principal should be due, those words mean nothing at all because at any moment the grantee could say, "No, I will not have your instalments." I think that the contention is correctly expressed by stating that the grantee could always say, "No, I will not have them. I have a greater right, and I am not going to take them," and the result is that there remains only the provision, "If I allow you, you may repay by certain specified instalments." It was argued on behalf of the claimants that such a provision meant nothing. I am unable to see that it means nothing. I think it was part (of very small and very little value, but still a part) of the bargain, and the effect of it was a provision : "If I, the grantee, should not after a certain date require the full payment, then there are certain specified instalments which I can sue for as separate debts at my own option instead of being

obliged, if I want to realize, to sue personally for the whole principal." It gives the grantee a right, at his option, to sue for a separate part of the principal *in personam*—for a portion of the debt—a right which he would not have had under the bill of sale alone ; but I think that is the only right which it gives.

It was argued on behalf of the appellants that by reason of an extended right of redemption which could be determined, the words in the bill of sale, that the grantee could not seize except for breaches of section 7 of the Act of 1882, were altered and that there was in the mortgage deed something which altered the effect of the right to seize under the bill of sale. If I had felt no doubt that these words come under what is called the "defeasance, condition, or declaration of trust" clause, the position might be different ; but I am unable to see that they in any way defeated or affected the right of the grantor to redeem on payment of the sum described in the bill of sale and according to its terms. I therefore am of opinion, on the construction of this document, the mortgage, as distinct from the bill of sale, that it gave a particular personal covenant and did not in any way affect the title either of the grantor or of the grantee to the goods—that it did not impair the grantee's right to seize or the grantor's right to redeem.

That being so, we have to consider this question which was argued, and which, to my mind, is a very difficult question—Do those provisions avoid the bill of sale under section 10 (3) of the Act of 1878 on the ground that the bill of sale was in fact given subject to a defeasance, condition, or declaration of trust not contained in the body thereof ? In my view they do not, and those words are not a defeasance, nor a condition, nor a declaration of trust.

We were pressed very strongly with the case of *Edwards v. Marcus* (10 *The Times* L.R., 255 ; [1894] 1 Q.B., 587). It was contended that we were bound, in consequence of that decision, to hold that all previous decisions had been overruled ; and that the notion that the defeasance must be one only in the interests of the grantor was disposed of, and that, in considering whether a term of the bargain amounts to a defeasance or condition within the section, it makes no difference whether it is in favour of the grantor or of the grantee. Now, to my mind, that entirely depends on this consideration : Do the words "defeasance or condition" mean the defeating of certain rights ? I think it is clear that in this clause there is nothing defeating the rights of either the grantor or the grantee as expressed in the bill of sale. It is obvious that there is no declaration of trust. Is there any condition ? To my mind, the decision in this case depends on the narrow question : Does "condition" in a bill of sale mean any term of the bargain entered into between the grantor and the grantee—any personal term entered into on the same date—or does it mean something really affecting the title of one or the other to the goods under the bill of sale ? Now, a case with regard to this point (I need not mention all the cases) is the original decision of Lord Justice James in *Ex parte Collins—In re Lees* (L.R., 10 Ch., 367), which was overruled and set aside in *Edwards v. Marcus* (*supra*). Lord Justice James, in considering what was the meaning of the words "defeasance or condition," said this : "The question is whether the non-registration of the memorandum avoided the whole transaction. The Act, after providing that every bill of sale shall be registered, has in its second section this provision," which he read. "The question, then, is whether this memorandum is a defeasance, condition, or declaration of trust subject to which the bill of sale was made or given. It certainly is not a defeasance, nor is it a declaration of trust. Is it then a condition either in the technical or ordinary sense of the word ? Conditions may be either precedent, subsequent, or inherent. A condition is precedent where, unless it is complied with, the estate does not arise ; it is subsequent where, if it is broken, the estate is defeated ; it is inherent where the estate is qualified, restrained, or charged by it ; in every case it denotes something which prejudicially affects the interest of the donee." Lord Justice James proceeded to say that he was of opinion that the rights of the grantee were not affected by the memorandum being unregistered. When that matter was considered and discussed in *Edwards v. Marcus* (*supra*), the portion of the earlier judgment dissented from was the expression "something which prejudicially affects the interest of the donee." In the judgments in *Edwards v. Marcus* (*supra*), I find words which are consistent with the interpretation of the word "condition" as meaning something affecting the title to the goods, or the right to seize them, on the one side or the other. Lord Justice Lindley, as he then was, decided in that case that the term of the bargain which had not been put into the bill of sale was something which imposed a fresh burden upon the donor, as it undoubtedly did, and therefore it obviously would be, and must be, a condition, and he uses these words (10 *The Times* L.R., 255 ; [1894] 1 Q.B., at p. 592) : "Any condition, whether it is prejudicial to one party or to the other, seems to be within the mischief struck at, and that was the view taken by the Court in *Counsell v. London and Westminster Loan and Discount Company* (19 Q.B.D., 512). *Ex parte Collins* (*supra*) was not cited in that case, but when you see that the document"—in *Ex parte Collins* (*supra*)—"was not a condition"—and the document in the *Collins* case (*supra*) was something very much like the document here—"and would not affect the title of the donee, that case does not conflict in any way with the later case." Then Lord Justice Lindley, in stating the ground of his judgment, goes on : "The title of the grantors is most prejudicially affected, because the grantee can hold these chattels until he is paid his principal and compound interest. Therefore I think the case is brought within the section." He then goes on to say : "Looking at the matter as men of business, the result is that you cannot split the bargain"—but he continues—"and put into the bill of sale what is allowed by the statute, and what is not allowed into the contemporaneous mortgage." Now there is in this contemporaneous mortgage nothing which could not have been put into the bill of sale. It would not have offended, in my view, against the provisions of the Bills of Sale Acts. The other judgments I will not go through, but they are to the effect that the whole bargain must be set out in the body of the bill. To my mind, if and wherever those words are used, the proper meaning to put upon them is that where there is an agreement affecting either the right of the grantor to redeem or of the grantee to seize, that causes the bill of sale to be given subject to a condition within the meaning of the section.

Now, I have only this to add, that that disposes of the two points in this action adversely to the appellants. But I desire to say that the learned Judge in the Court below gave his decision in reference to a judgment of Mr. Justice Bigham in the

case of *In re Leber* (52 Sol. Jo., 483). In my view he was right, and although I cannot fully understand the meagre report of that case, it is quite clear that Mr. Justice Bigham in that case was considering something which did affect the personal rights of one of the parties to the bill of sale. There there was a contemporaneous mortgage under which the grantor undertook to keep the premises in repair and therefore became pecuniarily responsible if he did not do so, and that was part of the bargain; and Mr. Justice Bigham said that that had nothing to do with the bill of sale. That statement perhaps does not help one very much, but at any rate it shows that he did take the view that something which had nothing to do with the mortgage of the chattels was not a condition within the meaning of section 10. For these reasons (and I have given them not without very great doubt) I am of opinion this appeal must be dismissed.

MR. JUSTICE FINLAY.—I agree with my Lord in everything; I agree with him in the tribute that he paid to counsel, and without in the least depreciating the arguments that we heard from the front row yesterday, I may perhaps be allowed to say that I personally have been assisted by the singularly able arguments presented from the back row this morning—by Mr. Lustgarten and Mr. Jolly. I agree also with my Lord in regard to the doubt and difficulty on one point in the case. With regard to the first point, that is, the statement of the consideration, I can add nothing, and I desire to add nothing, to what my Lord has said. I think there is no substance in the objection taken and I think the authority of *Credit Company v. Pott* (6 Q.B.D., 295) completely meets that point. I, like my Lord, feel very great difficulty on the second point, and, indeed, my view has fluctuated about it more than once during the argument. I do not desire to review the cases—that has been done quite sufficiently. All that I desire to say is this, that I think the truth of the matter is that there was here an additional term of the bargain, in this sense and in this sense only, that there was a collateral contract whereby a term having some operation (though not, I think, a very important operation) was introduced, but there was no variation and no alteration of the terms of the bill of sale, nor any addition to those terms, if by that is meant something which affected either the rights or the liabilities of the parties to the bill of sale. Those rights and liabilities under the bill of sale are, as I conceive, exactly what they would have been if this contemporary document had not been entered into. None of the rights or liabilities under the bill of sale is in any way affected and, in my view, both on principle, so far as there can be said to be any principle on a subject of this kind, and on a general survey of the authorities, the better view appears to me to be that the bill of sale in these circumstances is not made or given subject to any defeasance or condition. My Lord has dealt so fully with the authorities that I do not desire to add anything with regard to them.

On that short ground (though I fully share the doubts that have been expressed) I am, on the whole, of opinion on this point also that the conclusion arrived at by the learned County Court Judge was sound, and I, therefore, agree that this appeal fails.

[Solicitors—Mr. A. R. Lord, for Messrs. B. Kuit and Co., Manchester; Messrs. Peacock and Goddard, for Messrs. Barlow, Garrett and Co., Manchester.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)
1927. Nov. 29.

ATTORNEY-GENERAL v. BELILIOS.*

Revenue — Estate duty — Succession duty—Foreign disposition—Settlement of property situate in Hong-kong by testator domiciled there—Appointment of English trustees of settlement—Applications to English Courts by trustees—Trust funds abroad—No direction in disposition to establish trust in England—Original succession not changed—Succession Duty Act, 1853 (16 and 17 Vict., c. 51), s. 2—Finance Act, 1894 (57 and 58 Vict., c. 30), s. 2 (2).

Under the will made in English form of a testator domiciled in Hong-kong his residuary property, which mainly consisted of investments in local companies and real estate in Hong-kong, was left, subject to an annuity to his widow, upon trust for his son for life, with remainder to the son's two infant children. The testator died in 1905. The tenant for life desiring to borrow money, the lenders insisted on English trustees being appointed, and by a deed of appointment made in 1911 he appointed English trustees of the settlement along with himself. Later, it having been discovered that the tenant for life, while sole trustee, had drawn upon the capital of the trust funds, various applications were made, against his wish, to the English Court in the Chancery Division for directions regarding the administration of the trust, and orders were made thereon, and his sons were made wards of Court. The trust property remained in Hong-kong. The tenant for life died in 1922. The Crown having claimed succession and estate duty upon the property, Rowlatt, J., held under section 2 of the Succession Duty Act, 1853, that a trust was established in this country as a result of a foreign disposition, and therefore estate duty was payable, although the trust was not so established here as a result of any directions in the disposition, but that no succession duty was payable, as section 24 of the Finance Act, 1925, was not retrospective. On appeal, as to estate duty,

Held, that the succession was originally a foreign succession, having been established by the death of the testator abroad in 1905, and that it could not be changed into an English succession or settlement by any acts of the successors not amounting to an entirely new disposition, and that as there was no direction in the testator's will directing that any trust should be established in England, it remained a succession under the laws of Hong-kong, and the property was not liable to estate duty.

* Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.

Statement of Lord Cranworth in *Wallace v. Attorney-General* (L.R., 1 Ch., 1) applied.

Attorney-General v. Campbell (L.R., 5 H.L., 524) and *Attorney-General v. Jewish Colonization Association* (17 *The Times* L.R., 106 ; [1901] 1 K.B., 123) distinguished.

Dictum of Bacon, V.-C., in *Thompson v. Birch* ([1876] W.N., 177) overruled.

Decision of Rowlatt, J. (43 *The Times* L.R., 669) reversed.

This was an appeal from a decision of Mr. Justice Rowlatt (43 *The Times* L.R., 669) on an information filed by the Attorney-General against Vera Carlotta Belilios, Richard Owen Roberts, and Edward Elvy Robb, asking for a declaration that upon the death of Raphael Emanuel Belilios, who died domiciled in Hong-kong in 1905, succession duty and estate duty became payable on the residuary estate of the testator, wherever situate, other than the amount required for the payment of the annuity bequeathed to his widow, together with interest thereon at 4 per cent.

The facts are fully set out in the report of the proceedings below and are shortly restated in the judgment of the Master of the Rolls.

Mr. Justice Rowlatt held that at the date of the death of the tenant for life in 1922 there was a trust established in this country as a result of a foreign disposition, the appointment of English trustees, and applications by these trustees to the Chancery Division upon which orders were made, and that, therefore, estate duty became payable on the trust property under the Succession Duty Act, 1853, and the Finance Act, 1894, but that succession duty was not payable.

The defendants appealed, but there was no cross-appeal on the question of succession duty.

Mr. F. H. Maugham, K.C., Mr. A. M. Latter, K.C., and Mr. J. D. Israel appeared for the appellants ; the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. M. J. L. Beebee appeared for the Crown.

At the conclusion of the arguments, the Court took time for consideration.

The Master of the Rolls.—This is an appeal from Mr. Justice Rowlatt, who, on June 17, 1927, gave judgment upon this information in favour of the Crown.

The relevant facts are few and not disputed. The testator, Emanuel Raphael Belilios, late of Victoria in the colony of Hong-kong, made his will dated October 1, 1883. By it, after making provision for his wife, he left his property, which included both real and personal property in Hong-kong, to his son for life, and then to his children. The information states that the testator declared that the will, so far as the case admitted, with an exception hereinafter mentioned, was to take effect according to the law of Hong-kong.

The testator died domiciled in that colony on November 11, 1905, and probate of his will with two codicils was granted there to his son on May 15, 1906. The son, Raphael Emanuel Belilios, who was domiciled at Hong-kong, died on October 17, 1922, in the United Kingdom. At his death the beneficial interest in the estate of which he had been tenant for life passed under the dispositions of the testator to the two infant sons of Raphael Emanuel Belilios. That estate consisted of, (*a*) some £1,300 in a bank in the United Kingdom, (*b*) shares in Hong-kong companies which realized £66,246 15s. 7d., and also some other shares, (*c*) some immovable property situate in the colony of Hong-kong.

Between the deaths of the testator and of his son a number of applications had been made to the Chancery Courts here, and new trustees, domiciled and resident in the United Kingdom, had been appointed. No question arises as to the property in the United Kingdom which passes under the testator's will ; but the appellants contend that the Crown is not entitled to be paid succession duty, on the death of the son in 1922, in respect of what may be called the Hong-kong property. Probate duty amounting to £7,634 was paid on that in the colony. The Crown contends that succession duty under section 2 of the Act of 1853 and likewise estate duty—which they admit rests on the same footing—is payable upon all the property passing on the death of the son in 1922, on the ground that "At the date of the death of the said Raphael Emanuel Belilios the will of the said testator was for the purposes of the Succession Duty Act, 1853, an English settlement in that the trust funds and property, although for the most part situate abroad, were vested in trustees who were all resident within the United Kingdom and subject to the jurisdiction of the High Court of Justice, whose wards the said infants had become and then were by virtue of the orders hereinbefore referred to."

The question, therefore, to be decided is whether what was undoubtedly, so to speak, a foreign settlement in 1905 has now become a settlement subject to succession duty. For the appellants it is argued that the wide words of section 2 which would in their terms cover any property wherever situate—even belonging to a non-resident foreigner—must be governed by some limitation, and that it is limited to the succession to property of those who become entitled to it by the laws of this country.

The Attorney-General, contra, argues that a disposition—even if originally foreign—may come within the Act if there are British elements attached to or concerning it, so that British law is invoked, as was done in the present case. When a British forum is involved, and its aid invited, he claims that that gives a different effect to the disposition, which may and ought in the present case to be held to fall within the section.

The section opens with the words : "Every past or future disposition of property . . . and every devolution by law of any beneficial interest in property or the income thereof." Lord Cranworth had to consider these wide words in *Wallace v. Attorney-General* (L.R., 1 Ch., 1). At page 7 he rejects the suggestion that, where a person domiciled abroad makes a will giving personal property in this country by way of legacy, the legatee is a person becoming entitled within section 2 ; and he states his opinion : "I think that in order to be brought within that section, he must be a person who becomes entitled by virtue of the laws of this country."

These words appear to me to be supported, and not challenged by, or mistrusted in, the judgment of Lord Westbury in *Attorney-General v. Campbell* (L.R., 5 H.L., 524, at pp. 530 and 531). Lord Westbury does not doubt Lord Cranworth's decision, for he points out the "extraordinary conclusion" that was contended for, namely, that under the will of a man dying domiciled abroad the first legatee, though not liable to legacy duty, became liable to succession duty under the Act. Then he deals with the case before him, in which under the direction of the terms of the will a trust in this country had been created, and he pointed out that the character of the owner-

ship was determined under the trusts directed to be created by the will.

The reasoning of the Master of the Rolls in *In re Cigala's Settlement Trusts* (7 Ch.D., 351) does not, in my judgment, run contrary to the above decisions. Applying the tests used by Sir George Jessel to the present case, the settlement in the present case is the testator's will, a settlement by and upon persons, who were foreigners to the law of this country of property which was situate in Hong-kong. If so, it remains a Hong-kong settlement and succession. "I am unable to find in the Act any warrant for the view that a succession once created can, by the act of the successor, cease to exist and another succession be substituted for it," said Lord Herschell in *Lord Wolverton v. Attorney-General* (14 *The Times* L.R., 519 ; [1898] A.C., 535, at p. 548) ; unless, however, by a direction such as was found in *Attorney-Gencral v. Campbell* (*supra*) there was a trust created subject to a different jurisdiction. The words of Lord Cranworth are accepted in the judgment in *Harding v. Commissioners of Stamps for Queensland* (14 *The Times* L.R., 488 ; [1898] A.C., 769, at p. 774). That judgment includes the great authority of Lord Watson and Lord Davey.

Finally, Lord Macnaghten, giving the judgment of Lords Halsbury, Davey, Robertson, and Lindley, as well as of himself, in *Lambe v. Manuel* (19 *The Times* L.R., 68 ; [1903] A.C., 68), repeats the approval of the case of *Wallace v. Attorney-General* (*supra*). It is also, I think, clear that the date when the character of the succession becomes attached to it is at the moment when the succession is conferred : "The date of the entitlement" as Lord Cave calls it in *Lord Advocate v. Macalister* (40 *The Times* L.R., 564 ; [1924] A.C., 586, at p. 591).

It seems, therefore, that 1905 is the dominant date to decide the nature of the settlement and of the succession. If so, this succession was foreign. What has happened to bring the succession or any trust relating to it within this jurisdiction ?

The facts of the present case do not bring it within the decision in *Attorney-General v. Campbell* (*supra*).

Lord Justice Stirling in his exhaustive review of the cases in *Attorney-General v. Jewish Colonization Association* (17 *The Times* L.R., 106 ; [1901] 1 K.B., 123) appears to hold that the question whether any property comes within the purview of section 2 of the Succession Duty Act, 1853, depends upon the facts and circumstances of each case. He said : "Weighing all these circumstances as best I can, I think that there is nevertheless a preponderance in favour of the view that inasmuch as the settlement in question is an English settlement," &c.

The tests he applies are : (1) According to what law was the operative settlement made ? (2) Where was the legal control ? (3) What forum had cognizance of the trusts ?

Lord Justice Stirling does not suggest that the principle formulated by Lord Cranworth is incorrect, though he holds that his rule must be taken to be satisfied where property is found to be legally vested in a person subject to the jurisdiction of the English Courts, and the title to the beneficial interest in that property is regulated and capable of being enforced by the law of England ; see [1901] 1 K.B., at p. 142. These words must, I think, be estimated in relation to the facts of the case that he was considering, and not antagonistically to those of Lord Cranworth, in *Wallace's* case (*supra*), for he quotes the statement of the *ratio decidendi* of *Attorney-General v. Campbell* (*supra*), as given by Lord Westbury, which is not inconsistent with Lord Cranworth's proposition. I will not transcribe it : but the crucial part of it appears to be in the words : "The character of the ownership is no longer that of a legacy. The character of the ownership is under the trusts directed to be created by the will." See [1901] 1 K.B., p. 140.

Now in the present case there was no appropriation of any part of the property so as to make it English property, or to alter the character of the original disposition. The ownership passed in 1922 under the testator's will. The Hong-kong Courts would have had jurisdiction to secure that the disposition was effective to the successors on the son's death in 1922. It seems wrong to neglect this root of title, and to set aside the fundamental facts upon which the devolution of the property depends.

No doubt in the *Jewish Colonization* case (*supra*) there were strong facts to justify the decision, a deed in English form and language, to an English company with a registered office in London. The root of the disposition had been transplanted to London. But in the present case Hong-kong cannot be lost sight of. The preponderance lies in favour of the view that the settlement retained its original characteristics.

The case of *In re Badart's Trusts* (L.R., 10 Eq., 288) is an illustration of an appropriated sum which became liable to succession duty under the particular circumstances of the case, and it was distinguished from *Wallace's* case (*supra*).

There is, in my judgment, in the present case no such separation or other fact as involves the notional removal to this country of the property passing, or any part of it, in respect of which succession and estate duties are now claimed, and thus the conclusion must be reached that the duty is not payable. It is notable that in the case of *Toronto General Trusts Corporation v. The King* (35 *The Times* L.R., 450 ; [1919] A.C., at p. 685) the present Lord Chancellor treats the principle indicated by Lord Cranworth in *Wallace's* case (*supra*) as a test as to the limitation of the imposition of succession duty and adopts it.

Mr. Justice Rowlatt appears to have found himself bound by the case of *Thompson v. Birch* ([1876] W.N., 177) and quotes the words of Vice-Chancellor Bacon as to a fund established in this Court, "no matter by what means." I am not sure that I appreciate those words. But the authorities to which I have referred all strongly support the principle laid down by Lord Cranworth, and I cannot accept *Thompson v. Birch* (*supra*) if it does otherwise.

For these reasons I am of opinion that the claim of the Crown to these duties fails.

The appeal will be allowed with costs and the information discharged with costs.

Lord Justice Sargant.—The question under appeal here, namely, whether estate duty is payable on the general residuary estate of the testator, admittedly depends on whether succession duty would have been payable thereon under section 2 of the Succession Duty Act, 1853. That section uses language of the widest character, sufficient on its bare terms to include a succession arising under any disposition British or foreign, and in respect of any property real or personal wherever situate. It would, for instance, include a succession under the will of a domiciled American to real estate in the City of New York. Some implied limitation must therefore be read into the words of the section for the purposes of reasonable construction. We have here to ascertain the extent of this implied limitation to see whether

or not it prevents the application of the section to the succession now in question. There have, of course, been a good many decided cases in relation to the section, but none which is quite on all fours with the present case.

The succession in the present case is in relation to real estate in the colony of Hong-kong, and to personal property situate in the same colony, together representing the residuary trust estate of a testator who died domiciled in that colony in the year 1905. The will and two codicils of that testator gave this residuary estate upon trusts, in the events which happened, for the testator's son, Raphael Emanuel Belilios, during his life, and after his death upon trust for his two sons. The executors and trustees named in the will and codicils were four in number, namely, the testator's widow, the testator's son, and the respective managers for the time being in Hong-kong of two English banking companies ; but the only one of these four persons who actually proved the will and acted in the trusts thereof was the testator's son. The will was couched in terms familiar to English lawyers and, I should think, equally familiar to lawyers in Hong-kong. It was proved in Hong-kong, and on a subsequent appointment of trustees in the year 1911 by the testator's son he purported to act under the laws of that colony.

The testator's son, Raphael Emanuel Belilios, who remained domiciled in Hong-kong during the whole of his life, died on October 17, 1922, and it is on the occurrence of that event that duty is claimed to have become payable, on the ground that the beneficial interest then accruing to the two infant sons of the tenant for life constituted a succession within the meaning of section 2 of the Succession Duty Act, 1853. This claim is resisted on the ground that this succession to property in Hong-kong under the laws of that colony did not on the testator's death constitute a succession within the meaning of the Act of 1853, and that nothing has since occurred sufficient to bring it within that Act.

The first case which defined the extent of the limitation which must undoubtedly be placed on section 2 of the Act of 1853 is that of *Wallace v. Attorney-General* (L.R., 1 Ch., 1). There the Lord Chancellor, Lord Cranworth, said that in order to come within the section the successor must become entitled by virtue of the laws of this country. It is argued for the Crown that subsequent decisions show that this limitation was too broad ; and it is no doubt the case that in subsequent judgments the test adopted by Lord Cranworth has not been always applied in the precise terms employed by him. But I do not think that his language has ever been disapproved or, indeed, adversely criticized. And, in the cases in which the Courts have since had to consider whether the documents in question created a taxable succession, I think that the various indications on which they have relied have almost always been indications as to the law under which the succession arises, and that the question so often put as to whether the documents form an English settlement is substantially the same as Lord Cranworth's test. And, further, it is to be noted that the test suggested in *Wallace v. Attorney-General* (*supra*) has been adopted in two comparatively recent cases of high authority, *Winans v. The King* (26 *The Times* L.R., 133 ; [1910] A.C., 27), *Toronto General Trusts Corporation v. The King* (35 *The Times* L.R., 450 ; [1919] A.C., 679).

It has, indeed, been argued for the Crown that the important case of *Attorney-General v. Campbell* (L.R., 5 H.L., 524) shook the general authority of *Wallace v. Attorney-General* (*supra*) and has shown that a succession originating under foreign law—in that case Portuguese law—may be taxable under the Act of 1853. But, in my judgment, the case when carefully examined does not conflict at all with Lord Cranworth's judgment. In *Attorney-General v. Campbell* (*supra*) the trust in question was not constituted by the Portuguese will itself, but was a trust created under English law, though by virtue of a direction in a Portuguese will that it should be so constituted. The distinction lies in the difference between executory and executed dispositions. The dispositions in the Portuguese will as to the annuity fund in question were purely executory ; they would naturally, in the first instance, be construed under that law, and no doubt were valid under that law since they were in fact carried out. But they were so carried out in accordance with their precise terms by the constitution of a new and separate English trust. And it was in relation to the succession created by this English trust that the question of duty arose. In my view the language both of Lord Hatherley and of Lord Westbury, in allowing the claim for succession duty, shows that this was the *ratio decidendi*.

The same considerations seem to me to account for the decision in *Attorney-General v. Jewish Colonization Association* (17 *The Times* L.R., 106 ; [1901] 1 K.B., 123). Neither in this case nor in *Attorney-General v. Campbell* (*supra*) would it be necessary, as the learned Judge suggests, for the Court to apply foreign law for the purposes of administration. In each case there is found a duly constituted English trust to be administered as such, though the origin of the constitution of the trust has been foreign.

In *In re Cigala's Settlement Trusts* (7 Ch.D., 351) an English lady on her marriage with an Italian gentleman settled both English and Italian property by a settlement in English form and with English trustees. This was held to create a taxable succession. The decision entirely satisfied Lord Cranworth's test. The successor obviously became entitled under English law to the beneficial interest devolving on him in either class of property. In *Attorney-General v. Johnson* ([1907] 2 K.B., 885) the succession held taxable was in property in Assam remaining unsold, but the succession was created by an English will devising the property to English trustees upon trust to sell and hold for beneficiaries here. The law creating and governing the trust was English.

In re Smith's Trusts (12 W.R., 933) was, it seems, concerned with a resettlement effected by the whole of the beneficiaries under an original settlement. A succession under this resettlement was held taxable. The case is obviously analogous to that of *Attorney-General v. Campbell* (*supra*). The effective document was the resettlement.

In the present case Mr. Justice Rowlatt has felt the force of the taxpayer's contention that the decision in *Attorney-General v. Campbell* (*supra*) depended on the fact of a new trust having been created in this country under English law ; but he has held himself precluded from adopting this view by what he describes as a ruling of Vice-Chancellor Bacon in a case of *Thompson v. Birch* ([1876] W.N., 177), also stated in Hanson on Death Duties, 7th Edition, page 393. But, when this case is examined, it appears that the Vice-Chancellor's remarks were not in the nature of a decision (his decision was on a different point, and was subsequently reversed, see [1876] W.N., 278), but was merely an *obiter* expression of opinion as to what duty would become payable on a future event. I

think that Mr. Justice Rowlatt attached too much importance to this dictum even in relation to its effect in a Court of first instance ; in this Court, at any rate, it is open to review ; and it is, in my opinion, contrary to the general line of authority on this subject and is wrong.

It is important to observe that under the Act of 1853 a succession is constituted, if at all, immediately on the death of the testator, and not on the death of the tenant for life, or other limited owner, on whose death the successor becomes entitled in possession ; and the succession duty attaches immediately on the earlier event, and is merely postponed as to payment till the later event. The consequence is that the ultimate incidence of the tax cannot be avoided by any intermediate dealing. It has, however, been contended on behalf of the Crown that the converse does not follow ; and that, although in this case this Hong-kong will by a Hong-kong testator of Hong-kong property may not have created on his death a taxable succession in the hands of his two grandsons, it does not follow that intermediate events between the death of the testator and that of the tenant for life may not have rendered this succession a taxable one under the Act, even although during the whole period the two grandsons may have been infants.

Assuming, though without deciding, that such a result may be possible, what are the events on which the Crown relies as effecting this change ? They are set out in the information and are of two kinds. First, there is the indenture of May 4, 1911, under which the sole acting trustee and tenant for life, Raphael Emanuel Belilios, appointed as trustees in his stead four new trustees all resident in England. And, secondly, there are a number of orders made in the Chancery Division in this country on successive applications by the continuing trustees of the testator's will, by which certain proposed arrangements were approved in relation to the execution of the trusts of the will.

As regards the first point, I cannot think that a change in the *personnel* of the trustees of the will, effected as it was under the Hong-kong law, and in the necessary absence of any consent on the part of the infants, can have any effect in changing the nature or incidents of their succession, though the result was that for some time all the trustees were resident in this country, and that after a subsequent appointment, in which Raphael Emanuel Belilios resumed his character of trustee, the majority of the trustees were so resident.

As regards the second point, not only was no general order ever made here for the administration of the trusts of the will, a step which the Chancery Division here would, I think, have felt great difficulty in making, having regard to the local situation of the trust and the great bulk of the trust property, but the orders that were made went little, if at all, beyond the giving of advice to trustees here as to the steps it would be reasonable for them to take in the carrying out of a colonial trust constituted on lines similar to well-known forms of trust in this country. Indeed, I doubt whether, strictly speaking, the Chancery Division here could make orders, as to execution of the trusts of the testator's will, which would have the same binding effect in the colony of Hong-kong as orders to the like effect made here ; though the orders here would no doubt have a great practical effect should the *bona fides* of the trustees, or the propriety of their conduct, ever be questioned in proceedings in the Courts of Hong-kong. And, further, the infancy of the two grandsons until after the death of their father, Raphael Emanuel Belilios, negatives any suggestion of a consent on their part to a change in the character of their succession as a consequence of these proceedings. Mr. Beebee, who specially relied for the Crown on the change that had been effected, was asked to lay his finger on the particular transaction from which, and the particular point of time at which, the crucial change in the infants' succession occurred. The best answer he could give was to point to the indenture of appointment of May 4, 1911. There was no single one of the orders made by the Court which he was able to indicate as being conclusive for his purpose.

In my judgment the succession of the infants to the testator's residue was at the testator's death a succession by virtue of colonial law and to colonial property, and has never lost that character or fallen within section 2 of the Act of 1853. I agree, therefore, that the appeal should be allowed, with costs here and below.

Lord Justice Lawrence.—On this appeal the appellants rely upon the test laid down by Lord Cranworth in *Wallace v. Attorney-General* (L.R., 1 Ch., 1) as to the limitation on the imposition of succession duty under the Succession Duty Act, 1853, and maintain that they are not accountable for any duty under that Act on the ground that the infant beneficiaries do not claim title by virtue of the laws of this country.

The Attorney-General did not challenge the general correctness of the test laid down by Lord Cranworth, which, in my judgment, must be treated as firmly established (see, amongst other cases, *Lambe v. Manuel* (19 *The Times* L.R., 68 ; [1903] A.C., 68) and *Toronto General Trusts Corporation v. The King* (35 *The Times* L.R., 450 ; [1919] A.C., 679)), but he strenuously denied that, in the special circumstances of this case, the application of that test, when correctly interpreted, led to the result contended for by the appellants.

The disposition which is alleged to have conferred a succession within the meaning of section 2 of the Act is the will of a testator who died domiciled in the colony of Hong-kong in the year 1905 possessed of movable and immovable property locally situate in that colony. It is not suggested that this will, when it first became operative on the death of the testator, constituted a disposition conferring a succession within the meaning of the section as interpreted by Lord Cranworth, but the Attorney-General contended that, by reason of certain events which had happened before the death of the tenant for life in the year 1922, it had been brought within the section and had become what has conveniently been called an " English settlement," that is to say, a disposition conferring a succession within the Act.

The case made for the Crown was that the crucial date when to ascertain whether the will was an English settlement or not was the death of the tenant for life, at which date it was alleged by the Crown that the facts were as follows : The trustees, in whom the legal title to the trust property was vested, were resident in England ; the English Courts had exercised jurisdiction in matters relating to the execution of the trusts of the will, in particular by giving directions as to the realization of the trust property ; the interests taken by the infant beneficiaries under the will were English choses in action ; and the infant beneficiaries were wards of an English Court.

The case so made raises, first, the broad question whether a disposition, outside the Act when made, can by the subsequent manipulation of the parties

interested under it be brought within the Act and, secondly, if that question be answered in the affirmative the further question whether the events relied upon by the Crown have had the effect of bringing the present will within the Act.

Section 2 of the Act, so far as material, provides that every disposition by reason whereof a person becomes beneficially entitled to any property upon the death of any person, whether immediately or after an interval, either certainly or contingently and either originally or by way of substitutive limitation, is deemed to confer on the person becoming entitled by reason of such disposition a "succession" and the term "successor" denotes the person so entitled and the term "predecessor" denotes the testator or other person from whom the interest of the successor is derived; section 10 imposes the duty on every such "succession"; section 20 makes the duty payable on the "successor" becoming entitled in possession to the "succession"; and section 42 makes the duty a first charge on the "succession." The provisions of these sections make it clear that a succession within the Act is established once and for all at the moment of time when the disposition is made and first becomes operative; at that moment the succession is deemed to be conferred on the successors and from that moment the duty is imposed and the charge attaches. That this is the true effect of the Act is well established and not open to doubt (see *per* Lord Herschell in *Lord Wolverton v. Attorney-General* (14 *The Times* L.R., 519; [1898] A.C., 535, at p. 548) and *per* Viscount Cave in *Lord Advocate v. Macalister* (40 *The Times* L.R., 564; [1924] A.C., 586, at p. 591)).

According to the scheme of the Act it would seem that the only date for ascertaining whether a disposition conferring a succession within the Act has been effected is the date when the disposition is made.

It is also well settled that when a succession within the Act has once been established no manipulation of the parties afterwards can get rid of it, and if authority be needed for that proposition it is to be found in the emphatic statement to that effect made by Lord Halsbury in the case of *Duke of Northumberland v. Attorney-General* (21 *The Times* L.R., 639; [1905] A.C., 406, at p. 409). Mr. Maugham, with great force and much reason, contended that the corollary to that proposition is that where a disposition does not establish a succession within the Act when it is made, no manipulation of the parties afterwards (short of acts amounting to the creation of a new disposition) can establish such a succession.

The Crown, whilst not disputing that a succession once established cannot be got rid of by the parties, contended that the converse does not hold good, and further that Lord Cranworth's test, when interpreted in light of the subsequent decisions, cannot be taken as having laid down the broad principle contended for by Mr. Maugham. In my opinion the authorities relied upon by counsel for the Crown do not support their contentions, nor do any of the authorities cited qualify or shake the test laid down by Lord Cranworth. The relevant cases have been fully dealt with in the judgments of the other members of this Court. I will therefore content myself with stating shortly the reasons why in my opinion those most strongly relied upon do not establish the contentions of the Crown or govern the decision in the present case.

Attorney-General v. Campbell (L.R., 5 H.L., 524) and *Attorney-General v. Jewish Colonization Association* (17 *The Times* L.R., 106; [1901] 1 K.B., 123) are cases where trusts were established in England by, or by the direction of, persons domiciled abroad, which trusts when established in this country constituted English settlements from the time of such establishment and consequently came within the Act. As in each of these cases the trust derived its origin from the directions given by a person domiciled abroad, the validity of the directions so given no doubt depended upon the law of the domicil of the person giving them, but that fact did not prevent the establishment of the trust in England, when actually effected, from being held to constitute an English settlement, under which the beneficiaries claimed title by virtue of the laws of England. *In re Cigala's Settlement Trusts* (7 Ch.D., 351) and *Attorney-General v. Johnson* ([1907] 2 K.B., 885) are cases where the trusts were established by persons domiciled in England and were English settlements from the moment when they were made, therefore constituting dispositions under which the beneficiaries claimed title by virtue of the laws of England.

In none of the cases which I have mentioned so far was there any question, such as has arisen here, of a trust effectively established abroad, and therefore not constituting an English settlement when first established, having subsequently been brought within the Act by the manipulation of the parties interested under it.

The two cases next referred to are nearer the present case. *In re Smith's Trusts* (12 W.R., 933) was a case where all the parties entitled under a will of a testator domiciled abroad executed a deed in England appointing new trustees and declaring trusts of the fund (which apparently had been brought to England) identical with the trusts of the will, and Vice-Chancellor Stuart held that succession duty was payable. The reasons for the decision of the learned Vice-Chancellor are not reported, but I think that that case must have been decided on the ground that the beneficiaries claimed title, not under the will, but under the English deed, and consequently that the latter constituted a disposition conferring a succession within the Act. If the beneficiaries were treated as claiming title under the will, the decision is, in my opinion, inconsistent with Lord Cranworth's test and must be treated as overruled by *Wallace's* case (*supra*).

Thompson v. Birch ([1876] W.N., 177 and 278: Hanson, 7th Edition, p. 393) contains a dictum by Vice-Chancellor Bacon which was relied upon by Mr. Justice Rowlatt and has been much relied upon by counsel for the Crown in this Court. In that case the main point was whether the testator was domiciled in America or in the United Kingdom. The testator there had appointed English trustees and his American executors had remitted the proceeds of the testator's property (consisting of American shares) to the English trustees, who had paid such proceeds into Court in an action commenced in England by the infant beneficiary to secure the trust fund. The learned Vice-Chancellor decided that the testator was domiciled in America, and in the course of his judgment expressed the opinion that succession duty would become payable on the death of an annuitant, who was then still alive, on the ground that the fund was "a fund established in this Court, no matter by what means." The learned Vice-Chancellor seems to have based his opinion on *Campbell's* case (*supra*), stating that he did not understand that case to depend on the fact that the testator there had directed an English trust to be established. With the greatest respect to the learned Vice-Chancellor I think he was wrong if he meant that the mere fact of payment into Court of

a settled fund, whatever might be the trusts affecting it and the circumstances under which it was paid in, would attract succession duty. Such a proposition seems to me to be too wide and inconsistent with Lord Cranworth's test. Moreover, I think the learned Vice-Chancellor took an erroneous view of the decision in *Campbell's* case (*supra*), which, in my opinion, was based on the fact that the testator there had directed an English trust to be established. In any event the opinion of the learned Judge does not apply to the facts of the present case, as here no fund was ever established in an English Court.

Before leaving the authorities I would only add that I know of no case which supports the proposition that a will of a testator domiciled abroad effectively establishing a trust in respect of property locally situate in the country of his domicil has become an English settlement because at the date of the death of the tenant for life the trustees and beneficiaries happen to be residing in England and because the former had sought the protection of the English Courts in certain administrative acts and the latter had been made wards of an English Court. Such a proposition has at least the merit of novelty.

I now revert to the facts of the present case. Counsel for the Crown shrank from pointing to any particular act or event as having caused the will to become an English settlement, though Mr. Beebee, when pressed by the Court, seemed inclined to rely most strongly on the appointment of the English trustees in 1911 as being the crucial event. The main contentions of the Crown were, first that, as the language of section 2 was wide enough to cover a disposition of property situate abroad made by a person domiciled abroad, the onus lay on the appellants to prove that the present will did not fall within it, and secondly, if that were not the right view, that it was sufficient for the Crown to point to the facts existing at the date of the death of the tenant for life as showing that at that date the will was an English settlement and that it was not the concern of the Crown to prove how and when the will had first become an English settlement.

As to the first of these contentions, I think that it is ill-founded. As it is obvious that some limitation to the very wide words in the section must be implied, the duty of the Court is first to satisfy itself as a matter of construction what the true limitation to be implied is and then to ascertain whether the case has been brought within the section according to its true construction. Lord Cranworth's test shows the proper limitation to be implied, and according to that test the present will, when first it became operative, clearly did not fall within the section; therefore it rests on the Crown to prove that the will was subsequently brought under its provisions.

As to the second of these contentions, it is obvious that in order that the Court should be in a position to appreciate the true state of affairs at the date of the death of the tenant for life it is incumbent upon the Crown to adduce evidence of the relevant events which had occurred before that date; proof of the allegation that the will had become an English settlement at a particular date, in my opinion, necessarily involves proof of how and when such alleged event had in fact happened. The death of the tenant for life does not, of course, confer any new succession on the infants and the date of that death has no effect whatever on the character of the settlement; it is only material from the Crown's point of view, because if the will had before that date become an English settlement the duty would then have become payable.

The question of onus, however, is not really material in this case, as all the relevant facts have been placed before the Court by one or other of the parties, and the Court is in a position to reach a definite conclusion on the whole of the facts.

In considering the facts relied upon by the Crown in support of the contention that the will had, before the death of the tenant for life, become an English settlement it is of the utmost importance to bear in mind that the trust property had not been realized by the trustees and remained locally situate in Hong-kong, and, further, that the ultimate beneficiaries were infants and therefore powerless to assent to or dissent from any of the acts of the tenant for life or of the trustees.

The appointment of new trustees in 1911 was effected in accordance with the laws of Hong-kong, where the appointor and consequently his wife and infant beneficiaries were and remained domiciled. The motive which induced the appointment does not seem to me to be in the least material. In my opinion neither the appointment by the appointor of his wife and of the three other persons who were resident in this country to act jointly with himself, nor his subsequent retirement from the trusteeship (followed later by his resumption of office), had the effect of causing the will to become an English settlement. The mere vesting in the trustees of the legal title to the property in Hong-kong did not operate to bring that property into this country. The trustees in order to execute the trusts of the will would have to seek the forum of the country where the testator was domiciled and the trust property was situate and they would have to execute the trusts according to the laws of that country. The infant beneficiaries would, notwithstanding the appointment of trustees, claim title solely by virtue of the laws of that country. Even if the English Courts by virtue of their jurisdiction *in personam* had power to execute the trusts of the will, which is open to serious doubt, such Courts would, in executing such trusts, have to apply the law of Hong-kong. If the trustees were to go abroad, the English Courts would have no power to allow service of a writ for the execution of the trusts of the will to be served upon them out of the jurisdiction, as such trusts are not trusts to be executed according to the law of England. (See Order XI., rule 1 (*d*).)

Further, I am clearly of opinion that the giving of directions by the English Courts at the instance of the trustees in matters affecting the trusts of the Hong-kong property did not have the effect of causing the will to become an English settlement. In giving those directions the Courts could only have acted in exercise of their jurisdiction *in personam* and must have had regard to the Hong-kong law. How far the directions of an English Court would operate to exonerate the trustees if the trusts ever came to be executed by a Hong-kong Court I need not pause to consider.

If the appointment of trustees resident in England did not operate to make the will an English settlement it follows, in my opinion, that the fact that the infants acquired a right of action in England against such trustees, which is the natural consequence of the appointment, did not have any such operation.

The right which the infants have thus acquired is a right to have the trusts of the testator's will executed in the country where the testator was domiciled and where the trust property is situate. Such a right cannot, in my opinion, be properly

called an English chose in action, such as the right of the beneficiaries was held to be in *Attorney-General v. Lord Sudeley* (12 *The Times* L.R., 224 ; [1896] 1 Q.B., 354), affirmed in the House of Lords (13 *The Times* L.R., 38 ; [1897] A.C., 11). The foundation of the judgments of the majority of the members of the Court of Appeal and of all the learned Law Lords in that case was that the testator there was domiciled in England, where his will was proved and where his estate was being administered.

Lastly, I find a difficulty in appreciating how the fact that the infants were made wards of Court here can affect the question whether the will under which they take beneficial interests has or has not become an English settlement. Such wardship does not alter the law by virtue of which they claim title to their shares in the testator's estate or affect their rights in any way. It would indeed be startling if the fact of the infants having been made wards of Court were to operate to their detriment by imposing upon them and their shares a liability for succession duty from which they would otherwise be free. In my judgment it has no such effect.

In the result I have arrived at the clear conclusion that, on the assumption that it might have been possible by some means to have caused the will of the testator to have become an English settlement during the lifetime of the tenant for life, the manipulation of the parties which has in fact taken place in the present case has (in the absence of the realization of the Hong-kong property and of the transfer of the proceeds to this country) fallen short of having brought about that result.

Having reached this conclusion, it becomes unnecessary for me to express a final opinion upon the broader question whether a disposition outside the Act, when made, could by any subsequent manipulation of the parties (short of an act amounting to a new disposition, which in this case would be impracticable owing to the infancy of the beneficiaries), become a disposition within the Act, though, as at present advised, I think that Mr. Maugham is right in his contention that consistently with Lord Cranworth's test it could not.

I agree that the appeal succeeds, with the consequences indicated by the Master of the Rolls.

[Solicitors—Messrs. Elvy Robb and Co. ; the Solicitor of Inland Revenue.]

K.B. Div. (Sankey, J.) } 1928. Jan. 13.

ARNOLD AND WEAVER v. AMARI.*

Husband and Wife—Divorce costs—Wife guilty of adultery—Defence of divorce proceedings—Employment of solicitors—Pledging husband's credit—No authority at common law.

At common law a wife who has been guilty of adultery has no authority to pledge her husband's credit by employing solicitors to defend divorce proceedings. Her solicitors, therefore, cannot proceed against the husband for their costs after the decree, unless they have obtained from the Divorce Court an order for costs or for security for costs.

In this action, which was heard before his Lordship on December 2, 1927, Messrs. Matthew Arnold and Weaver, solicitors, of Watford, sued Mr. Sebastiano Amari, restaurant proprietor, of South Kensington, for £61 17s. 6d., for work done and moneys expended as solicitors in connexion with divorce proceedings instituted by the husband against his wife, for whom they acted.

Mr. P. B. Morle appeared for the plaintiffs ; Mr. Robert Fortune for the defendant.

His Lordship, in giving judgment, said that the defendant took proceedings against his wife for a divorce, alleging two acts of adultery with a boy of about the age of 16 years. In November, 1926, after the wife was threatened with proceedings, she consulted and retained the plaintiffs as her solicitors. They made full inquiry into the matter, satisfied themselves of her innocence, and obtained evidence on her behalf. On April 7, 1927, the plaintiffs received a copy of a letter, which the wife had written to the husband, saying that, for the sake of the child, she did not intend to defend the suit. At that time all the costs, with the exception of a few pounds, had been incurred.

The solicitors inquired of the wife why she wrote the letter, and she told them that she did not admit the adultery, but that her husband had urged her to give up the defence and had said that he would make provision for her. The solicitors thereupon continued the defence, and subsequently received from the wife a letter dated May 11. They attended on May 12, the day of the hearing, with counsel, on behalf of the wife, and expected to find her there, but she failed to appear. As a consequence the suit was undefended. The petitioner and co-respondent were called and satisfied the President of the adultery, and he pronounced in favour of the husband. The wife's counsel applied for costs, but, unfortunately, owing to an error of the London agents, no security had been obtained from the husband for the wife's costs, and the President refused to grant costs, saying that he would leave the wife's solicitors to their remedy, if any, at common law.

The present action was then brought against the husband to recover the costs on the ground that the wife had his authority to incur them.

Two points were taken by the defendant—(1) that the plaintiffs must have known, or ought to have known, that the wife was not an innocent party ; and (2) that in law the action was not maintainable. As to (1), he (his Lordship) was in favour of the plaintiffs. He found that the plaintiffs did not know that the wife had committed adultery, that they were in no way negligent, and that they honestly believed the wife was innocent and that she would be successful in her defence. They attended on the day of hearing, and were surprised not to find her there. They had conducted the litigation properly, had fairly investigated the charges, and had a reasonable foundation for the defence.

The second point therefore emerged—could a wife in those circumstances bind her husband to pay her solicitors' costs of divorce proceedings in which a divorce was granted against her ? It was conceded that she committed adultery with the boy before she instructed the plaintiffs.

The case of *Durnford v. Baker* (40 *The Times* L.R., 757 ; [1924] 2 K.B., 587) decided that a solicitor who appeared in a suit begun by the wife could not recover costs incurred on her behalf against her husband. But the present point—that was, where a wife was respondent—was expressly left open by the Court of Appeal. The question was really one of the law of agency. It might be stated in general terms that a wife living with her husband bound him by a

* Reported by G. G. Beagley, Esq., Barrister-at-Law.

contract made for necessaries, whereas a wife who was living apart from her husband and who had committed adultery did not bind him. But could a wife bind her husband so as to make him liable for the costs of a solicitor whom she employed to defend her against proceedings taken by her husband for a divorce on the ground of her adultery where the adultery had admittedly been committed? The solicitor was not left unprotected or at risk, because he could always apply to the Divorce Court for security for costs. Indeed, the case of *Franklin v. Franklin* (37 *The Times* L.R., 894; [1921] P., 407) showed that the Divorce Court would grant costs where the amount secured was not sufficient to meet the sum expended. That, however, was a jurisdiction peculiar to the Court and did not alter the rights, whatever they might be, at common law.

The question remained—could the present solicitors, under the present facts, get judgment for their costs against the husband? The point was left open in *Durnford v. Baker* (*supra*), for at page 600 Lord Justice Scrutton said:—

"There may be—and in the authorities there is some ground for thinking that there may be—an exception where the wife is defending herself against proceedings brought by the husband."

And at page 601 Lord Justice Atkin said:—

"Nothing we have said has any bearing on the rules of law and practice as to costs in the Divorce Division. . . . That has nothing to do with the common law rule as to a wife's agency of necessity. I should like to reserve the point whether the rule is subject to an exception in the case of a guilty wife called upon to defend herself against proceedings brought by the husband. We have had no authority cited to us; it may be that even in that case her solicitor would have to defend in reliance on the Court's exercise of discretion."

The only cases referred to bearing upon the point seemed to be *Otway v. Otway* (4 *The Times* L.R., 523, 534; 13 P.D., 141) and possibly *Holt v. Holt* (28 L.J., P. and M., 12). It would be observed, however, that both those cases arose in the Divorce Court, where the matter, as already pointed out, was governed by the peculiar practice of that Court; and Lord Justice Cotton, in giving judgment in the Court of Appeal, said in *Otway v. Otway* (*supra*) at p. 155:—

"Although her adultery prevented her from pledging the credit of her husband, and prevented her getting any alimony or allowance from the husband, yet, in my opinion, it does not prevent her from requiring her husband to provide for the costs reasonably incurred in bringing her case against his appeal before the Court. Therefore I think we ought to allow her her costs of this appeal, as well as the costs of the proceedings in the Divorce Court."

In both these cases the Court was exercising its undoubted discretion as to costs when sitting as a Court of divorce, and was not depending upon the mere common law. Indeed, as pointed out, Lord Justice Cotton rather suggested that the adultery of the wife prevented her pledging the credit of her husband in the matter of costs. Neither could he (Mr. Justice Sankey) dismiss from his consideration the fact that the President in this case refused to exercise his discretion, although that was not germane on the question of the common law liability.

In these circumstances he could see no authority which compelled him to hold that the wife was entitled to pledge her husband's credit and to bind him to pay her solicitors' costs in circumstances such as the present.

As already pointed out, the solicitors were not without remedy, or, indeed, at risk, in such cases, and had they at the beginning obtained an order in the Divorce Court for the wife's costs, which was granted almost as of course, they would not be in their present unfortunate position.

It was not necessary to relax what he conceived to be the common law rule in order to do justice in such a case as this, but if it were a proper thing to do so he thought that any such relaxation of, and exception to, the common law rule should be made by the Court of Appeal rather than by a Judge of first instance. For those reasons he was of opinion that judgment must be given for the defendant.

[Solicitors—Messrs. Church, Adams, Tatham and Co., for Messrs. Matthew Arnold and Weaver, Watford; Messrs. Langford, Borrowdale, and Thain.]

Chan. Div. (Romer, J.) 1927. Oct. 27.

IN RE BRIDGETT AND HAYES' CONTRACT.*

Settled Land—Vendor and purchaser—Land no longer settled land after death of tenant for life—Probate granted to executor of tenant for life—Title to convey—Special executors—Law of Property Act, 1925 (15 Geo. V., c. 20), s. 204 (1)—Administration of Estates Act, 1925 (15 Geo. V., c. 23), s. 22 (1), 37 (1).

On January 1, 1926, A was tenant for life, under the Settled Land Act, 1925, under a settlement of land, which on A's death was devised on trust for sale. Probate of the will of A (who died in 1926) was granted to B, her sole executor, settled land not being excluded by the grant. In December, 1926, B contracted to sell part of the property. After the date of the contract, B and another trustee were appointed trustees of the original settlement. The purchaser objected to the title on the ground that the legal estate was vested in the surviving Settled Land Act trustee of the original settlement, under s. 22 of the Administration of Estates Act, 1925, and that neither B nor the new trustees, after an assent by B, could convey the legal estate.

Held, (1) that, so long as the general grant of probate remained unrevoked, B had power to convey the legal estate to the purchaser; (2) that, as on the death of the tenant for life the land ceased to be settled land, the persons who were immediately before the death trustees of the settlement were not special personal representatives under s. 22 of the Administration of Estates Act, 1925.

This was a summons by the purchaser of certain leasehold property forming part of certain property held under the trusts of the will of Caroline Stoneley upon trust for sale on the death of the tenant for life, Mrs. E. M. Thornley. On January 1, 1926, Mrs. Thornley was tenant for life under, and John Jackson was the sole trustee of, the will of Caroline Stoneley. On January 17, 1926, Mrs. Thornley died

* Reported by J. L. Denison, Esq., Barrister-at-Law.

and a general grant of probate of her will was made to T. W. Bridgett, whom she had appointed to be the sole executor thereof. In December, 1926, T. W. Bridgett entered into a contract in writing (in which he was expressed to be contracting to sell as personal representative) with a purchaser, G. W. Hayes, for the sale to him of certain leasehold premises forming part of the trust estate held under the will of Caroline Stoneley. On January 21, 1927, John Jackson, being desirous of retiring from the trust, appointed T. W. Bridgett and M. Bridgett to be new trustees of the will of Caroline Stoneley in the place of two deceased trustees and of himself. The purchaser objected to the title on the ground that J. Jackson, as surviving trustee for the purposes of the Settled Land Act, 1925, must be deemed to have been appointed by Mrs. Thornley, the tenant for life, as her special executor in relation to the settled land; that the legal estate in the property was vested in him as such special executor; and that title could not be made until (1) the grant of probate to Mrs. Thornley's executor had been revoked so far as it related to the settled land; (2) a re-grant of probate, limited to the settled land, was made to J. Jackson; and (3) J. Jackson had, as special executor, assented to the vesting of the property in T. W. Bridgett and M. Bridgett as trustees for sale, or joined with such trustees in assigning the property to the purchaser. This summons was therefore taken out by the purchaser for a declaration that a good title had not been shown by the vendor.

Mr. G. P. Slade appeared for the applicant; and Mr. F. C. Watmough for the respondent.

Mr. Justice Romer.—It is common ground that up to the date of her death Mrs. E. M. Thornley, who was the tenant for life of this property now in question, had vested in her the legal estate in the property. It is common ground that that being so, on her death this legal estate passed to her personal representative by virtue of sections 1 and 3 of the Administration of Estates Act, 1925. But then it is said that if you look at section 22 of that Act you will find that in such a case (in this case) the lady must be deemed to have appointed as her special executor in regard to this land the person who up to the date of her death, or just before her death, was sole surviving trustee for the purposes of the Settled Land Act, 1925. Let me assume that that was so. On January 17, 1926, she died, and on April 7, 1926, a general grant of probate of her will was made to Thomas William Bridgett, a person whom she had thereby appointed as executor. In my opinion, as from that date at any rate, wherever the legal estate in this property may have been as between the date of her death and this act of probate, the legal estate in this land vested in Thomas William Bridgett and he, in my opinion, can, while that act of probate remains unrevoked, properly convey the legal estate in this property to the purchaser. Section 204 of the Law of Property Act, 1925, subsection 1, says this: "An order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not." With regard to section 22, subsection (1) of the Administration of Estates Act, 1925 (if the purchaser is right as to its application at all to this case), it provided that probate might have been granted to this sole surviving trustee. In point of fact the Court of Probate did not grant probate to him but granted probate to Thomas William Bridgett. That being so, it appears that section 204 of the Law of Property Act, 1925, applies to the case with regard to the taking of a conveyance from the legal personal representative. Further, the purchaser would be protected in the event of any subsequent revocation of that grant of probate by section 37, subsection 1, of the Administration of Estates Act, 1925. It can hardly be doubted that in this case if the purchaser does take a conveyance from the person to whom the grant of probate was granted he would be acting in perfect good faith.

The only difficulty I think as regards that point arises from the fact that if you turn to the definition section of the Administration of Estates Act, 1925, which is section 55, it is provided by subsection (xi.) that: "'Personal representative' means the executor, original or by representation, or administrator for the time being of a deceased person." At present the only executor of this deceased person is Thomas William Bridgett. Then it adds: "And 'executor' includes a person deemed to be appointed executor as respects settled land." In my opinion, the later part of that section, the words I have just read, only refer to the case where in the circumstances it is proper that the word "executor" should be so read as to include a person deemed to be appointed executor as respects settled land, and the effect of the definition is not to vest in the person who is deemed to be appointed special executor the legal estate in settled land where the Court of Probate has granted general administration to somebody else.

Now the point still remains—having heard it argued I think it only right I should dispose of it—as to whether section 22 (1) applies to the present case, it being conceded on both sides that on the death of this lady the settlement came to an end. Let me read the words of section 22 (1): "A testator may appoint, and in default of such express appointment shall be deemed to have appointed, as his special executors in regard to settled land, the persons, if any, who are at his death the trustees of the settlement thereof, and probate may be granted to such trustees specially limited to the settled land." Then follow these words: "In this subsection 'settled land' means land vested in the testator which was settled previously to his death and not by his will." Section 22 is the first of three sections which come under the general heading "Special provisions as to settled land," and in section 23 "settled land" is referred to, and in section 24 "settled land" is also referred to, and in both cases is referred to as meaning land which after the death of the testator continues to be settled land. The words in section 22 (1) "'settled land' means land vested in the testator which was settled previously to his death and not by his will," refer, therefore, as in terms they refer, only to this particular subsection. I cannot help thinking that these words were merely designed for the purpose of making it clear that section 22 (1) did not apply to a case where the land was settled by the will of a testator. However, I have to deal with the words as I find them, and that being so I must read the earlier part of the subsection as follows: "A testator may appoint, and in default of such express appointment shall be deemed to have appointed, as special executors as regards land vested in the testator which was settled previously to his death the persons if any who are at his death the trustees of the settlement thereof." So far down to the words "in regard to settled land" the section applies to the present case, because here land was vested in the testatrix previously to her death. Then the subsection says she shall be deemed to have appointed as her special executors the persons, if any,

who are at her death the trustees of the settlement. Now before anyone can apply to the Court of Probate and get probate specially limited to the settled land granted to him, he must be at liberty to say to the Court that he is to be deemed to have been appointed special executor of this land, because at the death of the testator he was trustee of the settlement thereof. If he says that, he can only say it truly in relation to the settlement then existing, and if the settlement comes to an end as soon as the testatrix dies, then nobody can say "I am the person to whom probate specially limited can be granted." It is to be observed that the subsection does not say the persons who immediately before the death of the testatrix were the trustees of the settlement, but the persons who at her death are the trustees of the settlement.

For these reasons I think this subsection does not apply in a case like the present, where upon the death of the testatrix in question the settlement previously existing up to the date of the death comes to an end.

[Solicitors—Messrs. Hedley Norris and Co., for Messrs. Cumberbirch and Potts, Macclesfield ; Messrs. Downer and Johnson.]

Chan. Div. (Astbury, J.) 1928. Jan. 17.

GRANT v. KNARESBOROUGH URBAN DISTRICT COUNCIL.*

Rating—Valuation list—Return demanded from occupier — Particulars required — Licensed premises—Gross takings—Tenant's remuneration and capital—Invalidity of form—Rating and Valuation Act, 1925 (15 and 16 Geo. V., c. 90), s. 40.

The Court granted a declaration that the defendants, a rating authority, had no right under s. 40 of the Rating and Valuation Act, 1925, and the Rating and Valuation Act (Return) Rules, 1926, to require the plaintiff, who was the licensee and occupier of licensed premises, to make for the purposes of valuation a return stating the gross takings for the last three years, the outgoings for the last three years, tenant's remuneration, wages and equivalents, breakages and depreciation, lighting, heating, &c., and tenant's capital, since these particulars were, upon the evidence, not such as in the words of s. 40 could be "reasonably required" for the purposes of the Act.

This was an action by Mr. James Grant, the licensee and occupier of the Golden Anchor Inn, Knaresborough, Yorkshire, against the Knaresborough Urban District Council for a declaration that the form of a return under the Rating and Valuation Act, 1925, attached to a notice by the council dated March 25, 1927, and served on him, was illegal, unauthorized, and *ultra vires* ; and that he was not under any obligation to comply with the requisitions contained in the form.

By section 40 of the Rating and Valuation Act, 1925, whenever a new valuation list is to be made the rating authority must serve notice on the occupier, owner, or lessee of every hereditament in its area requiring him to make a return "containing such particulars as may be reasonably required for the purpose of carrying out this Act." By section 42 penalties are imposed on a person failing to comply with the notice or making a false return. By section 58 the Minister of Health was authorized by rules to prescribe, *inter alia*, the form of any "statement, return, or other document . . . required or authorized to be used under or for the purposes of this Act." The Minister of Health accordingly made the Rating and Valuation Act (Return) Rules, 1926, giving the forms of the returns to be required to be made for the purposes of valuation. By the Rules the rating authority was allowed to vary the forms for the purposes of different classes of hereditaments by omitting clauses of the forms not required in the circumstances of the case, but nothing was said as to adding other forms.

The defendant council, who were the rating authority for the area in which the plaintiff's premises were situated, served upon the plaintiff a notice, dated March 25, 1927, requiring from him a return for the assessment of licensed premises in the form annexed thereto. The form contained 13 questions requiring particulars. The plaintiff took no objection to the first ten questions, but objected to questions 11, 12, 13, which were as follows :—

(11) Gross takings for the last three years. (12) Outgoings for the last three years. Tenant's Remuneration, Wages and Equivalents. Breakages and Depreciation. Lighting, Heating, &c. (13) Tenant's Capital.

The plaintiff objected that these three questions required particulars which were not reasonably required for the purposes of the Act of 1925 ; that they were in excess of and inconsistent with the requirements laid down in the Rules of 1926 ; and that they constituted an unreasonable and oppressive inquiry into the profits made by an occupier in the course of his business. None of these questions was included in the forms given in the Rules of 1926.

The plaintiff began this action and delivered his statement of claim. The defendant council delivered a defence putting in issue the illegality of the return required, but, on November 22, 1927, withdrew their defence. The action now came on for hearing.

Mr. Norman Birkett, K.C., and Mr. Tindal Atkinson appeared for the plaintiff ; Mr. J. V. Nesbitt for the defendant council.

Mr. BIRKETT said that the plaintiff had to bring the action on for hearing, as he could not obtain the declaration asked for on a motion for judgment without evidence. The questions objected to required answers dealing with the profits made by the plaintiff, which had nothing to do with the proper valuation of the premises. The value of licensed premises did not depend on whether the occupier was competent or not, and the phrases "tenant's remuneration" and "tenant's capital" were technical phrases dealing with hypotheses and not with facts, which alone an occupier could be required to give. There was no reference in the Rules to any trade returns being made in the case of any trades. The questions required returns which could not be reasonably required and were oppressive, illegal, and *ultra vires*. It was decided in *Dyson v. Attorney-General* (28 *The Times* L.R., 72 ; [1912] 1 Ch., 158) that where one requisition was illegal the whole of the form requiring returns was invalid.

Three surveyors then gave evidence.

* Reported by E. K. CORRIE, Esq., Barrister-at-Law.

Mr. Philip Michael Faraday, who had been in practice for 31 years, said that in valuing a licensed house he would want to know the rent, if it were a free house, but not if it were a tied house. He would not require to know the gross takings. They would be most misleading, as one house might have taken five times as much as an exactly similar house owing to a difference in the quality of the liquor sold. He had never heard of the trade takings being required in the case of any trade.

Sir Herbert Trustram Eve said that he had had 40 years' experience. He had never required trade returns. He had already valued large numbers of licensed houses under the Act of 1925. The trade takings depended on the personality of the tenant, and they would unfairly bias the mind of the valuer. "Tenant's remuneration" and "tenant's capital" were technical terms of hypotheses, and a licensee would not know what they meant. They were required for a balance-sheet valuation, which was never made in the case of licensed premises. "Depreciation" must be purely a matter of guesswork.

Mr. Sidney Motion gave similar evidence.

MR. JUSTICE ASTBURY said that the particulars required in questions (11) (12) and (13) did not comply with the particulars specified in the Rules of 1926. It was clear from section 40 of the Act of 1925 that only such particulars could be demanded as were reasonably required for the purposes of the Act. The expert evidence called was conclusive that the answers to those questions were not reasonably required. They did not deal with facts, but with hypotheses. No trade returns were mentioned in the forms in the Rules. The Court could not have made the declaration without argument and without hearing evidence. The plaintiff was entitled to the declaration. By the decision in *Dyson v. Attorney-General* (28 *The Times* L.R., 72 ; [1912] 1 Ch., 158) the whole form was invalid.

Mr. NESBITT asked that the defendant council should only pay the costs down to the time when they withdrew their defence. If the plaintiff wanted the declaration, which was not necessary after the withdrawal, he should only have it at his own expense.

MR. JUSTICE ASTBURY held that the plaintiff was entitled to the costs of the hearing.

[Solicitors—Messrs. Godden, Holme, and Ward ; Messrs. Warwick Williams and Marchant, for Mr. J. C. McGrath, Wakefield.]

Chan. Div. (Romer, J.) } 1927. Dec. 21.

IN RE PETITION OF RIGHT OF MASON AND OTHERS.*

Limitations, Statute of—Lunatic—Funds in Court — Administration—Escheat—Payment out—Indemnity—Mistake of fact—Petition of right to recover—Lapse of time—Droits of the Crown—Limitation Act, 1623 (21 Jac. I., c. 16).

In 1799 and 1801 the Crown made an *ex gratia* grant of certain funds in Court, which were claimed as *bona vacantia,* and took an indemnity in respect of the funds so granted. These funds represented the residuary estate of the father of a female lunatic, and she was entitled to them at the date of her death in 1798. In 1794 the Master had reported that she had no heir-at-law or next-of-kin. In July, 1926, a petition of right was presented by persons alleging that it had recently been established that the lunatic did in fact leave next-of-kin surviving her, and that they represented the next-of-kin, and they sought to recover from the Crown the personal estate of the lunatic.

Held, that the Crown must clearly have thought that there were no next-of-kin in fact ; that the taking of the indemnity was an ordinary measure of precaution and could not be regarded as any indication that the Crown knew that the estate was being wrongly paid over ; and that the claim of the suppliants was barred by the Limitation Act, 1623.

Attorney-General v. Köhler (9 H.L.C., 654) considered.

This was a petition of right the object of which was to obtain the replacement and distribution among the suppliants of £45,000, representing the personal estate and effects of Maria L'Epine, a lunatic, who died intestate on April 30, 1798. The suppliants alleged that the property had erroneously vested in the Crown at her death, and they claimed to be entitled to the property as her next-of-kin.

The petition was presented by the following suppliants :—Miss Amy Knight Mason, Miss Jessie Margaret Mason, Miss Ethel Marion Mason, Mr. Alfred William Mason, Mrs. Emily Eliza Harrison (formerly a Miss Mason), Mr. Herbert Frederick Mason, Mr. Arthur Charles Mason, Mr. William Henry Knight, Miss Lucy Isabella Coldwell Knight, and Viscount Bangor.

The Crown alleged, *inter alia,* that the claim was barred by statutes of limitation.

Mr. Topham, K.C., and Mr. A. C. Nesbitt appeared for the suppliants ; the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. Stafford Crossman for the Crown. Mr. Nicholson Combe and Mr. C. Montgomery White held watching briefs for parties interested.

MR. JUSTICE ROMER delivered the following considered judgment :—Maria L'Epine died on April 30, 1798. At this date she was entitled to certain funds in Court representing the residuary estate of her late father, but subject to the payment of two annuities. In the year 1791 she had been found to be a lunatic, and in the course of certain proceedings in Chancery instituted for the administration of her father's estate the Master had, in July, 1794, reported that she had no heir-at-law or next-of-kin. This report was in due course confirmed by the Court. In these circumstances the Earl and Countess Howe obtained letters of administration of the estate of Maria L'Epine for the use and benefit of his Majesty King George III., and thereupon petitioned the Court for payment out to themselves as such administrators of the funds in Court, after appropriating a sufficient part thereof to answer the two annuities. An order was made on this petition on July 22, 1799, directing certain securities of the nominal amount of £15,000 to be appropriated to meet the two annuities and directing payment to Lord and Lady Howe of the balance of the funds in Court. It appears that Lord and Lady Howe had presented a memorial to the Lords Com-

* Reported by J. L. DENISON, Esq., Barrister-at-Law.

missioners of the Treasury alleging that it had been the intention of Maria L'Epine's father to give them the beneficial interest in the property left to her by his will in the event of her death, and praying that the Commissioners would intercede with his Majesty to grant to them for their use and benefit the personal estate and effects of Maria L'Epine, subject to any claim or right of the next-of-kin of the said Maria L'Epine, if any should thereafter appear entitled in that capacity. Before any such grant was in fact made, Lord and Lady Howe both died, and their only two surviving children—namely, Sophia Baroness Howe and Catherine Marchioness of Sligo—were their legal personal representatives. These two daughters then presented a memorial to the Commissioners asking that, subject to the payment of 10 per cent. on the value thereof for his Majesty's use, they might be at liberty to appropriate the estate of Maria L'Epine to their own use in equal moieties. His Majesty's assent having been obtained to this proposal, the two daughters appear to have paid over the 10 per cent. to his Majesty, and thereupon by Royal Warrant dated June 8, 1801, his Majesty granted to the two daughters, to be divided between them in equal moieties, the personal estate and effects of Maria L'Epine to which his Majesty in right of the Royal Prerogative had become entitled, including the £15,000 which was still in Court. The habendum was in these terms : "To have hold, take and enjoy the same unto the said Baroness Howe and the said Marchioness of Sligo, their executors, administrators and assigns in as full, ample and beneficial a manner as we ourselves are or could or might have been entitled to have, receive or enjoy the same, subject nevertheless to any claim or right of the next-of-kin of the said Maria L'Epine, if any should hereafter appear entitled in that capacity to the said personal estate and effects and as an indemnity to us, our heirs and successors against any such eventual claim, security has been given by or on behalf of the said Baroness Howe and Marchioness of Sligo." The indemnity here referred to consisted of two bonds in penal sums for the purpose of securing repayment of the estate to his Majesty, his heirs and successors, if any person or persons whomsoever should at any time or times thereafter by due course of law prove himself or themselves to be the next-of-kin of Maria L'Epine and for the purpose of indemnifying his Majesty, his heirs and successors, against all claims and demands which should or might at any time or times thereafter be made upon him or them for or in respect of the personal estate and effects of the said Maria L'Epine by any person or persons whomsoever, and also all loss, costs, damages and expenses which his Majesty, his heirs and successors, might at any time thereafter pay or sustain by reason of his Majesty's having given and granted the personal estate and effects to the Baroness Howe and the Marchioness of Sligo.

The two annuitants having died in 1818 and 1830 respectively, the £15,000 was duly paid out of Court to persons claiming under the two daughters of Lord and Lady Howe under orders dated July 1, 1820, and March 8, 1831, respectively.

On July 1, 1926, this petition of right was presented by persons alleging that it has recently been established that Maria L'Epine did in fact leave next-of-kin surviving her, and that they now represent such next-of-kin. They accordingly seek to recover from the Crown with interest the whole of the personal estate of Maria L'Epine, or alternatively the 10 per cent. of such estate that was paid over to the Crown by the two daughters of Lord and Lady Howe. I am not for the present concerned to inquire whether Maria L'Epine left any next-of-kin or whether the suppliants do or do not represent any such next-of-kin. For the parties have agreed to confine themselves, for the present, to seeking a determination of the following questions : (1) Whether the petition is maintainable on the assumption that no part of the funds in question ever came into the hands of or was dealt with by his present Majesty or his nominees or grantees or was carried to the Consolidated Fund. (2) Whether the petition is barred by any Statute of Limitations. (3) Whether in view of section 5 of the Petitions of Right Act, 1860, the suppliants can proceed, without serving the petition upon the successors in title of the Earl and Countess Howe and Sophia Baroness Howe and Catherine Marchioness of Sligo.

Inasmuch as it is obvious that if either of the first two of these questions is answered adversely to the suppliants the petition must be dismissed, the course suggested appeared to me to be a convenient one. The three questions were accordingly argued before me and I must now give my decision upon them. It will, however, I think, be convenient to consider, in the first place, the question of the Statutes of Limitation. In the Crown's demurrer to the petition the Statutes of Limitation specifically referred to are section 3 of the Intestates' Estates Act, 1884, section 30 of the Administration of Estates Act, 1925, and section 13 of the Law of Property Amendment Act, 1860. But at the Bar the only statute relied on by the Crown was 21 James I., Chapter 16. In order to see whether this statute affords an answer to the claim of the suppliants, it becomes necessary to ascertain what is the real nature of that claim. So far as regards that portion of Maria L'Epine's estate which was granted by George III. to the daughters of Lord and Lady Howe it is difficult to see on what ground the Crown can in any case be made liable to restore it to Maria L'Epine's next-of-kin unless the Crown was under some fiduciary obligation to the next-of-kin to obtain possession of it on their behalf, and it was not contended before me that any such obligation existed. The most that can be said against the Crown, as it seems to me, is that in the circumstances that portion of the estate must be deemed to have been received by his Majesty King George III. from the administrators of Maria L'Epine and paid over by him to the two daughters. I doubt very much whether this is the proper conclusion to be drawn from the facts ; but for the present purpose I will assume that his Majesty received not only the 10 per cent. which admittedly came into his hands, but the rest of Maria L'Epine's estate as well. On that assumption the claim of the suppliants is one to recover from the Crown moneys that in fact belonged to Maria L'Epine's next-of-kin, but was wrongfully paid over by her administrators to King George III. It is, in other words, a claim by a *cestui que trust* to recover from a third party money which his trustee has by mistake paid to that third party. Such a claim is one for money had and received. Now it was pointed out by Mr. Justice Warrington, as he then was, in *In re Robinson* ([1911] 1 Ch., 502), to which I must refer presently, that it may be a matter of some doubt whether, in strictness, the *cestui que trust* in such a case could maintain an action against the third party for money had and received, though he could at all events maintain a suit in equity for it, making the trustee a party. But in such a suit the *cestui que trust* would have no better right than the trustee would have in an action brought by himself, and if the claim of the trustee would be barred in an action at

law by any Statute of Limitations, the claim of the *cestui que trust*, so far as it was one for money had and received, would be equally barred. What, then, is the Statute of Limitations applicable to an action for money had and received ? Inasmuch as such an action is an action upon the case, the statute applicable is that of 21 James I., Chapter 16, and the action is barred after six years from the time when the cause of action arose. It was, however, urged before me, on behalf of the suppliants, that, though an action to recover money paid under a mistake of fact may come within the category of actions on the case, nevertheless time does not begin to run under the statute until discovery of the mistake, and *Brooksbank v. Smith* (2 Y. and C. Ex., 58) was cited as an authority for this proposition. But that was not an action to recover money paid under a mistake. It was, as pointed out in *Baker v. Courage and Co.* ([1910] 1 K.B., 56), a case in which the plaintiff was seeking purely equitable relief. A trustee had by mistake paid over certain stock to the defendant, who was not entitled to it, and, upon discovering his mistake, the trustee filed a bill to have retransferred to him so much of the stock as was still retained by the defendant. The trustee was, therefore, claiming to follow specific trust property. To such a claim no Statute of Limitations was applicable, and Baron Alderson, when asked to apply the statute of James I. by analogy, declined to do so inasmuch as six years had not elapsed since the plaintiff had the opportunity of discovering the mistake. In *Baker v. Courage and Co.* (*supra*) there was a counterclaim by the defendant to be repaid money paid by him to the plaintiff under a mistake of fact. The plaintiff relied upon the statute of James I. and the defendant contended that time did not run under the statute until discovery of the mistake. In rejecting this contention Mr. Justice Hamilton, as he then was, distinguished *Brooksbank v. Smith* (*supra*) on the grounds mentioned above and added this : "Therefore it was a case to which the Statute of Limitations did not apply ; and the rule which was there laid down was one which in my opinion cannot be transferred to cases like the present, to which the statute does directly apply. In dealing with the latter class of cases, Courts of Equity were just as much bound by the statute as were Courts of common law." He further held that the cause of action was complete as soon as the money was paid. In this connexion I ought perhaps to refer to the statement made by Lord Parker in *Lodge v. National Union Investment Company, Limited* (23 *The Times* L.R., 187 ; [1907] 1 Ch., 300, at p. 305), that an action for money had and received is an equitable action. He did not, however, say, nor did he intend to say, that a plaintiff claiming money had and received was claiming equitable relief. This is quite clear from the fact that he used the word "action" and that he referred to *Moses v. Macferlan* (2 Burr., 1005) as an authority for his statement. In that case Lord Mansfield said : "If the defendant be under an obligation, from the ties of natural justice, to refund ; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ('*quasi ex contractu*,' as the Roman Law expresses it)," and he referred to an action for money had and received to the plaintiff's use as a species of assumpsit. Later on he added : "This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which *ex aequo et bono* the defendant ought to refund." An action for money paid under mistake is therefore an action at common law, though it is one founded upon an equity. But though it may therefore properly be called an equitable action it is nevertheless an action to which the statute of James I. directly applies, and is not one to which the statute is only applicable by analogy. I am therefore of opinion that the suppliants' claim is barred by the statute so far as it is to be regarded as a claim at common law for money had and received. There are, however, cases in which a *cestui que trust* who finds that his money has been paid away by his trustee to a third party, who has applied it to his own use, can recover it in equity after any length of time if he has not lost his right by his own laches. These cases are three in number, as pointed out by Mr. Justice Warrington in *In re Robinson* (*supra*). He said : "I think cases of this kind where mistakes have been made by trustees in payment of trust funds fall under three heads. Where the Court is administering the funds and adjusting the rights of the parties between themselves in the ordinary course, if there are funds belonging to the person who has been overpaid, the Court may so adjust the rights as to rectify the overpayment." To that class belonged the case of *Harris v. Harris* (*No.* 2) (29 Beavan, 110), when properly understood, as was pointed out by Mr. Justice Warrington. The learned Judge then proceeded as follows : "Then, again, there are cases where trust money actually remaining in the hands of the person in whose hands it has been wrongly placed may be followed. In such a case there is no difficulty at all ; a person has received a trust fund, and it is still in his hands, and still impressed with a trust, and of course he holds it as trustee and is bound to transfer it." *Brooksbank v. Smith* (*supra*) was a case of that class. "The third class of cases is where the trust funds or the proceeds of the trust funds have been received by a person with knowledge that they are wrongly paid to him." Of this last class of case *In re Eyre Williams* ([1923] 2 Ch., 533) is an instance. In such cases the recipient is a constructive trustee and comes within the class of persons mentioned by Lord Bowen in *Soar v. Ashwell* ([1893] 2 Q.B., 390), who have received trust property and dealt with it in a manner inconsistent with trusts of which they were cognizant.

Now the present case does not, of course, come within the first of the three classes mentioned by Mr. Justice Warrington. Having regard to the assumption that I am required to make, I must take it that no part of the estate of Maria L'Epine is in the hands of his present Majesty or forms part of the Consolidated Fund. The case does not therefore fall within the second class. Does it fall within the third ? The suppliants contend that it does, inasmuch as his Majesty King George III. took steps to procure an indemnity from his grantees against the claims of any next-of-kin of Maria L'Epine. The suppliants ask me to infer from this that the Crown suspected that there were such next-of-kin in fact. But the Master in Chancery had certified in 1794 that there were no next-of-kin, and the Court had confirmed his report. It seems quite clear that the Crown must have thought that there were no next-of-kin in fact, and I cannot regard the taking of the indemnity as affording any indication that the Crown knew that the estate was being wrongly paid over, or that it was being dealt with in a manner inconsistent with trusts of which the Crown was cognizant. The taking of this indemnity was an ordinary measure of precaution, and one which I suspect would always be taken by the Crown when making an *ex gratia*

grant out of funds claimed as *bona vacantia*. When a trustee distributes a trust fund he very often asks for and receives a release and indemnity. It cannot be inferred from his doing so that he knows or even suspects that he is paying the wrong persons. In my judgment the claim of the suppliants is barred by the statute of James I. This is sufficient to dispose of the petition, but as the other two points of defence were fully argued before me, and as this case will probably go farther, I think that I ought to express shortly the conclusions at which I have arrived upon them.

In support of his contention that upon the assumption referred to in the first question submitted to me the petition is not maintainable, the Attorney-General relied upon the case of *Attorney-General v. Köhler* (9 H.L.C., 654). In that case one Mitford had in 1813 obtained as nominee of the Crown, and for the use and benefit of his then Majesty, a grant of letters of administration to the estate of one Köhler, who had died intestate, and, as it was then thought, without next-of-kin. Mitford administered the estate, and in 1814 paid over the surplus of the estate to the Prince Regent on behalf of King George III. In the year 1820 a bill was filed against Mitford by persons claiming to be entitled as Köhler's next-of-kin for the purpose of receiving such surplus. In 1824 Mitford died and in 1827 one Maule obtained letters of administration *de bonis non* to Köhler's estate. Thereupon the suit was revived against Maule, who died in 1851. Both Mitford and Maule had been in succession Solicitors to the Treasury, and on the death of the latter one Reynolds was appointed to that office. By the statute 15 Victoria, Chapter 3, it had been enacted that all proceedings in law or equity against Maule as administrator as the nominee of the Crown pending at the time of his decease should not thereby abate, but should continue and take effect against the Solicitor for the time being of the Treasury. In the year 1859 the title of the next-of-kin was established. It was in these circumstances that in 1860 an order was made on Reynolds to pay into Court the amount paid over to the King's Proctor in respect of Köhler's surplus estate, together with a large sum for interest. From this order an appeal was brought before the House of Lords in the year 1861. On the hearing of the appeal it was contended that in any case Reynolds could not be made liable in respect of the money paid over by Mitford. But it was also argued on behalf of the appellants, and apparently for the first time, that Mitford was merely the nominee of the Crown, that if anyone was liable it was the Crown and not Mitford, but that her Majesty Queen Victoria was not bound to afford compensation for an erroneous payment made by Mitford to King George III. In answer to this latter contention the respondents' counsel objected that, inasmuch as this point had not been raised in the Court below, where the only point argued, apart from the proof of the title of the respondents, was whether interest was payable, it was not open to the appellants in the House of Lords. The question, therefore, whether Queen Victoria could be asked to make compensation for money which was paid over wrongfully to George III. and never came into her hands was not argued by them. They contented themselves by contending for the personal responsibility of Mitford as administrator, and for the devolution of that responsibility upon Reynolds. It is necessary to state the facts and the arguments thus fully in order to understand the speeches of the noble Lords who took part in the decision. Lord Cranworth said this: "If this case is to be dealt with on the ordinary principles of equity as administered between subject and subject, I have great difficulty in understanding how either the Crown or the appellant Reynolds can be held to be liable in respect of the demand of the respondents." He then stated the facts and proceeded as follows: "The personal estate of an intestate who leaves no next-of-kin belongs absolutely to the Sovereign for the time being as part of the *droits* of the Crown. Assuming, therefore, the facts to have been such as they were supposed to be in 1814, the money was properly paid over to the Prince Regent, as representing for that purpose King George III. Subsequent investigation has shown that the payment was made in ignorance of the true state of facts. It was a mistake to suppose that the General had left no next-of-kin. He left nephews and nieces who were his next-of-kin, and in that character were entitled to the money. If the true state of things had been ascertained in the lifetime of King George III., the obvious justice of the case would have required that he, or the Prince Regent acting for him, should refund the money which had been paid to him on a mistaken view of the facts. But the truth was not discovered in the lifetime of George III., or of either of his sons, George IV. or William IV. It was not finally established till the year 1859, *i.e.*, nearly 40 years after the death of King George III.; nearly 30 years after the death of King George IV., and considerably more than 40 years after Mitford had parted with the money. Who in these circumstances ought to be held responsible to the next-of-kin for the money which thus improperly came into the hands of the Prince Regent acting for his father King George III.? It is very difficult to say on what ground her Majesty or her Majesty's Treasury can be considered as under any obligation to refund, or rather pay, the money. It never came to her Majesty's hands. The Crown is a corporation sole, and has perpetual continuance. Can a succeeding Sovereign, upon the principle that the King never dies, be held responsible for money paid over in error to and spent by a predecessor, which that predecessor might lawfully have disposed of for his own use, supposing it to have rightfully come to his hands? Does the successor for such a purpose represent his predecessor? These are questions difficult of solution. Let me put a case between subjects nearly analogous to the present, in which the Sovereign is concerned. Suppose a bishop, lord of a manor; and that on the death of the copyholder he claims a heriot, alleging such to be the custom of his manor, and suppose that the heir of the copyholder, relying on the assurance of the bishop that the heriot was due by the custom of the manor, accordingly pays to the bishop a sum of money by way of composition for the heriot; the bishop dies, and then it is discovered that no heriot was payable to the bishop in respect of the copyhold held of him, but that it was in fact payable to the lord of an adjoining manor, who thereupon recovered it against the copyhold heir. It could not be pretended that the copyholder would have any right against the bishop's successor. His right would be against the executor of the bishop, to whom the payment had been made, on an erroneous allegation by him, that there was a custom in his manor entitling him to it. On the same principle, reasoning by analogy from the case as it would have stood between subject and subject, the right of the present respondents would be a right against the executors of either King George III. or King George IV., it is immaterial to consider which, certainly not against Queen Victoria. Nor is the case altered by the arrangements made on

the accession of her Majesty with reference to the civil list. On that occasion her Majesty, in consideration of a certain annual income secured to her by Parliament, gave up to the public, as King William IV. had previously done, *inter alia* all *droits* of the Crown accruing during her reign, which therefore, when received, are now received by the Treasury, not on the private account of her Majesty, but on account of the public. This arrangement, though it secures to the public *droits* of the Crown accruing after the accession of her Majesty, obviously has no bearing on the question who is liable in respect of *droits* which came to the hands of a preceding Sovereign. If an heir in tail, on succeeding to his lands, were to convey them for his life to a stranger, in consideration of an annuity secured to him for his life, it would be absurd to say that such a settlement could create in the heir in tail, or the person claiming from him, any liability to discharge the debts of the preceding tenant in tail. On no analogy taken from disputes among subjects, can either the present Queen or the Treasury be deemed liable to the respondents for the personal estate of the intestate received by King George III. It is not, however, necessary to decide whether in a direct proceeding against the Sovereign (by petition of right, for instance), these analogies would govern the decision to be pronounced. The party here made responsible is not the Crown but Mr. Reynolds, and the true question is, whether he, as personal representative of the intestate, on the nomination of the Crown, can be held liable." Lord Cranworth then considered whether Reynolds could be made responsible for what Mitford had done, and holding that the principles that would have prevailed in the case of ordinary administrators were applicable notwithstanding the fact that the grant of administration had been made to a nominee of the Crown for the use and benefit of his Majesty he decided that Reynolds could not be made liable for principal or interest, or rather, that he would not have been liable had not his liability for the principal been admitted in the Court below. Lord Wensleydale, so far as the present point is concerned, contented himself by saying that the remedy of the next-of-kin against the Crown was "a very doubtful one to say the least." Lord Chelmsford expressed himself more positively. He said: "There can be no doubt that Mitford, by taking out administration and possessing himself of the personal estate of the intestate, became personally responsible to those who were entitled to this estate, that is, to the next-of-kin of the intestate. And if, after Mitford had paid over the money to the Treasury for the use of his Majesty, any persons had appeared and established their claim as next-of-kin, he would have been liable to repay the money to them, because he would not have properly administered the estate. Upon his death this liability would have been continued against his representatives. But as the money had, strictly speaking, been paid to the use of George III., although George IV. had probably received it as Regent, he would not have been liable to refund it as King." "He" in this last sentence refers, as I understand it, to King George IV. Lord Chelmsford then continued: "If nothing more had been done, therefore, after the accession of King George IV., the only remedy which the claimants could have had would have been against the estate of Mitford," and a little later he says: "The difficulty of the case, however, is not so apparent during the reign of George IV. as after the accession of King William IV. and of her present Majesty. If the claim could be maintained only against the Sovereign, it would be most unreasonable that his successors should be required to pay what never came to their hands." In the end, however, he stated that he did not treat this case as being a proceeding against the Crown, but as a suit against successive administrators.

In these circumstances I cannot, unfortunately for myself, treat the case as a conclusive authority in favour of the contention of the Attorney-General, in the case before me, and I must form my own conclusions upon the point. The opinions of such high authorities as Lord Cranworth, Lord Wensleydale, and Lord Chelmsford must naturally be received with the greatest respect. I may, however, be pardoned if I venture to criticize their opinions, seeing that the point was never argued on the part of the respondents, and that the argument on the part of the appellants, so far as this point is concerned, does not appear to have been supported by the citation of any reported case or other authority. It must, I think, be taken as established law that the Crown is a corporation, whether it be a corporation sole as it is generally thought to be, or whether, as Professor Maitland supposed, it be a complex and highly organized corporation aggregate of which the King is the head. (See Vol. III. of his Collected Papers, page 259.) If Professor Maitland's view be the true one, then the estate of Maria L'Epine was received by a corporation aggregate, and the reasoning of Lord Cranworth based upon the analogy of certain corporations sole would not apply. The corporation aggregate that received the money would be the same corporation aggregate that is now asked to refund it, and the fact that such corporation is now under a different headship would not appear to be material. But assuming the Crown to be a corporation sole, why should not the same result follow? The estate was received in the time of King George III. by the corporation sole, and the same corporation sole is now asked to refund it. Lord Chelmsford thought that where there had been a change in the person of the sole corporator such a demand was "most unreasonable." It does, no doubt, seem somewhat unreasonable that in the year 1861, the Crown, in the person of Queen Victoria, should have been asked to refund money that was paid to King George IV. when he was Prince Regent. Anything that is unreasonable in such a stale demand could, I should have thought, be safely left to the Statute of Limitations to deal with. But Lord Chelmsford did not seem to be dealing merely with a stale demand, and, if he be right, then although money should have been wrongfully paid, in right of the Crown, to King William IV. in 1836, it would be "unreasonable" for the true owner to petition the Crown in the person of Queen Victoria for repayment in 1838. Surely if the matter is to be decided from the point of view of reasonableness it would be most unreasonable in such a case to refuse the true owner relief; for he would then be without any remedy at all (as to this see *Ryves v. Duke of Wellington,* 9 Beavan, 579). Lord Cranworth, indeed, seemed to think that in the case before him the next-of-kin would have had some right against the executors of George III. or George IV. But *Ryves v. Duke of Wellington* (*supra*) was not cited to him; and even if there could have been any such executors, they would have had nothing to do with moneys that had come to their testator in right of the Crown, for over such moneys the Sovereign had not been given any testamentary powers by the statute 40 George III., chapter 88. The truth is that Lord Cranworth's opinion throughout was based upon the analogy of other corporations sole, and if I may be permitted to say so, it was a false analogy. He

supposed the case of a bishop lord of the manor receiving a sum of money from a tenant by way of composition for a heriot, that could not lawfully be claimed, and pointed out that it could not be pretended that the tenant could claim repayment of the money from the bishop's successor. But neither a heriot received by a bishop nor the money paid in composition for it would pass to the bishop's successor, so far as not disposed of in his lifetime. They would pass to his legal personal representatives (*Rennall v. Bishop of Lincoln*, 7 B. and Cr., 113, at p. 166). In this respect the Crown differs from most other corporations sole (see Grant on Corporations, page 629, and the cases there cited). It differs, too, in many other respects. In the case of other corporations sole the sole corporator for the time being has two capacities, his personal and his corporate capacity. If land be conveyed to him and his heirs, in the former capacity the fee simple belongs to him, and not his successor. It is otherwise in the case of the King. He has, from the point of view of property at any rate, but one capacity, or, to use the language of the Judges in the *Duchy of Lancaster* case (Plow., 212), "to this natural body is conjoined his body politic, which contains his royal estate and dignity, and the body politic includes the body natural, but the body natural is the lesser, and with this the body politic is consolidated. So that he has a body natural, adorned and invested with the estate and dignity royal, and he has not a body natural distinct and divided by itself from the office and dignity royal, but a body natural and a body politic together indivisible, and these two bodies are incorporated in one person, and make one body, and not divers, that is the body corporate in the body natural, *et e contra* the body natural in the body corporate." But these observations do not apply to any other corporation sole with which I am acquainted. They certainly do not apply to Lord Cranworth's bishop. The bishop by his will could have disposed of the heriot or the money. The Sovereign, in a like case, could not. Even his testamentary power over property coming to him otherwise than in right of his Crown had to be conferred on him by Act of Parliament, and, but for this statutory power, everything of which the Sovereign should die possessed would pass to his successor. If the analogy of Lord Cranworth's bishop is to prevail, then the King's successor corresponds, not to the successor of the bishop, but to the bishop's legal personal representatives. And, subject to the Statute of Limitations, they would certainly have been liable to refund out of the bishop's estate the moneys received by him, even if the moneys had been spent by the bishop in his lifetime.

For these reasons, and with the utmost respect, I am unable to bring myself to agree with the opinions expressed by Lord Cranworth and Lord Chelmsford. In my judgment the first question submitted to me for decision must be answered in favour of the suppliants.

The only question remaining to be disposed of is that arising under section 5 of the Petitions of Right Act, 1860. The section refers to petitions of right presented for the recovery of any real or personal property, or any right in or to the same, which shall have been granted away or disposed of by or on behalf of his Majesty or his predecessors, and directs that a copy of the petition shall be served as therein mentioned upon the person in the possession, occupation, or enjoyment of such property or right. The section *prima facie* would appear to relate to a claim to recover any special property wrongfully granted or disposed of by the Crown in favour of some third party. But in such a case why should the Crown be brought into the matter at all? If the Crown in making the grant or disposition could be treated as having committed some breach of trust, a claim might conceivably be preferred against it for the damages thereby caused to the suppliant. But the petition of right would not, in that case, be presented for recovery of the property, but for compensation, and the section would not apply, or, apart from any question of a breach of trust, the Crown might have effected a tortious conversion of the property; but in that case no petition of right would lie at all. I therefore find it somewhat difficult to understand what kind of claim against the Crown is contemplated by the section. There is presumably some sort of claim to which it would apply, though I have been unable to think of one. It does not, at any rate, apply to the present case. This is not a claim to recover any property granted away or disposed of by the Crown; it is a claim to render the Crown liable for money alleged to have been had and received by the Crown to the use of the suppliants. I have already referred to the difficulty of treating the Crown as having received any more than the 10 per cent. But assuming in the suppliants' favour that the Crown is to be treated as having received the balance, as having then paid it over to the daughters of Lord and Lady Howe, the suppliants are not attempting to recover the estate in specie, or to make the Crown liable for having wrongfully paid it over, but as having, by reason of this receipt alone, come under an equitable obligation—enforceable, if the Crown had been an ordinary person, by an action on the case at law—to pay an equivalent sum to the suppliants.

In my opinion, the section has no application to the case.

[Solicitors—Messrs. Markby, Stewart, and Wadesons; the Treasury Solicitor; Messrs. Finnis, Downey, Linnell, and Chessher; Messrs. Trower, Still, and Keeling.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) — 1927. Nov. 27.

IN RE GIBBINGS.*

Probate—Practice—Settled land—Tenant for life—Special executors—Grant of probate, limited to settled land, to surviving executor of settlor as trustee of the settlement—Settled Land Act, 1925 (15 Geo. V., c. 18), ss. 7, 30 (1) (3)—Administration of Estates Act, 1925 (15 Geo. V., c. 23), ss. 1 (1) (2) (3), 2 (1) (2), 3 (2) (4), 22 (1) (2), 55 (xxiv.)—Probate Rules (Non-Contentious Business), 116 and 118.

If land is settled upon a person for an interest not ceasing on his death, when that event occurs the trustee of the settlement is, by the Administration of Estates Act, 1925, s. 22, entitled as special executor to a grant of probate of the will of the deceased.

This was a motion by Frederick John Gibbings, an Australian resident, by his attorneys for a grant of probate to him, as a special executor, limited to certain settled land. The settlor was his father, John Gibbings, who by his will appointed his wife, Amelia,

* Reported by WILLIAM LATEY, Esq., Barrister-at-Law.

and his son, Frederick John, executors, and devised real property to them on trust for his wife for life and, subject to this life interest, in trust for the children of the marriage in such shares as his wife should by her will appoint. The settlor died in December, 1890, and the wife by deed and in her will appointed the property to the children in equal shares. On April 20, 1926, the wife died, and her executor, Charles Edwin Gibbings, a brother of the present applicant, obtained a grant of probate except in respect of the settled land.

In March, 1927, Frederick John Gibbings appointed his brother, Charles Edwin, as co-trustee of the settlement under their father's will, and appointed attorneys to obtain for himself, as special executor, a grant of probate under his mother's will limited to the settled land. The application was refused by the Registrar on the ground that it did not come within the category of grants to special executors. On August 23, 1927, application was made to the Vacation Judge, Mr. Justice Clauson, who adjourned it to the Probate Division.

Mr. R. M. Middleton appeared for the applicant.

LORD MERRIVALE delivered the following considered judgment :—

Application is here made by the attorneys in this country of Frederick John Gibbings, who is resident in one of the States of the Australian Commonwealth, for a grant of probate to him, as a special executor, limited to certain settled land which under the will of his father, John Gibbings, was devised in fee to him and his mother, Amelia Gibbings, now deceased. The grant has not been made in the registry upon application in common form, for reasons arising upon consideration of certain statutory enactments which bear on the matter, and because, as is stated, this case does not appear to fall within the practice as to such grants so far as it has at present been defined.

The statutes in question are the Administration of Estates Act, 1925, and the Settled Land Act, 1925. The rules more immediately applicable are the rules for Non-Contentious Business in Probate, Nos. 116 and 118.

By the will of John Gibbings, deceased, he devised the realty of which he died seised to the use of his wife Amelia, now deceased, and his son Frederick John, now applying, their heirs, executors, and administrators, upon trust to suffer the wife to receive the income during her life subject to a defeasance, which did not operate, and, subject thereto, for the testator's children in such shares as their mother might by deed or will appoint. John Gibbings also appointed his wife and the applicant his executors, and they took probate, the widow in the first instance and the son under a reservation of his rights in the grant to the widow. The widow, by successive deeds and by her will, appointed the realty in equal shares among her children. The executor of the will of Amelia Gibbings, a brother of the applicant, applied in due course for probate of this will. He deposed under Rule 118 that the realty in question was vested in the deceased previously to her death, and as he applied for a grant "save and except settled land," no question arose under the provision in the rules that trustees of settled land "shall be cleared off before a general grant shall issue."

It was stated upon the motion before me that the applicant, in pursuance of the Settled Land Act, 1925, s. 30 (3), had appointed his brother, the executor of the mother's will, a co-trustee with him of the settled land, that they had entered into contracts for the sale of parts of the land, and that the present application was made incidentally to the carrying out of these contracts. With this matter the Court has no direct concern on this present application. If questions arise on contracts for the sale of land, such questions can be dealt with elsewhere after argument. The governing sections of the Administration of Estates Act, 1925, are sections 1 and 22. Section 1, so far as material, is in these terms :—

"(1) Real estate to which a deceased person was entitled for an interest not ceasing on his death shall on his death . . . devolve . . . on the personal representative of the deceased. . . .

"(2) The personal representatives for the time being of a deceased person are deemed in law his heirs and assigns within the meaning of all trusts and powers.

"(3) The personal representatives shall be the representative of the deceased in regard to his real estate to which he was entitled for an interest not ceasing on his death as well as in regard to his personal estate."

Section 22 is in these words :—

"(1) A testator may appoint, and in default of such express appointment shall be deemed to have appointed, as his special executors in regard to settled land, the persons, if any, who are at his death the trustees of the settlement thereof, and probate may be granted to such trustees specially limited to the settled land. In this subsection 'settled land' means land vested in the testator which was settled previously to his death and not by his will.

"(2) A testator may appoint other persons either with or without such trustees as aforesaid or any of them to be his general executors in regard to his other property and assets."

Sections 2 (1) and 3 (4) of the same Act are of interest and have been considered by those who are advising the persons concerned. Section 3 (4), which I will mention later, touches the origin and quantum of the interest of the applicant in the lands in question.

"Settled land" and "settlement," as the terms are used in the Administration of Estates Act, 1925, have, by virtue of section 55 (xxiv.) of that Act, the same meaning as in the Settled Land Act, 1925.

Reference to the sections will show, as might be expected, that the will of John Gibbings was a "settlement," and that the land in question is "settled land." Section 7 of the Settled Land Act, 1925, provides for the devolution of settled land on the death of the tenant for life. Section 30 (1) specifies various classes of persons who are trustees of a settlement for the purposes of the Act, and in conjunction with other sections imposes obligations and provides for the exercise of powers in modes which clearly are intended to simplify the business of dealing with settled land. I do not discuss them here because I have not to define the rights and powers which a special executor acquires in respect of settled land, or which the law will confer in the present case, if the grant which is sought is made. I do not, however, find in the Settled Land Act, 1925, any sections which bear directly upon the enactment in the Administration of Estates Act, 1925, whereby that statute provides for a limited grant of probate in respect of settled land to a special executor. What has to be done is to ascertain whether the applicant is included in the class of persons to whom such a grant is to be made. The difficulty which has arisen in the Registry springs from a view which has been taken of the effect of the Settled Land Act, 1925, section 30 (1), the section which specifies the classes of persons who are

trustees of settlements under that Act. Heretofore grants to special executors have been confined to applicants falling within the classes so defined in section 30 (1), whose qualifications in that respect existed at the death of the tenant for life. Other persons interested, including persons who become qualified to satisfy the conditions of section 30 (1) after the death of the tenant for life, have had made to them the grant of administration with the will annexed, upon clearing off special executors.

Section 30 (1) of the Settled Land Act, 1925, does not, in my judgment, limit the operation of the Administration of Estates Act, 1925, sections 1 and 22, so as to exclude the present applicant. It does not purport to do so, and section 30 (3) appears to me to point to his inclusion. There is no doubt an important inter-connexion between the two statutes, and a link between them exists of which section 22 of the Administration of Estates Act, 1925, is a conspicuous instance.

Now the operation of the Administration of Estates Act, 1925, ought not, on the one hand, to be limited by implications from outside its contents, or, on the other, to be extended beyond its clear intention. As to the latter consideration, in applying the provisions of the Act on a previous occasion, I pointed out that, apart from statute, an executor is appointed only to dispose of "the substance of the testator" (*vide In re Pickering deceased, unreported.* Judgment given July 13, 1927. *Vide* below).

Section 1 of the Administration of Estates Act, 1925, which substituted the personal representative for the heir-at-law as the immediate successor of the deceased person in respect of real estate, applies only, so far as real estate is concerned, to real estate to which the deceased was "entitled for an interest not ceasing on his death." So when section 22 provides for the appointment of special executors in regard to settled land it *prima facie* deals with settled land as to which some representative of the deceased must be appointed to discharge functions theretofore exercised by the deceased. Accordingly if the realty here in question was realty to which Amelia Gibbings was entitled for an interest not ceasing on her death the applicant is clearly within the provision of this statute.

Section 3 (4) of the Administration of Estates Act, 1925, which provides for the case of "a joint tenancy when another tenant survives the deceased," lays down that in such a case, "the interest of a deceased person is an interest ceasing at his death," but, when regard is had to other parts of the section, as for example subsection 2, and to the general tenor of the Act, it seems to me that subsection 4 is not intended to apply to realty vested in this testator for an estate in fee upon trusts which continue operative after the testator's death, to which section 22 applies. This being so, the applicant is entitled under the combined effect of sections 1 and 22 as a special executor to a grant of probate limited to the realty in question, he being trustee of the settlement of realty to which the deceased was entitled for an interest not ceasing on her death.

The grant will issue as a grant pursuant to the Administration of Estates Act, 1925, section 22, limited to the settled land (described in the affidavit used at the hearing), to which the deceased was entitled for an interest not ceasing on her death. I should have been glad to make an order in unqualified terms, but the matter is not simple. I have necessarily not had the advantage of hearing arguments, and interests so great depend upon cautious exercise of the jurisdiction to grant probate and administration that no justifiable safeguard can properly be omitted.

In ordering the costs of the application to come out of the estate, the President said that it was a case of some singularity. The trustees were placed in a difficult position, and the applicant was properly advised in the step which had been taken.

[Solicitors—Messrs. Torr and Co.]

IN RE PICKERING DECEASED.

The following judgment was delivered in this case by LORD MERRIVALE, P., on July 13, 1927 :—This is a motion for revocation of a grant of probate made to an executor and for a grant in lieu thereof of probate to a special executor on grounds founded upon various statutory considerations. The dispute began with rival claims for a house and farm in Lincolnshire. It has become a quarrel as to procedure and more immediately as to costs.

The property in question—I will call it the settled land—was devised in 1866 by the will of Thomas Hunt, senior, to trustees, John Sindall and Sleight Hill, charged with certain obligations not now material, and subject thereto upon trust for his son, Thomas Hunt, junior, for life and after the death of Thomas Hunt for any widow of his for her life, and subject to these successive life interests in trust absolutely for such person or persons as Thomas Hunt, junior, should by his will appoint. The trustees, Sindall and Hill, were executors of the will.

Thomas Hunt, junior, died in 1878 and by his will appointed the trustees under his father's will his executors and trustees, and to them he devised the settled land upon trusts of limited operation now immaterial, and subject thereto upon trust to sell and distribute the proceeds of sale among named beneficiaries.

After the death of Thomas Hunt, junior, his widow, Emily Hunt, the then tenant for life, remarried and became Emily Pickering. She died on December 29, 1926, and by her will made in 1911 she named as her executrix her daughter, Emily Jane Graville, the respondent on this motion. The testatrix had been at her death nearly fifty years in possession of the settled land. Messrs. Sindall and Hill, the executors and trustees under the will of Thomas Hunt, senior, and Thomas Hunt, junior, respectively, for the deceased Emily Pickering appear to have abstained from any active interference with the settled land during the successive tenancies for life ; they did not appoint or obtain the appointment of any new trustees. The survivor of them, by a duly executed will in 1890 and admitted to probate in 1891, appointed executors, one of whom still survives. He is the applicant in this present motion, John Godby.

Mrs. Emily Pickering by her will devised to her daughter, the now respondent, all her real estate. The respondent appears to have supposed herself to be beneficially interested in, if not entitled to, the settled land. The rightful claimants, on whose behalf the present motion is made, took prompt action to assert their interests. On January 1, 1927, the applicant Godby, as executor of the executors of Thomas Hunt, junior, and Thomas Hunt, senior, in purported exercise of statutory powers under the Settled Land Act, 1925, appointed new trustees of the two wills, and their solicitors, without stating grounds for their claim, called on the respondent to deliver up possession of the settled land. The respondent's solicitors replied asserting a beneficial interest in her, and demanding a statement of the grounds of the claim for possession. A cautious correspondence, in which neither claimant gave much

information, proceeded from February to June, and in the meantime the respondent sought probate of the will of her mother, Emily Pickering. Her affidavit to lead probate deposed to the existence as part of the estate of that testatrix of settled land, meaning thereby the settled land in question, and stated that of this settled land there were no surviving trustees.

Thereupon, on March 7, probate of the will of Emily Pickering was granted to the respondent "with administration of all the estate, including settled land, which by law devolves to and rests in the personal representative of the said deceased." This is the grant revocation of which is claimed by the applicant.

Counsel for the respondent was ready to admit at the hearing that she was not entitled to administer the settled land and was ready to consent to a limitation of her grant of probate, and the issue of a limited probate to the applicant, upon terms as to costs, which had been offered to the respondent earlier in the controversy. Except upon a misunderstanding of the respondent's rights it is difficult to realize why she obtained the grant which she in fact obtained. Under the Administration of Estates Act, 1925, section 1 (1) (3), the real estate of her mother, which would devolve upon her as personal representative, is real estate to which the testatrix was entitled for an interest not ceasing on her death. Section 22, which provides for default in appointment by a testator of trustees of settled land as his special executors, appears not to help the respondent's case.

The grant of probate to the respondent as executrix under her mother's will must be reformed by excluding the reference therein to settled land.

The applicant has the advantage of the Settled Land Act, 1925, section 30 (3), whereby in case of a settlement created by will the personal representative of the deceased becomes until other trustees are appointed trustee of the settlement, and in due course he has availed himself of the provisions of the statutes to appoint additional trustees to act with him. "The deceased," in the present case, however, was not Emily Pickering, but Thomas Hunt, senior, of whom the applicant is personal representative by virtue of the chain of representation in successive executors long recognized in probate law and practice and now dealt with in the Administration of Estates Act, 1925, section 7. Section 30 (3) seems to me to give the applicant no support in his present application. Under the Administration of Estates Act, 1925, section 22 (1), trustees of the settlement are rendered capable of appointment as special executors in respect of settled land, and a grant of probate is available for that purpose, but executorship of settled land seems to me to presuppose the existence in the testator, for whom an executor is to be appointed, of an interest not ceasing with the death of the testator. Apart from statutory provisions an executor is a person appointed by will to dispose of "the substance of the testator" (Wentworth on the Office of an Executor, Supplement). The settled land was not at any material time part (in this sense) of the substance of the testatrix, Mrs. Emily Pickering. It was, however, and is, part of the substance of the testator, Thomas Hunt, senior, and of the testator Thomas Hunt, junior. On all ordinary principles of construction and administration the personal representative of those testators or one of them would seem to be the material matter now.

As at present advised I see no requirement of the statute or other legitimate or useful purpose which would be served by the appointment of the applicant as special executor of the will of Emily Pickering. If for some reason not at present clear this appointment is seriously desired, the matter may be mentioned later.

There are, however, various means under the statutes, and, I think, under the ordinary powers of Courts of Equity, whereby the trustees can secure necessary and proper powers additional to those which they already have.

Two questions remain in respect of which I took time for consideration—that of procedure in such cases and that of costs.

As to procedure, this case has satisfied me that it ought not to be possible by a common form application to obtain without the precaution of notice to interested parties a grant of special executorship for the purposes intended to be served by the manifold far-reaching provisions as to the administration of settled property which are now embodied in the Settled Land Act, 1925, aided by the powers contained in the Administration of Estates Act, 1925. Where an executor is appointed by the will of a testator to administer the substance of that testator and also as a special executor in respect of settled land, as to the disposal of which the testator had a right of control, a grant of probate in common form seems to me to go to its fullest extent, consistently with prudent regard for the rights of beneficiaries. Where the question is one of appointment of a special executor for one or some of the purposes of the Settled Land Act, 1925, it will be safer that such an appointment should be made after proper notice to parties immediately interested.

As to costs, the motion of the applicant to revoke the grant to the respondent of special executorship as to settled land was warranted by the facts. That, indeed, was not seriously contested at the hearing, but the applicant also demanded a revocation of the legitimate grant of probate to the respondent of the executorship of her mother's will. A tendency to proceed to extremities marked some of the actions of both the parties from an early period. On the whole, I prefer to leave them to reimburse themselves, if they lawfully can, from assets at their disposal.

I make no order as to costs.

Mr. J. A. Reid appeared for the applicant, and Mr. Noel Middleton for the respondent.

[Solicitors—Messrs. Routh, Stacey, and Castle, for Messrs. Maples and Son, Spalding; Messrs. Gibson and Weldon, for Mr. Cecil Crust, Spalding.]

Judicial Committee of the Privy Council. (Lord Buckmaster, Lord Blanesburgh, and Lord Darling.) — 1928. Jan. 19.

HONG-KONG AND SHANGHAI BANKING CORPORATION v. LO LEE SHI.*

Bankers—Bank-note—Accidental destruction—Partial reconstruction of fragments — Oral evidence—Number of note missing—Liability of bank on note—Bills of Exchange Act, 1882 (45 and 46 Vict., c. 61), s. 64.

The Board held that in the special circumstances of the case it was possible for the holder in due course of a bank-note, which by accident had been almost destroyed, to establish by means of the fragments, assisted by oral

* Reported by Sir W. J. Soulsby, Barrister-at-Law.

evidence, a claim against the bank for the amount due upon the note, although the number of the note was missing.

This was an appeal by the Hong-kong and Shanghai Banking Corporation from a judgment of the Supreme Court of Hong-kong relating to the liability of the appellants to pay one of their bank-notes which had been accidentally mutilated and partly destroyed.

Mr. Jowitt, K.C., and Mr. J. Forster appeared for the appellants ; the respondent was not represented.

Lord Buckmaster, in delivering their Lordships' judgment, said :—Their Lordships notice with approval that this case has been brought before them for consideration within 12 months of its first hearing before the Puisne Judge in Hong-kong. They wish that this example of expedition was widely known and imitated. The point that arises for decision is singularly free from authority, but fortunately the facts are beyond dispute. The appellants are the Hong-kong and Shanghai Banking Corporation, who carry on the business of banking in Hong-kong. In the course of their business they issue bank-notes for various sums ; such notes are not legal currency but, owing to the high credit of the appellants, they are used as if they were. The bank is under liability to the Government of Hong-kong to deposit dollars as against all notes issued over a certain amount, and a tax is payable at the rate of 1 per cent. per annum on the value of notes in circulation. Apart from these conditions, which it may be assumed would apply to every bank in Hong-kong, the appellants have no special relationship with the Government at all. The notes they issue are in the ordinary form of a bank-note. The name of the bank is at the head, the amount of the note is written in figures in the right- and left hand corners. In the middle of the document the number of the note appears in two places on the same line, one on each side , below this there comes the promise to pay the bearer on demand at the office of the bank the amount of dollars, stated in words, for which the note is issued. Underneath this promise the value of the note appears again in large light letters, over which is written "Hong-kong" followed by a date, and then "by order of the Board of Directors" with the signature of the chief accountant and the chief manager.

Lo Lee Shi, who is the respondent in this appeal, was given by her husband two of such notes, each for $500. She placed them in the pocket of some garment and then, having forgotten their hiding-place, she washed, dried, and starched the garment and was proceeding to iron it when she found a wad of paper in the pocket. This upon extraction proved to be the remains of the two bank-notes which, together with the coat, had been subjected to all the above processes. Considerable effort was made, with the help of the bank, to restore these agglutinated fragments to their original shape and, as to one note, this met with complete success and the note was accordingly paid. The full restoration of the other was more difficult ; with the utmost skill the number could not be recovered. Apart from this, a very considerable portion of the note was replaced and its most critical characteristics were made plain—the name of the bank, the amount of the note, the definite promise to pay the "Bearer" on demand at the appellants' office, and the signatures by the chief accountant and the chief manager were all clearly and definitely evidenced. The bank, however, refused payment mainly upon the ground that the number was missing and Lo Lee Shi accordingly brought an action against them upon the note. The Judge on the trial of the action found in favour of the plaintiff. On appeal to the full Court the Judges were divided, the Chief Justice being in favour of the defence and the Trial Judge who formed the other member of the Court affirming his own judgment. The bank, anxious to know their true legal position with regard to a note whose number was defaced, brought this appeal, but the respondent, deterred no doubt by fear of cost, has not appeared. The case has, however, been fully and carefully placed before the Board, who see no reason to think that any relevant matter escaped their attention. The real point of controversy is this. In the circumstances above stated are the appellants liable on a note whose number has been accidentally defaced ? The case to which most consideration was given both in the earlier Courts and in argument on the appeal was the case of *Suffell v. Bank of England* (9 Q.B.D., 555), but their Lordships think that apart from certain dicta the actual decision is of little assistance. In that case certain Bank of England notes had been intentionally and fraudulently altered by changing a 5 in the numbers to a 3. After this alteration the notes having come into the hands of a perfectly innocent holder, he presented them for payment to the bank, which refused to honour them on the ground that the change in the number effected a material alteration in the document by virtue of which their liability was discharged. The action was brought upon the notes. The Court of Appeal decided in favour of the bank but the grounds of their decision were these : First, that according to old and indisputable law the alteration of a deed in a material respect avoided the document ; secondly, that this doctrine had become extended to ordinary written documents and was applicable to bills of exchange and promissory notes ; and thirdly, that upon a Bank of England note, which the bank was bound to issue against bullion and which by law was currency, the alteration of the number was a material alteration.

The authority for the first two of these propositions needs no further investigation ; for those interested in the subject the history of the principles will be found fully examined in the judgments of the learned Judges in the case referred to, but since the date of that decision the law has been summarised in section 64 of the Bills of Exchange Act, 1882, the terms of which are literally reproduced for Hong-kong in the Bills of Exchange Ordinance, 1885, section 64, in the following terms :—

"Alteration of Bill."

"64.—(1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers. Provided that, where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor.

"(2) In particular the following alterations are material—namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent."

Both the history of the law which this section enunciates and the terms of the section itself show that it relates only to alterations effected by the will of the person by whom or under whose directions they are made, and that it does not apply to a change due to pure accident.

The alteration contemplated is one to which all parties might assent. It is not reasonable to assume parties assenting to a part of the document being effaced by the operations of a mouse, by the hot end of a cigarette, or by any of the other means by which accidental disfigurement can be effected. Again, the provision which excepts from the category of persons against whom the bill is avoided, a party who has "himself made, authorized, or assented" to the alteration cannot reasonably apply to the ravages of a rat, a white ant, or any other animal pest. The fact that the change is accidental in itself negatives the possibility of assent.

The case of *Davidson v. Cooper* (13 L.J. Exch., 276) emphasizes the point, since there Lord Denman states that the party who may suffer if a document is avoided by alteration has no right to complain since there cannot be any alteration except through fraud or laches on his part, meaning a fraudulent alteration, effected by the party, or carelessness permitting it to be effected by another. It is not in that section that the solution of this difficulty is to be found, and yet it is upon the authority of the case which depended on this law that the learned Chief Justice bases his judgment, holding that the accidental obliteration of the number was an alteration within the meaning of the section and that the case quoted showed that such alteration was material. It is therefore necessary to determine this case apart from the ordinance, and in this connexion their Lordships do not think the question of negligence plays any part. The right of a party to sue on the note in the event of its being defaced by fire or attacked by a mouse cannot depend upon whether it had been placed in a fire-proof or a mouse-proof safe or left in an ordinary box. When once honest accident is accepted as the cause of damage, the only remaining question is whether the extent of the damage is such as to prevent the note from being sued upon, and it may be also whether the missing material parts can be supplied by oral evidence, though that question does not now arise. In the first instance, therefore, it is essential to investigate whether there is enough of the note remaining to establish its identity as a note of the bank, and to contain all the necessary elements that render it valid and effectual as a negotiable document. To some extent this must depend upon oral evidence as well as upon the pieces of the document. These pieces must be identified, their condition must be explained, and they must of course be shown to be parts of one and the same instrument. In this case every one of these conditions has been satisfied. It is, indeed, not denied that the pieces are pieces of one of the appellants' notes, nor is it, nor could it be, suggested that the missing particles could be used in building up another note. It is the absence of the number on which the appellants rely, and this is no part of the operative portion of a bill of exchange or promissory note, although its alteration was held to be material in the case of a Bank of England note, owing to its special features. (See *per* Sir George Jessel, Master of the Rolls, at p. 563, and *per* Lord Justice Cotton at p. 575 of *Suffell v. Bank of England, supra.*) Alteration, within the meaning of the statute, is not what has taken place here—and apart from this, it is difficult to see what has destroyed the liability of the bank upon a document admitted to be one of their notes. Lord Justice Brett states (at p. 566 and p. 568) that the number even of a Bank of England note is no part of the contract, and its alteration does not affect the contract, and Lord Justice Cotton, at page 574, appears to take the same view, though the Master of the Rolls leaves the question open. In their Lordships' opinion the contract here has never been altered and is sufficiently evidenced by the mutilated document and the oral testimony. Their Lordships do not think that beyond their decision as to the meaning of the ordinance it is possible in this case to lay down any general principles of law; they desire their judgment to be limited to this point, that in the special circumstances of this case it is possible, by means of the fragments of the document assisted by oral evidence, to establish a claim against the bank for the $500 due upon the note and that accordingly this appeal should be dismissed, and they will humbly advise his Majesty accordingly.

[Solicitors—Messrs. Stephenson, Harwood, and Tatham.]

Court of Appeal.
(Lord Hanworth, M.R., Atkin and Lawrence, L.JJ.)

1928. Jan. 16.

LEE v. S. AND J. BRECKMAN, LIMITED.*

Master and Servant—Compensation for injury by accident—Arising out of and in the course of the employment—Assault—Special risk of the employment—Whether "arising out of."

When the appellant, a porter employed by the respondents, who were upholsterers, was engaged in carrying furniture from the respondents' premises to a railway company's van, an altercation arose between the appellant and the carter in charge of the van, and the latter assaulted the appellant with the result that the appellant's eye was so injured that it had to be removed. On an application for compensation the Judge found that the assault, which he assumed to have been unprovoked, though an accident arising in the course of the employment, did not arise out of it, as the appellant was not exposed by his employment to the risk of being assaulted and it was not his employment that brought that risk upon him. The Judge therefore made an award in favour of the respondents.

Held, that as the Judge had found that no special risk of being assaulted attached to the employment and that it was not the employment that brought the risk upon the appellant, and as these were questions of fact, the Judge's award must be affirmed.

This was an appeal by a workman from an award of his Honour Judge Cluer, sitting at Shoreditch County Court as arbitrator under the Workmen's Compensation Acts. The appellant, Henry Lee, who was a porter employed by the respondents, Messrs. S. and J. Breckman, Limited, upholsterers, of Hoxton-street, N.1, claimed compensation for accident arising out of and in the course of his employment. The circumstances were unusual.

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* Reported by H. Langford Lewis, Esq., Barrister-at-Law.

On September 19, 1927, he was engaged in carrying furniture to a van outside the respondents' premises. The van, which belonged to the London Midland and Scottish Railway, had been detailed to collect the furniture, and had been waiting for the load for a considerable time in charge of a carter named Debuse, who had frequently collected goods from the respondents and was well known to the appellant. The appellant, having put some furniture in the van, said to Debuse : "Are you going to give us a bit of a chance to-night ?" suggesting that he should help the respondents' men to finish their work early. Debuse replied : "Why, you're moaning again." The appellant said : "I'm not moaning ; I want to get done early. You're not like a union man." An altercation then arose, Debuse jumped down from the van, and, as the appellant was going back to the door, hit him three successive blows in the face. The third blow struck him in the eye, which was so injured that it had to be removed. Debuse was prosecuted and convicted of assault. The appellant claimed compensation. Judge Cluer found that the assault, which he assumed to have been unprovoked, though an accident arising in the course of the employment, did not arise out of it as the appellant was not exposed by his employment to the risk of being assaulted, and it was not his employment which brought that risk upon him. The Judge made an award in favour of the respondents. The appellant appealed under the Poor Persons Rules.

Mr. F. Soskice appeared for the appellant ; Mr. W. Shakespeare for the respondents.

The Master of the Rolls (Lord Hanworth), in giving judgment, stated the facts and said that counsel for the appellant had contended that the judgment given was not in accordance with the authorities on assault cases, but that if it were the authorities were not exhaustive, and that on principle the appellant was entitled to compensation. He had cited a number of authorities.

In *Trim Joint District School Board of Management v. Kelly* (30 *The Times* L.R., 452 ; [1914] A.C., 667) it was held that a schoolmaster, who had aroused the hostility of his pupils and who was so injured by them in consequence of a pre-arranged plan that he died, came within the Act. He had been appointed to rule over unruly pupils, and, therefore, there was a risk that he would be assaulted and injured. The decision of the House of Lords was not unanimous, but that was the effect of the case. Another case was that of *Reid v. British and Irish Steam Packet Company* (37 *The Times* L.R., 362 ; [1921] 2 K.B., 319), where a foreman of dock labourers, employed to superintend labour of a very rough class, was assaulted by one of the workmen whom he had reprimanded and was held entitled to compensation. In *Parker v. Federal Steam Navigation Company* (18 B.W.C.C., 469), a recent case, a stoker was attacked by an undisciplined African employed in the same ship, a man of savage nature, and it was held that there was evidence to support the decision of the County Court Judge that the accident arose out of the employment.

An assault, though unexpected, might arise out of the employment where the nature of the employment was such as to involve the possible risk of assault.

Mr. Soskice's second point was that the decided cases had not gone far enough, and that the appellant was entitled to recover though there was no active causation between the employment and the assault, and he supported his argument by a reference to Lord Haldane's judgment in *Upton v. Great Central Railway Company* (40 *The Times* L.R., 204 ; [1924] A.C., 302), where he said (at p. 308) :—

"The question is whether circumstances such as I have referred to may be found among the causal conditions of the accident. These may have amounted to no more than passive and inert surroundings, requisite only to provide circumstances which admitted of the accident being occasioned by his own movement. Active physical causation by the surroundings is not required in order to satisfy what is implied by the expression 'arising out of the employment.'"

In that case the words were used of a man who slipped on a platform while about to enter a train in the course of his employment. He (the Master of the Rolls) was somewhat sceptical as to the utility of arguing from judgments in cases decided on quite a different state of facts. And there was little doubt that there had been passages in the judgments of Lord Haldane which were not altogether easy to follow or to reconcile, as in *Thom (or Simpson) v. Sinclair* (33 *The Times* L.R., 247 ; [1917] A.C., 127). where he suggested a rule as to the proximate cause of an accident. And Lord Shaw there said that the expression "arising out of the employment" was not confined to the nature of the employment, but applied also to its conditions, its obligations, and its incidents. A better test was given by Lord Dunedin in *Upton v. Great Central Railway Company* (*supra*), where he said : "The course of employment connotes, to my mind, the idea that the workman or servant is doing something which is part of his service to his employer or master." There might be cases in which there was a special risk of such an accident as this attached to the work, and it was a question of fact in each case whether such a risk existed ; *per* Lord Justice Scrutton in *Reid v. British and Irish Steam Packet Company* (*supra*) and Lord Justice Atkin in *Parker v. Federal Steam Navigation Company* (*supra*).

It might have been the case that there was a special risk attaching to this particular employment, and that the workman in receiving the assault was doing something of service to his employers. But here the County Court Judge had clearly found that there was no special risk attaching to the employment, and that it was not the employment which brought the risk upon the appellant. He had negatived both the special risk and the rule laid down by Lord Dunedin. Although the Court of Appeal was not a tribunal to decide on the facts, he would say incidentally that he should have arrived at the same conclusion of fact himself. The appeal must be dismissed, but without costs, as it was a case under the Poor Persons Rules.

Lord Justice Atkin.—This is an unusual case of a workman sustaining serious injury by assault. Such cases give rise to interesting questions of law and fact. I am not quite satisfied that the law is altogether settled, but I think it is sufficiently settled by a number of cases in the Court of Appeal that in order that a person may recover he must show that his employment subjected him in a special degree to a risk of assault—a degree of liability to be assaulted such as would not be present if he were not in the employment. Those cases are *Parker v. Federal Steam Navigation Company* (18 B.W.C.C., 469), where a British stoker was assaulted by an African stoker, and *Reid v. British and Irish Steam Packet Company* (37 *The Times* L.R., 362 ; [1921] 2 K.B., 319).

In the latter case, to which I was a party, the Judge had found such a risk, and it seemed to me

that the workman was entitled. I think there is also authority in the Court of Appeal for saying that the risk must be incidental to the employment. *Mitchinson v. Day Brothers* (29 *The Times* L.R., 267 ; [1913] 1 K.B., 603) was a case where a carter was assaulted by a drunken man and died of the injuries, and it was held that the carter's dependants were not entitled to compensation. The correctness of this decision has been doubted by Viscount Haldane, and Mr. Soskice has argued that *Upton v. Great Central Railway Company* (40 *The Times* L.R., 204 ; [1924] A.C., 302) has decided that active physical causation by the surroundings is not required. I do not find it necessary to decide the proposition put before us by Mr. Soskice, though there is a great deal to be said for the argument. For instance, it seems curious that a bank messenger carrying money, if assaulted and robbed, can recover, but an ordinary man assaulted in the mistaken belief that he is carrying money, cannot. But here, if the Judge had taken the view that the man owed a duty to his employers to suggest that the van-driver should hurry up, and was assaulted in consequence of making the suggestion, he might have been in a position to award compensation. Here it seems that the Judge has dealt with both branches of the law in this case and has found no such risk of being assaulted incidental to the upholstery business, and has also found that the assault did not arise out of the employment. Without deciding the point put before us by counsel for the appellant, it is sufficient to say that the Judge had ample evidence on which he could find that the assault was not connected with the employment. I agree that the appeal should be dismissed.

LORD JUSTICE LAWRENCE.—I agree. On pushing Mr. Soskice's argument to its logical conclusion, it comes to this, that the learned Judge, in any case where a workman incurs the opprobrium of another person and is assaulted while at work, is bound to hold that the injury is one to which the Act applies. That is putting the argument much too high. It is quite clear on the authorities that it was open to the Judge to find that the injury did not arise out of the employment. The Judge had ample evidence before him, and the evidence shows that he could come to that decision.

[Solicitors—Mr. Oliver L. Marlow ; Messrs. Gardiner and Co.]

Chan. Div. (Astbury J.) } 1928. Jan. 20.

TATTERSALL v. SLADEN.*

Dentists — Register — Retention of name—Annual fee—Non-payment—Regulation providing for removal of name—Whether *intra vires*—Dentists Act, 1921 (11 and 12 Geo. V., c. 21), s. 7.

By s. 7 of the Dentists Act, 1921, the Dental Board may make regulations as to keeping a register of dentists, as to removal from the register and restoration thereto, and as to prescribing a fee for retaining thereon in any year the names of persons registered after July 27, 1921, but the Act contained no provision for removing from the register the name of a person failing to pay the fee for retention.

The Board made a regulation providing that an annual fee of £5 should be paid for retaining on the register the name of any person registered after the above date and that unless it was paid before December 31 the Registrar should remove the name from the register.

Held, that as non-retention on the register was a necessary consequence of non-payment of the fee for retention the regulation was within the powers conferred by the Act.

This action was, in form, an action for the dissolution of the partnership between the plaintiff and the defendant, practising as dentists, on the ground that the defendant's name had been removed from the Dentists' Register and that the plaintiff was entitled for that reason to give notice of dissolution. In fact, the action was a friendly test action brought by arrangement for the decision of the question whether the Registrar of the Dental Board of the United Kingdom was entitled to remove the defendant's name from the Dentists' Register on account of his failure to pay, for the retention of his name on the register for the year 1927, the annual fee of £5 prescribed by the regulations of the board. The action was heard on an agreed statement of facts. The facts were not of importance except that the defendant did not pay the retention fee for 1927 and that his name was removed from the Dentists' Register on January 18, 1927. The articles of partnership contained a clause whereby, in such an event, the other partner might determine the partnership by notice, and the plaintiff duly gave such notice.

There was a difference of opinion between the Law Officers in England and the Lord Advocate in Scotland as to the validity of the regulation in question, and the action was brought by arrangement with the Dental Board for a judicial decision of the matter.

There was no statutory regulation of the practice of dentistry before the Dentists Act, 1878. By that Act it was provided that no person should use the title of "dentist" or "dental practitioner" unless he had been registered under the Act. The register was to be kept by the Registrar appointed by the General Medical Council and was to contain the names of the persons duly qualified under the Act to practise dentistry. The Act provided for the payment of a fee not exceeding £5 for the registration of any person, but there was no provision for the payment of any fee for the retention of a name on the register. It was provided that all fees under the Act might be recovered as ordinary debts due to the General Medical Council.

Owing to a decision of the House of Lords in *Bellerby v. Heyworth* (26 *The Times* L.R., 403 ; [1910] A.C., 377) as to the meaning of the words "qualified to practise dentistry," the Act of 1878 became to a large extent inoperative to exclude from the practice of dentistry unregistered persons, and the Dentists Act, 1921, was passed.

Under that Act no person might practise dentistry unless he was on the register. A statutory corporation was created called the Dental Board of the United Kingdom, whose duty it was to keep the register, and the powers and duties of the General Medical Council were transferred to the board. By section 7, the board might make regulations, *inter alia,* (*a*) as to making and keeping the register ; (*b*) as to the removal of persons from the register and for restoration thereto ; and (*c*) as to prescribing a fee not exceeding £5 for retention on the register in any year

* Reported by E. K. CORBIE, Esq., Barrister-at-Law.

of persons registered after July 27, 1921. Those regulations had to be approved by the General Medical Council and the Privy Council, and had to be laid before both Houses of Parliament. Regulations were duly made by the board and duly approved and laid before Parliament. It was provided that an annual fee of £5 for the retention of a name on the register of any person registered after July 27, 1921, should be paid before December 31 in each year, and that unless it was paid the Registrar should forthwith remove the name from the register; and the name of any person so removed might, in certain circumstances, be restored upon application being made. The Act of 1878 was still in force, except where specially repealed by the Act of 1921.

Mr. Maugham, K.C., and Mr. Eardley-Wilmot appeared for the plaintiff; Sir Thomas Hughes, K.C., Mr. J. V. Nesbitt, and Mr. J. R. Butterfield for the defendant.

Mr. MAUGHAM, after stating the circumstances in which the action was brought, said that the defendant, having been registered after July 27, 1921, was subject to the regulation. He said that as the board had, by the Act, power to prescribe a fee for retention, it was a necessary implication that if the fee was not paid the person was not entitled to remain on the register. The regulations, having been approved and laid before Parliament, had statutory effect even though the question of removal from the register was not provided for by the Act. He cited *Institute of Patent Agents v. Lockwood* (10 *The Times* L.R., 527; [1894] A.C., 347), where the House of Lords dealt with somewhat similar regulations. He submitted that statutory regulations when duly passed could not be criticized or disputed.

SIR THOMAS HUGHES, for the defendant, said that the matter was one of great importance, as removal from the register meant excluding a man from practising his profession. Under the Act of 1878 a man paid his fee to be registered, and no further fees were payable. There was no power of removal for non-payment of fees. The Acts had to be read together. There must be found something express in the Act of 1921 to justify removal. There was nothing to that effect in the Act itself. The payment of the fees was merely for the benefit of the Dental Board, and was only a fiscal question. The fees might be recovered as a debt under section 40 of the 1878 Act. That being so, the regulations in this respect were *ultra vires*. It was not a necessary implication that if the fees were not paid the person in default should be removed from the register. The observations of the House of Lords in *Institute of Patent Agents v. Lockwood* (*supra*) were really *obiter dicta*. Here the power of removal for non-payment of the retention fee was not within the ambit of the Act of 1921.

MR. JUSTICE ASTBURY, in giving judgment, said that the short point was whether the regulations were valid or not. He read the relevant sections of the Acts of 1878 and 1921. Under section 7 of the Act of 1921 the Dental Board had a general power of making and erasing entries in the register, and had power to prescribe a fee for retention of the name on the register for any year and to make regulations as to such fees. The defendant here was registered after the Act of 1921 was passed, and he was subject to section 7.

The regulations, after they were made by the Dental Board and before they came into force, had to undergo very strict scrutiny and consideration by the General Medical Council and the Privy Council, and had to be laid before the Houses of Parliament, which could disapprove of them. The regulations in question had been approved and duly passed. Under them the name of a person who had not paid his retention fee could be removed, and could be restored under certain provisions.

It was not denied that a retention fee could be charged and recovered, but it was suggested that, as removal was a penal or stringent restriction, a person's name could not be erased from the register for non-payment of the retention fee unless the Act contained a distinct provision to that effect. There was no such distinct provision in the Act of 1921. It seemed to him that if a man did not pay the fee to retain his name on the register there was no alternative but to take the name off. If that were so, the defence must fail.

In *Institute of Patent Agents v. Lockwood* (10 *The Times* L.R., 527; [1894] A.C., 347) no doubt, in a sense, the speeches were not necessary to the actual point on which the appeal was decided, but they were applicable to the question to be decided here. In many respects the case went beyond the present case. Here the board was the body to make the regulations, the subject of the regulations was expressly provided, and the regulations had to be scrutinized and approved by many bodies. He thought that the regulations here were *intra vires*. Non-retention on the register was a necessary consequence of non-payment of the fee for retention. The plaintiff must succeed in his action, and it must be declared that the defendant, by non-payment of his fee, was liable to be removed from the register.

[Solicitors—Messrs. Waterhouse and Co.; Messrs. Percy Robinson and Co.]

K.B. Div. } 1927.
(Avory, Branson, and Talbot, JJ.) } Dec. 15.

RILEY BROS. (HALIFAX), LIMITED v. HALLIMOND.*

Adulteration — False warranty — "Rum and butter toffee" — Addition of coconut fat — Conviction affirmed.

The appellants, who manufactured an article called "Riley's Rum and Butter Toffee," supplied it to a confectioner with a warranty, and on analysis it was found to contain rum and butter, and coconut fat. On a summons against the appellants for giving false warranty there was evidence that toffee made partly with coconut fat had been sold for years as "rum and butter toffee." The justices convicted the appellants.

Held (Talbot, J., dissenting), that the description "butter toffee" implied that no fat, except butter, was used in the manufacture, and therefore the conviction must be affirmed.

This was a case stated by justices sitting at Bishop Auckland, Durham, who convicted the appellants and fined them 40s. on an information under the Sale of Food and Drugs Acts for giving a false warranty in respect of "rum and butter toffee."

The respondent, an inspector under the Sale of Food and Drugs Acts, bought from a retail confectioner for analysis a tin of "Riley's Rum and

* Reported by J. W. HALL, Esq., Barrister-at-Law.

Butter Toffee" and complied with the required formalities. After analysis of the toffee a summons was taken out against the confectioner for selling to the prejudice of the purchaser an article not of the nature, substance, and quality demanded by the purchaser. The manufacturers, the present appellants, then took responsibility, for they had supplied it with a warranty, and these proceedings were then instituted against them for giving a false warranty.

The analysis showed that the toffee in question contained both rum and butter, and had the flavour of both, but that it contained, in addition, a certain larger percentage of coconut fat, which was used to prevent the consistency of the toffee from being unduly sticky. The coconut fat was nutritious and harmless. There was evidence that the flavour of rum and butter could be produced by synthetic flavours, and in that case it would be properly called "rum and butter flavoured toffee," but not "rum and butter toffee." Toffee made with no fat but butter would be greasy both to touch and taste, and toffee made in part with coconut fat had been sold for years as "rum and butter toffee."

Mr. Lowenthal, K.C., and Mr. Hallett appeared for the appellants; Mr. G. Russell Vick for the respondent.

Mr. Justice Talbot said that the majority of the Court were in favour of supporting the conviction, but he was unable to arrive at that conclusion. He thought "rum and butter toffee" meant toffee with a substantial amount of rum and butter in it, and that the appellants should have been acquitted.

Mr. Justice Branson thought that the conviction was right. The case turned on the construction of the description given by the appellants. Toffee was something which could be made with various fats, and if toffee was described as "butter toffee" he thought butter was indicated as the fat used exclusively.

Mr. Justice Avory delivered judgment agreeing with Mr. Justice Branson.

[Solicitors—Messrs. Helliwell, Harby, and Evershed, for Messrs. Jubb, Booth, and Helliwell, Halifax; Messrs. Sayer, Ledgard, and Smith, for Mr. Thomas Jennings, Bishop Auckland.]

Chan. Div. (Russell, J.) 1928. Jan. 19.

IN RE LORD ARMAGHDALE—CRAIG v. LADY ARMAGHDALE.*

Will — Annuity — Super-tax — Annuity free of super-tax up to certain sum—Additional income of annuitant—Amount of super-tax payable by the trustees.

By his will a testator bequeathed to his wife an annuity of such a sum as, after allowing for income-tax at the highest rate for the time being and for super-tax, would yield her, free of all such tax, a cumulative net yearly sum of £3,500, and directed that there should be no apportionment of super-tax between the annuity and the rest of his wife's income, but that the whole of the super-tax payable by his wife up to but not exceeding super-tax on £3,500 a year, with the income-tax thereon added to it, should be attributed to the annuity and paid by his trustees.

Held, that the trustees were not liable to repay to the annuitant out of residue a sum arrived at on the footing that the annuity was to bear the highest rates of super-tax payable on the annuitant's total income, but were liable for no more than what would be payable on a super-taxable sum of £3,500 with the income-tax added thereto—namely, at the present rate of income-tax, £4,200. With the present exemption, from super-tax, of the first £2,000 of the income the trustees would thus have to pay the super-tax payable on a total income of £6,200.

By clause 7 of his will the testator left to his widow an annuity and gave his trustees certain directions as to the payment of super-tax. This summons, which was taken out by the trustees, asked: "Whether for the purpose of ascertaining the amount or rate of the super-tax payable by the trustees the said annuity ought to be treated as the last or highest part of the total income of the said Baroness Armaghdale or how otherwise the super-tax payable by the said trustees should be ascertained." Clause 7 of the will was in these terms: "I also bequeath to my said wife during her widowhood an annuity of such a sum as after allowing for income-tax at the highest rate for the time being, and also after allowing for super-tax or any other additional tax in the nature of income-tax, will yield her free of all such tax a cumulative net yearly sum of £3,500. And I direct that as regards super-tax no apportionment thereof shall be made between the said annuity and the rest of my wife's income, but that the whole of the super-tax payable by my wife up to but not exceeding super-tax on £3,500 a year with the income-tax thereon added thereto shall be attributed to the annuity hereby bequeathed and be paid by my trustees accordingly."

Mr. A. L. Ellis appeared for the trustees; Mr. Wilfrid Greene, K.C., and Mr. Evershed for Lady Armaghdale; and Mr. Fairfax Luxmoore, K.C., and Mr. Roxburgh for the residuary legatee.

Mr. Justice Russell.—The will is dated November 21, 1921, and it seems reasonably clear that the testator through his legal advisers was aware of a case decided by Mr. Justice Sargant in 1919—namely, the case of *In re Bowring* (34 *The Times* L.R., 575; [1918] W.N., 265). In that case the testator made a will in which there were the following clauses: "(1) I give to my wife, during her life, an annuity of £4,000, free of duty and of income-tax, super-tax, and any other tax or impost of that nature, to the intent that she shall receive the sum of £4,000 net per annum, commencing from the time of my death," and payable quarterly. Then clause 13 provided: "During the life of my wife . . . my trustees shall apply the income of the trust fund in the manner and order following:—(i) In payment of the annuity hereinbefore given to my wife and the income-tax and other taxes thereon. . . ." Sub-clauses (ii) to (iv) directed payment of other annual sums. Lady Bowring, the testator's widow, had a separate gross income of her own quite outside the will, of £1,637 a year, and a summons was taken out by the trustees, or by four of the five trustees, against Lady Bowring who was the other trustee and an annuitant for the determination of the question "whether the super-tax directed

* Reported by J. B. B. MacMahon, Esq., Barrister-at-Law.

by the will to be paid on the annuity given to Lady Bowring ought to be calculated on the annuity with or without reference to any other income receivable by her during the period on which the super-tax was to be paid, or how otherwise the tax ought to be calculated." Mr. Justice Sargant, in his judgment, after pointing out that the difficulty arose owing to the different rates payable in respect of super-tax, super-tax being payable in respect of no particular sums but in respect of the whole income, and pointing out also the difficulty arising owing to the income being free of income-tax and super-tax, proceeded as follows: "It was quite obvious there were three ways at least, though no more than three had been suggested to him, in which the super-tax on the £4,000 that had to be paid by the trustees might be calculated. One might take the £4,000 as if it were the sole source of Lady Bowring's income. In that case £2,500"—that was the sum which then escaped the super-tax, it is now £2,000—"would escape super-tax altogether, on £500 there would be super-tax paid at a comparatively low rate, and on the next £1,000 super-tax would be paid at a higher rate. If that were done the result would be that the higher rates of tax would be thrown exclusively on the additional outside income, and the trustees who had to pay the £4,000 free of super-tax would only have to pay super-tax on the last £1,500 of the £4,000." Putting it shortly, that first alternative is treating the annuity as the bottom slice of the total income of the annuitant. Then the learned Judge continued: "Another method which appeared startling in the other direction was that the trustees should take the additional income as being Lady Bowring's sole income; that they therefore should consider themselves not bound to pay any super-tax on that; and, as regarded the £4,000, that they should consider that was exempted from super-tax only to the extent of the difference between the amount of additional income and £2,500, and that then they should say that the remaining £3,200 or £3,300 bore super-tax at the progressively increasing rates, the result of which would be that a large amount would have to be paid by them in respect of super-tax, and that in effect there would be no charge made against Lady Bowring at all in respect of super-tax on her outside income." That is what is sometimes conveniently called the top slice. Then the third and intermediate course "in favour of which he should give judgment was that the super-tax should be charged rateably as between the outside income on the one hand and the £4,000—increased, of course, by the fact that that was free of income-tax—on the other hand, so that the rateable proportion of each source of income would be free of tax up to £2,500, and that a rateable proportion of each of the successive increases of income beyond that amount would be also free of super-tax. Whichever of the three courses was adopted it seemed to him that Lady Bowring would be getting her £4,000 a year net. The only question was really the position which the income of £4,000 a year occupied in her budget as compared with the position of the outside income which she had from her own independent resources, and when he had spoken of outside income and the £4,000 a year he had not complicated the matter by speaking of the £100 annuity which she got as a trustee of the will because that, of course, must be dealt with on the same basis. He did not see any reason why the Court should in fact marshal either the annuity income or the independent income so as to say that that income came either first or last in the total income of Lady Bowring"—and he decided in favour of what has been called the aliquot proportions. That decision, as indicated, points out that there were three possible alternatives—namely, (1) for the trustees to pay out of residue what would be the amount of super-tax payable if the annuitant had no income from other sources, (2) for the trustees to repay out of residue to the annuitant a sum arrived at on the footing that the annuity was to bear the highest rates of super-tax payable on the annuitant's total income, and (3) that the super-tax payable on the annuitant's total income should be charged rateably as between the annuitant's outside income on the one hand, and the annuity on the other. Mr. Justice Sargant held that the third course was the proper one to adopt; and he re-affirmed that view in *In re Doxat* ([1920] W.N., 262).

By the special provisions of this will the alternative adopted in *In re Bowring* (*supra*) is excluded. There is to be no apportionment. What course then is to be adopted? Lady Armaghdale claims that the second method should be followed—that has been referred to as the top slice method—namely, that the trustees should repay to her out of residue a sum equivalent to the super-tax paid on so much of her total income as pays the highest rates, and amounts to the figure of £3,500. This claim is based on the wording of the gift, according to which it is said she has to have yielded to her free of all super-tax a net yearly sum of £3,500. In *In re Bowring* (*supra*) Mr. Justice Sargant pointed out, and I think rightly, that whatever alternative is adopted no super-tax is being paid in respect of the annuity by the annuitant; she is getting it net, that is, free from super-tax. It is, however, argued before me that unless the top slice theory is adopted, Lady Armaghdale will in fact be paying, after recoupment, a larger sum for super-tax in respect of her total income than she would have paid had no annuity been bequeathed to her by the will, and accordingly to the extent of such excess she is out of pocket and will not have the net additional sum of £3,500 per annum in her purse. That may be so; no figures are in evidence; but my task is to construe the testator's language, and if that be reasonably clear to decide accordingly.

What the testator has done is to say there is to be no apportionment, but another procedure is to be followed which he describes—namely, the trustees are to pay the whole of his wife's super-tax but with a limit, and the limit is super-tax on a sum of £3,500 a year with the income-tax thereon added thereto, which by the way is an amount different from the sum which after deduction of income-tax therefrom will produce £3,500. In other words the testator has fixed a limit to the amount which the trustees have to pay Lady Armaghdale in recoupment of what she pays for super-tax—namely, the trustees are not to pay her more than what would be payable on a supertaxable sum of £3,500 with the income-tax added thereto. At the present rate of income-tax the supertaxable sum will be £4,200. The trustees are to ascertain what would be the amount of super-tax payable on a supertaxable sum of £4,200, that is to say, with the existing £2,000 exemption, what would be the super-tax payable on a total income of £6,200. To that extent, but no further, is Lady Armaghdale to be recouped the super-tax payable by her.

The costs of all parties will be paid out of the residuary estate, and, if the residuary legatee does not object, as between solicitor and client.

[Solicitors—Messrs. Ellis, Peirs and Co.; Messrs Hunters.]

Court of Arches. (Sir Lewis Dibdin, Dean of Arches.) } 1928. Jan. 24.

RECTOR AND WARDENS OF ST. NICHOLAS ACONS v. LONDON COUNTY COUNCIL.*

Ecclesiastical Law — Disused churchyard — Erection of electric transformer chamber—Whether a "building"—Refusal of sanction —Disused Burial Grounds Act, 1884 (47 and 48 Vict., c. 72), s. 3.

By s. 3 of the Disused Burial Grounds Act, 1884, "After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting-house, or other places of worship."

By reason of this enactment the Court refused to sanction an agreement for the construction, by an electric lighting company, of a transformer chamber in a disused churchyard, holding that the proposed structure would be a building and therefore came within the prohibition.

In re St. Nicholas Cole Abbey ([1893] P., 58) disapproved.

This was an appeal from a decision of the Chancellor of the Diocese of London (Mr. F. H. L. Errington). The Chancellor had rejected a petition for the sanction of an agreement between the rector and churchwardens of St. Nicholas Acons, in the City of London, and the City of London Electric Lighting Company, Limited, for the construction by the company of a transformer chamber in the churchyard. The Chancellor held that the proposed construction came within the prohibition in section 3 of the Disused Burial Grounds Act, 1884.

Mr. A. T. Lawrence, K.C., and Mr. G. G. Honeyman appeared for the appellants; the Hon. Sir Malcolm Macnaghten, K.C., and Mr. Sydney Turner were for the respondents.

Mr. LAWRENCE said that the appeal turned very little, if at all, upon the facts. The question was purely one of the interpretation of section 3 of the Act, and whether the structure proposed to be erected in the churchyard was in fact a "building." The churchyard was closed for burials in 1854. The company, which had a transformer chamber under Nicholas-lane, found it necessary to extend it. They already had certain rights in connexion with the churchyard (for which faculties had been granted), and were now asking for the additional use of so much of the churchyard as was necessary for enlarging the transformer chamber. They entered into a provisional agreement with the rector and churchwardens under which they gave an undertaking that the amenities of the churchyard should not be interfered with. The churchyard was not open to the public, but was an "open space" which was kept locked up.

The Chancellor, in the course of his judgment, found that a former faculty granted by the late Dr. Tristram in *In re St. Nicholas Cole Abbey* ([1893] P., 58) was *ultra vires*, and that in view of the provisions of the Disused Burial Grounds Act, 1884, he had no jurisdiction to grant the application. It was only in the case of city churches, said counsel, that a question like the present was liable to arise, and it was a matter of the greatest importance in connexion with electric lighting undertakings. He submitted that the proposed work would not constitute a "building" erected in the churchyard.

The DEAN.—My difficulty on Dr. Tristram's case is, first, that the matter was *ex parte*; and, secondly, that this Act was never mentioned.

Mr. LAWRENCE said that his instructions were that if this kind of space was not to be available in the City of London for such undertakings, the supply of electricity in the City could scarcely be maintained.

The DEAN.—That is an excellent argument for a private Act of Parliament.

Counsel next referred to Dr. Tristram's judgment in *In re St. Nicholas Cole Abbey* (*supra*).

The DEAN.—I am not going to regard a judgment given on an *ex parte* hearing as binding where the Act which we have to construe here was not in the Judge's mind.

SIR MALCOLM MACNAGHTEN said that the London County Council only appeared in this matter as the proper authority which had to carry out the statutory duty of preventing the violation of churchyards, and of generally enforcing observance of the Disused Burial Grounds Act, 1884. He contended that what was proposed by the appellants was, in fact, to erect a building on a disused burial ground. No question of preserving an open space arose here such as figured in several of the cases referred to. He (Sir Malcolm Macnaghten) relied very much on the finding of Lord Cairns in *Thompson v. Sunderland Gas Company* (2 Ex.D., 429). He failed to appreciate the argument that the proposed chamber was not to be a building "upon" this churchyard.

The question raised here was quite distinct from the "open space" question. An example of the latter existed to this day in the preservation in the City of what, in fact, was the burial ground of the old Bridewell Prison. Some of the unfortunate inmates of that gaol died there, and were buried there. Under this Act the ground could not be built upon. Consequently it was now surrounded by a most unpleasant hoarding.

The DEAN remarked that counsel for the appellants had not raised the question as to there being any right to use consecrated ground for such a purpose. The construction of these chambers would involve the exhumation of human remains to a very considerable extent.

Mr. LAWRENCE.—Assuming that your Lordship finds in my favour that this is not a building upon a churchyard, then the question arises whether you ought to grant this faculty.

The DEAN.—Whether I can. The law protecting sacred ground has been unchallenged for many years.

Mr. LAWRENCE admitted that he had not considered the point.

The DEAN.—If this case goes farther you will have to consider it. You represent the rector and churchwardens—the people who naturally protect the churchyard.

In giving judgment, the DEAN OF ARCHES said that the faculty granted by Dr. Tristram in *In re St.*

* Reported by SIR W. J. SOULSBY, Barrister-at-Law.

Nicholas Cole Abbey ([1893] P., 58) was granted without reference to the Act, and must be regarded as wrongly decided. He did not propose to decide the further point to which he had alluded, but which, in fact, had not been actually raised. He confirmed the Chancellor's decision, and dismissed the appeal, with costs.

[Solicitors—Messrs. Phillips, Son and Rollinson ; Mr. T. Bullivant.]

K.B. Div. } 1928.
(Rowlatt, J.) } Jan. 23.

TERRY v. VARIETY THEATRES CONTROLLING COMPANY, LIMITED.*

Contract — Actor—Appearance—Leading actor of company—Provision for substitute in case of illness—Serious illness—Impossibility of appearing—Whether basis of contract gone.

The plaintiff, who was an actor, made with the defendants an agreement by which the plaintiff was to find a company, described as consisting of himself and a full company, and appear as a principal in a play, and in the event of the non-appearance of a principal the plaintiff was to provide a deputy to the satisfaction of the defendants. The plaintiff became too ill to appear at all, and this was announced some days before the play was to begin, but he provided a substitute. The defendants thereupon rescinded the contract, alleging that as the plaintiff could not appear the basis of the contract was gone. In an action for damages,

Held, that since the plaintiff's intended non-appearance was for the whole of the engagement, and since on the terms of the agreement his appearance was of the essence of the contract, the defendants were entitled to rescind, and the action failed.

This was an action in which the plaintiff, Mr. Frederick Terry, an actor, of 4, Primrose Hill-road, St. John's Wood, N.W., claimed from the defendants, the Variety Theatres Controlling Company, Limited, of Holborn Empire Offices, damages for alleged breach of an agreement in writing dated October 16, 1925.

By the agreement the plaintiff was to provide a theatrical company called "Fred Terry and Company" to appear in a costume play at the Hippodrome, Portsmouth, for six nights and one *matinée,* beginning on April 12, 1926. The company was to be an efficient No. 1 principal company, and in the event of the plaintiff's non-appearance he was to provide a deputy to the satisfaction of the defendants. Mr. Terry was to receive 65 per cent. of the gross door receipts up to £1,000, and 70 per cent. thereafter. The plaintiff said that he himself was seriously ill at the time, but that he had provided a satisfactory deputy. He pleaded that the defendants had refused to perform the agreement. He claimed £800, his estimated share of the gross door receipts, or, alternatively, £308 8s. 10d., being the expenses incurred, *plus* his estimated net profits of £300.

The defendants alleged that the damages claimed were too remote and were not in law recoverable. They further pleaded that, owing to the plaintiff's illness, the basis of the agreement had disappeared, and that it was frustrated.

Mr. D. N. Pritt, K.C., and Mr. Ashton Roskill appeared for the plaintiff ; Mr. C. Doughty, K.C., and Mr. H. St. John Field for the defendants.

Mr. PRITT, in opening the case, said that the dispute was whether the defendants were entitled to refuse to allow a theatrical company to perform because Mr. Frederick Terry was too ill to appear. He referred to the conditions in the contract, and said that in view of Mr. Terry's illness Mr. Frank Royde was offered as a substitute. Mr. Royde had, in fact, previously played for the defendants in the Portsmouth Hippodrome as substitute for Mr. Terry.

Mr. Terry, in evidence, said that in the play in question, *Sweet Nell of Old Drury,* Miss Neilson had more to do than himself. The illness which prevented his appearing was congestion of the lungs, and it was not expected that he would recover. He had four doctors in attendance. Mr. Frank Royde had been a member of the company since 1919. He (the witness) had never heard any complaints about Mr. Royde's acting. The obligation to appear in the play was not the only definite obligation.

Replying to Mr. DOUGHTY, he said that he hoped that his name was a very great draw in the provinces. He suggested that the reason why the prices at Portsmouth were increased when his company was there was because the play was only given once nightly, whereas two performances a night were generally given.

MR. JUSTICE ROWLATT said that the only real questions in the case were :—(1) Whether the contract disappeared because Mr. Terry could not appear ; and (2) whether the substitute was to the reasonable satisfaction of the defendants.

Mr. Frank Royde gave evidence of his acting in the provinces as deputy for Mr. Terry, and said that neither from the management nor from the public had he heard any complaint.

Mr. John Hart, theatrical director, of 22, Buckingham-street, Strand, said that the usual practice adopted to meet the possibility of a well-known actor falling ill was to have an understudy to him. It was not usual to send for another actor of equal eminence.

After hearing more evidence of Mr. Royde's acting, MR. JUSTICE ROWLATT said that he would dispense with further evidence as to Mr. Royde's capabilities. He was satisfied that he was not to be objected to as an understudy.

Mr. Garrett, general manager to Mr. Terry, gave evidence of the expenses and accounts of the company. He said that there was now a rule that a company on tour must not be kept out of work for more than two weeks in a tour of 20 weeks.

Dr. Arthur Ricketts, M.D., C.M.G., stated that he, together with three other doctors, including Sir Thomas Horder, found Mr. Terry suffering from pneumonia, pleurisy, and dropsy in April, 1926. Mr. Terry was unable to move for several weeks.

Mr. DOUGHTY, for the defendants, submitted that the contract was for the appearance of one named actor, and one only, and that when he could not appear for a whole week the basis of the contract was gone. Dealing with the substitute offered, he submitted that the clause in the contract providing for a substitute was simply a non-applicable piece of

* Reported by CHARLES CLAYTON, Esq., Barrister-at-Law.

print. On the question of satisfaction, he contended that it could not be laid down dogmatically that any particular actor was as good as another, and the management ought to be allowed a very wide discretion. It was no disparagement, however, to say that Mr. Royde was not to be compared with Mr. Terry. The defendants contracted to have Mr. Terry, and they were entitled to have him. If Mr. Terry had been ill before the company had gone on tour, the contracts would have been revised by all the theatres. It was immaterial whether he was ill six months before or only the night before. The only question on which reasonableness arose was whether Mr. Royde was a competent understudy.

Mr. V. C. Parnell, booking agent of the defendant company, in answer to Mr. PRITT, said that, if they really wanted Mr. Terry's personal appearance, it was possible for them to have had a clause to that effect inserted in the contract.

Mr. C. E. Marner, manager of the Portsmouth Hippodrome, estimated that the non-appearance of Mr. Terry, and the substitution of Mr. Royde, would make a reduction of about £200 in the week's receipts.

MR. JUSTICE ROWLATT, in his considered judgment, recapitulated the facts, and said that the material clause of the contract required the insertion in it of the size of the cast ; how many members were to be principals ; and the names of particular artists. The form had not been strictly used ; no numbers had been filled in, but the words "Fred Terry and full Company" had been inserted as the artists to be included. Mr. Terry was a principal to whom the clause as to the non-appearance of a principal was applicable. The clause was for the protection of the theatre proprietors and entitled them in the event of the non-appearance of a principal to insist on a satisfactory substitute, on the assumption that the contract remained in force. It did not operate to give the producer the right to substitute the entire company, or to make such an extensive substitution as would go to the root of the matter. That would entitle the theatre proprietors to rescind. It could, indeed, justly be said that the typing in of the words "Fred Terry and full Company" did show that it was within the contemplation of the parties that the non-appearance of Mr. Terry might not have terminated the contract. The non-appearance, however, might only have been for one night ; or, even if it was more serious, the employer might not have wished to rescind and might have exercised his rights under the clause. Here, however, the intended non-appearance of Mr. Terry was for the whole of the engagement, and was announced some days before the play was to begin.

Mr. Terry, so far as the defendants were concerned, was to drop out of the contract altogether. If, therefore, his inclusion in the cast was of the essence of the primary term of the contract, or if, in other words, the phrase "Fred Terry and Company" could not be satisfied by a company which did not include Mr. Terry, the defendants were within their rights in rescinding. That was the whole question. Upon that point he held in favour of the defendants. He had no right to say that "Fred Terry and Company" should be read as "Fred Terry's Company."

Judgment was accordingly given for the defendants, with costs. His Lordship said that in case the decision should be overruled he would have assessed the damages at £450.

[Solicitors—Messrs. Guedalla, Jacobson, and Spyer; Messrs. Amery Parkes and Co.]

K.B. Div.
(Lord Hewart, C.J., Avory and Branson, JJ.)
1928. Jan. 13.

HARKER v. BRITANNIC ASSURANCE COMPANY, LIMITED.*

Insurance (Industrial)—Child under six years of age—Assurance of payments on death exceeding £10—Offence—Time for institution of proceedings—Friendly Societies Act, 1896 (59 and 60 Vict., c. 25), s. 62—Industrial Assurance Act, 1923 (13 and 14 Geo. V., c. 8), s. 4 (1)—Friendly Societies Act, 1924 (14 and 15 Geo. V., c. 11), s. 2 (1).

A child was born on November 12, 1921, and shortly after his birth the respondents, an industrial assurance company, issued three policies of assurance in respect of him ; each policy contained a table showing the amount payable in the event of the child's death at various dates before maturity, and on October 18, 1926, while he was still under six years of age, the total amount assured under the three policies was £15 10s. Each policy contained the proviso : "The provisions of the Act of Parliament enacting that no greater amount than a sum of £6 shall be paid on the death of a child under the age of five years or than the sum of £10 on the death of a child under the age of ten years shall apply to this policy." These limits had since been altered by statute so as to permit a maximum of £10 in the case of a child under six, and £15 in the case of a child under ten.

Held, (1) that to assure a child for more than the permitted amount was an offence, no less than to pay more than the permitted amount ; (2) that the proviso in the policies did not protect the respondents, as it had no legal effect, since the statute applied of its own force and not by agreement between the parties ; (3) that there was an assurance of the child with each acceptance of a premium, and that therefore the date of the last acceptance of a premium was the date from which the time for taking proceedings began to run.

This was a case stated by justices for the West Riding of Yorkshire, who had dismissed an information against the respondent company for an alleged offence under the Industrial Assurance Act, 1923, as amended by the Friendly Societies Act, 1924. The information was preferred at Goole Petty Sessions on April 13, 1927, by Harold Parkinson Harker, the appellant, at the instance of George Stuart Robertson, K.C., Industrial Assurance Commissioner, against the Britannic Assurance Company, Limited, the respondents, under section 39 of the Industrial Assurance Act, 1923, charging that the respondent company on October 18, 1926, unlawfully did insure the sum of £15 10s., payable on the death of Frederick Cowling, being a child under the age of six years, which exceeded the sum of £10, contrary to section 4 of the said Act of 1923 as amended by

* Reported by J. W. HALL, ESQ., Barrister-at-Law.

section 2 of the Friendly Societies Act, 1924. The information was dismissed.

The following facts were proved : On October 18, 1926, the said Frederick Cowling, son of Adelaide Cowling, was under six years of age, having been born on November 12, 1921. On October 18, 1926, there were in existence three policies of assurance on the life of the said Frederick Cowling issued by the respondent company to his mother, the said Adelaide Cowling, the person assured under the policies.

The particulars of the policies were as follows :—

(*a*) Policy No. 18,743,638, dated December 5, 1921, assuring the life of the said Frederick Cowling. The sum payable on death subject to the terms of the policy was calculated under a table given in the policy according to the period for which the policy had been in existence at the date of death. Under this table the sum of £4 10s. was assured on the life of the said Frederick Cowling on October 18, 1926. The premium on the policy was 1d. per week.

(*b*) Policy No. 18,743,639, dated December 5, 1921, assuring the life of the said Frederick Cowling subject to the terms of the policy for a sum calculated under a similar table in the policy. This policy also assured by way of endowment a sum of £5 5s. on the maturity of the policy after 15 years. Under the table in this policy a sum of £2 was assured on the life of the said Frederick Cowling on October 18, 1926. The premium was 2d. a week.

(*c*) Policy No. 19,015,281, dated August 7, 1922. The conditions of this policy were similar to those of (*b*). The terms were for a payment of £23 12s. 6d. on maturity, and a sum calculated as mentioned above on death previous to maturity. Under this policy subject to its terms the sum of £9 was assured on the life of the said Frederick Cowling on October 18, 1926. The premium was 9d. a week.

The total sum according to the tables in the policies for which the said Frederick Cowling was assured on October 18, 1926, was £15 10s.

The respondent company was an industrial assurance company within the meaning of section 1 of the Industrial Assurance Act, 1923, and the above policies were issued in connexion with industrial assurance business carried on by the said company, as defined by subsection (2) of that section, in that the premiums were payable weekly and were collected at the house of the assured person by collectors employed by the respondent company.

Each of the above policies contained a proviso in the following terms, viz. : "The provisions of the Act of Parliament enacting that no greater amount than the sum of £6 shall be paid on the death of a child under the age of five years or than the sum of £10 on the death of a child under the age of ten years shall apply to this policy."

The above provision sets out the maximum sums allowed under section 62 of the Friendly Societies Act, 1896, to be insured or paid on the death of a child under ten years of age in respect of insurances entered into at the dates of the above policies. These maximum sums had been altered by section 2 of the Friendly Societies Act, 1924, which, so far as it was material to this case, read as follows :—

"(1) Section 62 of the Friendly Societies Act, 1896 (which relates to assurances on children), both as originally enacted and as applied to trade unions and industrial assurance companies, shall have effect as if for that section the following section were substituted :

"'A society or branch, whether registered or unregistered, shall not insure or pay on the death of a child under the ages hereinafter specified any sum of money which exceeds or which, when added to any amount payable on the death of that child by any other society or branch or by any trade union or industrial assurance company exceeds, the amounts hereinafter specified.' (These were: Under 3, £6 ; under 6, £10 ; under 10, £15.)

"(3) Subsection (1) of section 4 of the Industrial Assurance Act, 1923, shall be repealed from the words 'except that' to the end of the subsection."

Section 4, subsection (1), of the Industrial Assurance Act, 1923, as amended by the Friendly Societies Act, 1924, reads as follows :—

"(1) The provisions of sections 62 and 64 to 67 of the Friendly Societies Act, 1896, relating to payments on the death of children shall extend to industrial assurance companies as if those provisions were herein re-enacted, and in terms made applicable to industrial assurance companies."

Section 39 of the Industrial Assurance Act, 1923, provides :—

"(2) Any industrial assurance company which contravenes or fails to comply with any of the provisions of this Act, or any directions given by the Commissioner thereunder shall be guilty of an offence under this Act. . . .

"(5) Notwithstanding any limitation on the time for the taking of proceedings contained in any Act, summary proceedings for offences under this Act, or for offences under the Friendly Societies Act, 1896, where the society by or in respect of which, or the person by or in respect of whom, the offence is alleged to have been committed is a collecting society or an officer of such a society may be commenced at any time within one year of the first discovery thereof by the Commissioner, but not in any case after more than three years from the commission of the offence."

Section 11 of the Summary Jurisdiction Act, 1848, provided that in all cases where no time is specially limited an information shall be laid within six calendar months from the time when the matter of it arose.

It was contended on behalf of the respondent company that the information should be dismissed for the following reasons : (*a*) That an assurance on the life of a child under the age of ten for more than the maximum sum mentioned above was not an offence by an industrial assurance company, because subsection (1) of section 4 of the 1923 Act extended to industrial assurance companies such part only of section 62 of the Friendly Societies Act, 1896, as related to payments on the death of a child and not such part as related to insuring. (*b*) That, although an insurance of a child under ten years of age for more than the above maximum might be prohibited by law, it was not made an offence by an industrial assurance company. It was argued that in the case of a society registered under the Friendly Societies Act, 1896, clause (*f*) of section 84 of that Act made it an offence if "a society . . . pays money on the death of a child under ten years of age otherwise than is provided by this Act," the act of insuring not being made an offence in that clause.

(*c*) That under the above policies the respondent company did not insure the life of the said child for a sum greater than was allowed by law, because it was a proviso of the insurance that the provisions of the statute relating to such maximum sums should apply, and if the child had died on October 18, 1926, the maximum amount payable under the terms of the three policies would have been £6.

(*d*) That if it was an offence for an industrial assurance company to insure a child under ten years of age for a greater sum than the maximum stated above, there could not be a conviction under the

information in this case by reason of section 11 of the Summary Jurisdiction Act, 1848, because the offence alleged to have been committed on October 18, 1926, had in fact been committed on the dates of the issue of the policies as it was on those dates that the respondent company did insure the life of the child.

(*e*) That, alternatively, insuring more than the maximum sum was not an offence, because such insuring was forbidden by the section and, therefore, it was impossible in law so to insure, and a policy purporting to insure was a mere nullity.

It was contended for the appellant in reply to the above points, taken in their order :—

(*a*) That the expression "relating to payments on the death of children" as used in section 4 of the Industrial Assurance Act, 1923, was descriptive of the section it referred to ; that these were the words used in the heading in the Friendly Societies Act, 1896, to describe section 62 and other sections following ; that subsection (1) of section 4 of the Industrial Assurance Act, 1923, in its second sentence, in stating how far section 62 of the Friendly Societies Act, 1896, was to be varied in its application to industrial assurance companies, made no mention of any variation of the expression "insure or pay" ; and that by the express terms of section 2 of the Friendly Societies Act, 1924, the provision which was there substituted for section 62 of the Friendly Societies Act, 1896, and which reproduced the expression "insure or pay" was extended to industrial assurance companies.

(*b*) That insuring a child under ten years of age for more than the maximum amount was not only prohibited but was also an offence. Section 39, subsection (2), of the Industrial Assurance Act, 1923, said that if an industrial assurance company should contravene any of the provisions of that Act it should commit an offence, and by insuring the child the respondent company according to the facts contravened the provisions of the Act. A similar transaction by a friendly society would be an offence under clause (*b*) of section 84 of the Friendly Societies Act, 1896, which made it an offence for a registered society to do anything forbidden by that Act.

(*c*) That the provisions in the policies to the effect that on death the amount payable would not be greater than the maximum allowed by law afforded no answer to the charge against the respondents.

(*d*) That the matter of this case arose on October 18, 1926, as on that date the respondent company was insuring on the death of the child an amount which was greater than by law allowed.

(*e*) That the respondents' contention in paragraph (*e*) of their contentions was obviously ill-founded in law.

The justices were of opinion that the contentions (*c*) and (*d*) on behalf of the respondent company were correct in law, and dismissed the information.

Mr. H. M. Giveen appeared for the appellant ; Mr. A. S. Comyns Carr, K.C., and Mr. G. R. Blanco White for the respondent company.

The Lord Chief Justice, in giving judgment, said : This is a case stated by justices for the West Riding of Yorkshire.

The question arises out of an information preferred by Harold Parkinson Harker, the appellant, at the instance of George Stuart Robertson, an Industrial Assurance Commissioner, against the respondents, the Britannic Assurance Company, Limited, under section 39 of the Industrial Assurance Act, 1923, charging that the respondents, on October 18, 1926, unlawfully insured the sum of £15 10s. payable on the death of one Frederick Cowling, a child under the age of six years, which sum exceeded the sum of £10, contrary to section 4 of the Act of 1923, as amended by section 2 of the Friendly Societies Act, 1924.

That information was heard and determined by the justices on April 13, 1927, and they dismissed the information.

The question for the Court is whether, in so dismissing the information, the justices came to a correct determination in point of law.

It is not necessary, I think, to recapitulate the facts which are fully and clearly set out in the case stated. It was established by the evidence that on October 18, 1926, the infant, Frederick Cowling, the son of Adelaide Cowling, was under six years of age ; he had, in fact, been born on November 12, 1921, and the effect of the granting of the series of insurance policies upon the life of that infant, which policies are described, with particulars and dates, in the case stated, was that the total sum, according to the tables in the policies, for which the infant was assured on October 18, 1926, was £15 10s. In those circumstances, it was contended on behalf of the present appellant that an offence had been committed. It was contended, on the other hand, by the respondents, the assurance company, that the prohibition in the statutes, although it prohibited payment, did not prohibit insurance ; and, secondly, that the company could not be said to have insured for more than was lawfully permitted, because nobody could insure effectively for more than was lawfully permitted ; and, finally, that in any event the proceedings were out of time.

Contention (*e*) of the contentions of the assurance company was in these remarkable terms : That, "alternatively, insuring more than the maximum sum was not an offence, because such insuring was forbidden by the section, and therefore it was impossible in law so to insure, and the policy purporting to insure was a mere nullity." The question is whether, in these circumstances, the information ought to have been dismissed.

It was provided by section 62 of the Friendly Societies Act, 1896, that a society or branch should not insure or pay on the death of a child under five years of age any sum which, added to any amount payable on the death of that child by any other society or branch, exceeded £6, or on the death of a child under ten years of age, any sum which, added to any amount payable on the death of that child by any other society or branch, exceeded £10.

By section 4 (1) of the Industrial Assurance Act, 1923, the provisions of the said section 62 of the Friendly Societies Act, 1896, *inter alia*, were extended to industrial assurance companies as if those provisions were therein re-enacted and in terms made applicable to industrial assurance companies. It was contended on behalf of the respondents that by reason of the words "relating to payments on the death of children" the provisions of the section were extended to industrial assurance companies only in so far as they related to payments, and not in so far as they related to the insurance of children in excess of the prescribed limit. But the statutory heading of sections 62 to 67 of the Act of 1896 is "payments on death of children," and, in my opinion, the words "relating to payments on the death of children" in section 4 (1) of the Act of 1923 were merely descriptive of the sections therein referred to, and did not limit those sections in their application to industrial assurance companies. This view is confirmed by the amending section of the Friendly Societies Act, 1924

(section 2). This section, while it alters the amounts for which children may lawfully be insured, again uses the words "shall not insure or pay on the death of a child," and, in express terms, refers to section 62 of the Act of 1896 as applied to industrial assurance companies.

Section 39 (2) of the Industrial Assurance Act, 1923, provides that any industrial assurance company which contravenes or fails to comply with any of the provisions of the Act shall be guilty of an offence under the Act. It follows that if an industrial assurance company insures a child for a sum which exceeds the sum mentioned in section 2 (1) of the Friendly Societies Act, 1924, that is to say, in the case of a child under six years of age, £10, the company is guilty of an offence under the Act of 1923.

But it was argued that the respondent company did not insure the child for a sum in excess of the limit, inasmuch as each of the policies contained a proviso in the following terms: "The provisions of the Act of Parliament enacting that no greater amount than the sum of £6 shall be paid on the death of a child under the age of five years or than the sum of £10 on the death of a child under the age of ten years shall apply to this policy." And it was said that, though the sum for which the child was insured according to the tables in the policies was £15 10s., he was really insured only for £6 in the case of death under the age of five years, or £10 in the case of death between the ages of five and ten years. This proviso, I think, has no legal effect at all. All insurances are necessarily subject to the statutory provisions relating thereto, and the effect of the argument is that, because a company cannot lawfully insure a child for a sum beyond the statutory limit, it commits no offence if it grants such an insurance unlawfully. It is an entertaining argument. It seems to involve the proposition that a person cannot effectively commit an offence which is forbidden by law because the law steps in to prevent his act from being completed, or, at any rate, from remaining undisturbed. Unfortunately, the law cannot always prevent the commission of offences. Sometimes it has to punish the offender. In my opinion, if a company purports to insure a child for a sum beyond the limit, it commits an offence under the statute, and none the less because it may also be perpetrating a gross fraud upon the assured.

With regard to the contention that the prosecution was out of time, it is sufficient to say that, in my view, the offence of insuring a child for a sum in excess of the lawful amount is committed on every occasion when a premium is paid and received in respect of such an insurance.

For these reasons I think that the appeal should be allowed, and the case be remitted to the justices with a direction to convict.

MR. JUSTICE AVORY.—To establish the offence charged in this case it was necessary to prove: (1) That an industrial assurance company in insuring a sum exceeding the sum of £10 payable on the death of a child under six years of age is contravening the provisions of the Industrial Assurance Act, 1923. (2) That the respondents had, in the circumstances, insured a sum exceeding £10 payable on the death of a child under six years of age. (3) That they had so insured on the date alleged in the information, namely, October 18, 1926.

On behalf of the respondents it was contended: (1) That section 4 of the Industrial Assurance Act, 1923, extends to industrial assurance companies so much only of the provisions of section 62 of the Friendly Societies Act, 1896, as relates to payments on the death of children, as distinguished from insurance. (2) That, in the circumstances, the respondents had not insured a sum exceeding £10 payable on the death of a child under six years of age. (3) That they had insured not on October 18, 1926, but on the dates of the policies of insurance in 1921 and 1922, and that the provisions of section 11 of the Summary Jurisdiction Act, 1848, applied as a bar to the proceedings.

As to the first point, in my opinion section 2 of the Friendly Societies Act, 1924, substituting, as it does, the amended section therein enacted for section 62 of the Act of 1896, both in its application to friendly societies and to industrial assurance companies, removes the difficulty which is suggested to arise from the fact that section 4 of the Industrial Assurance Act, 1923, in terms, only extends to industrial assurance companies the provisions of the Friendly Societies Act, 1896, relating to payments on the death of children. In other words, the amended and substituted section is to be read as incorporated in section 4 of the Act of 1923, and any breach of the amended section is a contravention of the Act of 1923.

In view of this conclusion, it is not necessary to consider the contention of the appellant that the words "relating to payments" in section 4 of the Act of 1923 are merely descriptive of the group of sections under that heading in the Act of 1896. I am not prepared, as at present advised, to adopt this construction of the section.

On the second point, on further consideration, I have come to the conclusion that the respondents, having insured the life of the child in question by the terms of the three policies in the sums of £4 10s., £2, and £9 respectively in the event of its death under six years of age, they had insured a sum exceeding £10 on the death of the said child under six years of age, notwithstanding the proviso in each policy that no greater amount than £6 should be paid on the death of the child under five years of age or £10 under ten years. Assuming in the respondents' favour that they only insured the amount which they agreed to pay according to the proviso, they would be liable on the three policies in the event of the child dying under six years of age to pay the several sums of £4 10s., £2, and £6, making a total of £12 10s., the limit of £6 applying to each policy separately; but it is at the least open to doubt whether the application by the proviso of the provisions of a statute which were no longer in force in 1926 would have any effect on the liability of the respondents accruing in 1926, and in that view they would have been liable, as the appellant contended, to pay the sum of £15 10s. on the death of the child.

On the third point, the respondents' contention that they insured only on the dates of the policies cannot, I think, be supported. So long as the assured is not in default in the payment of premiums and the policies are in force, the respondents are continuing to insure, and were doing so on October 18, 1926, and the insurance being for a sum exceeding £10 was in breach of the provisions of the section as amended in 1924, and in contravention of the Act of 1923.

For these reasons I think the appeal should be allowed, and the case remitted to the justices to convict.

MR. JUSTICE BRANSON.—I agree. I am satisfied for the reasons given by my Lord that it is an offence for an industrial assurance company to insure for a

sum in excess of the statutory limit allowed for payment and also that the words "insure or pay" cover keeping insured, and therefore that the prosecution is not out of time.

The only point upon which I desire to add anything is the question whether the respondents have insured for an amount in excess of the statutory limit. Clearly they have, unless the proviso in each policy operates contractually (*a*) in the case of the third policy to cut down the amount specified in the policy itself, and (*b*) in the case of each policy to cut down the amount specified therein because of amounts insured by the other policies. Each policy contains a contract by the respondents to pay according to the schedule and the appropriate table; then comes a proviso which makes the Schedule and the appropriate table part of the contract. Then follows the other proviso to which I have already referred. All that it says is that the statutory provisions in question shall apply to the policy. Such a term in a contract can have no legal effect, for the statute operates of its own force and applies to the policy apart from any such term. The respondents seek to discard the natural meaning of the language used and to contend that the proviso should be construed as meaning that notwithstanding that a certain sum is specified in the table to be payable it shall not be paid if in the event which happens payment of that amount would be an infraction of the Act. The only ground for this contention of the respondents is that to confine the meaning of the proviso to the plain meaning of the language used would be to render it useless and inoperative. But the contract must be construed, if there is any ambiguity, *contra proferentem,* and I decline to depart from the plain meaning of the language used in order to enable the company to say that, though they have taken premiums under the third policy which according to the table incorporated therein entitled the assured to £9 on the death of the child between four and five, they are only liable to pay £6. The argument is *a fortiori* when it is sought to use the proviso in each policy to limit the amount, apparently payable under it apart from the proviso, by reference to amounts payable under other policies. I agree, therefore, that this contention of the respondents must also fail, and that the appeal must be allowed.

[Solicitors—The Treasury Solicitor; Messrs. Kingsley Wood, Williams and Co., for Mr. J. G. Cooper, Birmingham.]

Court of Appeal.
(Scrutton and Atkin, L.JJ., and Eve, J.)

1928.
Jan. 20.

MESSAGER v. BRITISH BROADCASTING COMPANY, LIMITED.*

Copyright — Broadcasting — Opera — Music — Performance in public—"Broadcasting" by wireless telephony—Grant by composer of right to perform—Assignment or licence—Whether grant determinable on death—Copyright Act, 1911 (1 and 2 Geo. V., c. 46), s. 1.

By an agreement dated March 23, 1905, the plaintiff granted to G. E. "the sole and exclusive right of representing or performing" in certain areas a play, of the music of which the plaintiff was the composer. G. E. died in 1915, and in 1920 his executors assigned to a limited company the benefits of copyright and other rights previously held by G. E. In October, 1926, the limited company agreed to permit the defendants to "broadcast" by wireless telephony a performance of the opera. The defendants "broadcast" the opera from their studio, to which the public was not admitted.

In an action for breach of copyright the Judge held, (1) that the defendants gave a public performance of the opera within section 1 of the Copyright Act, 1911, and (2) that, as the agreement of March 23, 1905, was not an assignment by the plaintiff to G. E. of all his performing rights, but was a licence confined to ordinary performances at a theatre, and of such a personal character as to be determinable on the death of G. E., the defendants had acquired no lawful licence to perform the opera in public and were, therefore, liable in damages to the plaintiff.

On an appeal by the defendants on the second point,

Held, that the agreement of March 23, 1905, was not limited to performances at a theatre and was not a mere licence but was an assignment to G. E. of rights which either he or his executors could assign, and the defendants were protected, and therefore the action failed.

Decision of McCardie, J. (43 *The Times* L.R., 818), reversed.

This was the defendants' appeal from the judgment of Mr. Justice McCardie (43 *The Times* L.R., 818) in an action brought by the plaintiff, M. André Messager, the musical composer, of 103, Rue Jouffroy, Paris, claiming an injunction to restrain the defendants, the British Broadcasting Company, Limited, from infringing his copyright in the music of the opera, *The Little Michus,* of which he was the composer, and damages for alleged infringement of his copyright.

The opera, *The Little Michus,* was produced at Daly's Theatre, London, in 1905, under a contract dated March 23, 1905, between André Messager, Albert Vanloo, and Georges Duval, all of Paris (the licensors), of the one part, and George Edwardes, of Daly's Theatre, London (the licensee), of the other part, whereby the latter was granted the sole and exclusive right of representing or performing the opera in the United Kingdom, America, and the British Empire.

The defendants pleaded that Mr. Edwardes's rights in the opera became vested after his death in 1915 in George Edwardes (Daly's Theatre), Limited, under an agreement between his executors and the company in May, 1920, and that in October, 1926, George Edwardes (Daly's Theatre), Limited, licensed the defendants to perform the opera. In November, 1926, the defendants broadcast the opera from their studio in Savoy-hill, to which the public was not admitted.

Mr. Justice McCardie held that the defendants in doing so gave a public performance of the opera within section 1 of the Copyright Act, 1911, and that, as the agreement of March 23, 1905, was not

* Reported by T. W. Morgan and E. J. M. Chaplin, Esqrs., Barristers-at-Law.

an assignment by the plaintiff to Mr. Edwardes of all his performing rights, but was a licence confined to ordinary performances at a theatre, and of such a personal character as to be determinable on the death of Mr. Edwardes, the defendants had acquired no lawful licence to perform the opera in public and were, therefore, liable in damages to the plaintiff for breach of copyright. He accordingly gave judgment for the plaintiff for £150 damages, with costs.

The defendants appealed.

Sir Duncan Kerly, K.C., and Mr. Trevor Watson appeared for the appellants ; the Hon. S. O. Henn Collins, Mr. A. J. Duhamel, and Mr. K. E. Shelley for the respondent.

Sir Duncan Kerly, in opening the appeal, said that M. André Messager claimed to be the owner of the performing rights in England of *The Little Michus*. Several questions had been discussed in the Court below, one being whether the performance at the Savoy-hill studio of the British Broadcasting Company was a public performance ; another, whether, by such performance, there was not also a performance in France so as to constitute an infringement of the French copyright. The Court would not be troubled with the question whether this was a public performance or not, as they accepted the Judge's finding that it was. The present appeal turned mainly on the question of the licence, which was the most material question in the case. The Judge had put a construction on that document which was a surprise to everybody.

The other question which was to be discussed was the effect of sections 1, 2, and 24 of the Copyright Act, 1911. The facts might be stated very shortly. In 1905 an English version of the opera was successfully produced at Daly's Theatre. In the same year Mr. Edwardes granted provincial rights to Sir George Dance. The Copyright Act, 1911, came into force on July 1, 1912. In October, 1915, Mr. Edwardes died. In 1920 the lease of the theatre, together with all copyrights, passed to George Edwardes (Daly's Theatre), Limited, who had ever since assumed that they were in possession of all rights. There had been no further performance in London until the performance in the Savoy-hill studio, but there had been various performances in the provinces and in respect of these performances the plaintiff had received royalties. In October, 1926, the British Broadcasting Company obtained a licence from George Edwardes (Daly's Theatre), Limited, to broadcast the play in question, for which they paid £60. The performance took place on November 10, 1926, and the original company, so far as they could be gathered together, was present.

Mr. Justice McCardie had held that the agreement of 1905 was not an assignment but merely a personal licence of a strictly limited nature, limited to theatrical representation of the ordinary kind at a theatre, and no other place, and that the agreement had been put an end to by the death of Mr. George Edwardes in 1915. He (counsel) submitted that the expression "licensee" must cover assigns, and that by the agreement of 1905, the plaintiff had granted the whole of the performing rights then known in this play to George Edwardes, in whom the rights then became vested.

The question must be considered in the light of (1) the position under the Copyright Act, 1911, and (2) with regard to the reported cases. The Copyright Act, 1911, for the first time dealt with performing rights separately and extended copyright to mechanical performances.

Counsel referred to sections 1 (2), 5, 19 (7) and 24 of the Copyright Act, 1911, and submitted that on the proper construction of the licence in this case George Edwardes (Daly's Theatre), Limited, had the sole performing rights in the opera at the material date, and that the plaintiff had no performing copyright in the opera and had no interest in any performing rights under the Act.

Counsel then proceeded to deal with the reported cases and said that it had been held that where a person had granted the performing rights to anyone before the Act of 1911 came into operation the cinematograph rights also passed to the owner of the performing rights. See *Barstow v. Terry* ([1924] 2 Ch., 316). Counsel also referred to *Falcon v. Famous Players Film Company, Limited* (42 *The Times* L.R., 666 ; [1926] 2 K.B., 474) ; *Stevens v. Benning* (1 K. and J., 168) ; *Reade v. Bentley* (3 K. and J., 271) ; *Hole v. Bradbury* (12 Ch.D., 886) ; *Griffith v. Tower Publishing Company, Limited, and Moncrieff* (13 *The Times* L.R., 9 ; [1897] 1 Ch., 21) ; *Taylor v. Neville* (47 L.J., Q.B., 254) ; *British Actors Film Company, Limited, v. Glover* (34 *The Times* L.R., 162 ; [1918] 1 K.B., 299).

The Hon. S. O. Henn Collins, for the respondent, contended that if, under the terms of the agreement of March 23, 1905, Mr. George Edwardes acquired the performing rights of *The Little Michus*, they were confined to the right of performance of the opera at theatres, which the agreement contemplated —theatrical performances, and no others. Mr. George Edwardes had never exercised nor claimed any rights at all except theatrical rights. M. Messager was only interested in the music and not in the rest of the opera. An agreement like the one in question in this case ought not to be construed more widely than the necessities of the case required. Mr. George Edwardes had no rights in the opera which he could transmit to others.

Lord Justice Scrutton, in giving judgment, said that the decision in the case depended on the construction of the relevant document, and, although the case had aroused some interest, the decision would be of very little use except in cases where the document was similar. The question was whether, on the construction of the document and in the events which had happened, the defendants were entitled to say that they were performing with the permission of persons who had powers to assign. In the Court below, the defendants had had the courage to contend that to broadcast a play was not a public performance of it. Mr. Justice McCardie held that it was a public performance. But in the Court of Appeal the defendants had wisely abandoned that contention, and, therefore, it was not necessary to deal with that branch of the judgment of Mr. Justice McCardie.

The appeal would be decided on the construction of the document. It was impossible in such a case as this to lay down any satisfactory rules which would distinguish between a licence to do an act and an assignment of the right to do an act. Broadly speaking, a licence did not confer a right ; it merely prevented something from being treated as unlawful which but for the licence would be unlawful. It was necessary to consider each contract by itself. The document, which was dated March 23, 1905, recited that André Messager was the composer, and Albert Vanloo and Georges Duval were the authors, of the comic opera entitled *The Little Michus*, and that they, as licensors, had delivered the play to Mr. George Edwardes, called the licensee, with the full score of the music thereof, with a view to its being performed by the licensee at Daly's Theatre and elsewhere. The licensors granted to the licensee the sole and exclu-

sive right of representing or performing the play in the United Kingdom of Great Britain and Ireland, America, and the British Colonies and Dominions. Under clause 3 of the agreement the play was to be adapted for the English stage at the expense of the licensee. The agreement also provided that the licensee should not interpolate music not composed by M. Messager without his consent, but M. Messager agreed to compose such additional numbers required for the English stage as Mr. George Edwardes might reasonably require. Another clause provided that, if the play was not produced in London by Mr. Edwardes within three months from the date of the agreement, all rights of representation should revert to, and become again the absolute property of, the licensors.

That clause was very strongly in favour of the document being an assignment of rights and not a mere licence. Looking at the document as a whole, it appeared to him (his Lordship) that it was impossible to say that it was only a licence. It was a grant of a right to Mr. George Edwardes. It was more than a licence; it was an assignment. Mr. Justice McCardie had said that the document was personal to Mr. George Edwardes, but he (Lord Justice Scrutton) could not accept that view. Mr. George Edwardes could not assign the task of adaptation, but when he had carried out the adaptation and produced the opera in London he had power to assign. Having regard to the terms of the document itself, it appeared to him that it was an assignment of rights to Mr. George Edwardes which Mr. Edwardes could himself assign, and consequently his executors had power to grant the permission under which the appellants gave their performance, and the defendants were protected. It had been contended that the contract limited the right to represent or perform the opera in theatres only. That was too narrow a view of the contract. It was enough to say that there was a performance by the appellants in a region in which the contract permitted performance. The judgment for the plaintiff must be set aside, and judgment must be entered for the defendants, with costs.

Lord Justice Atkin and Mr. Justice Eve concurred.

[Solicitors—Messrs. Gery and Brooks; Messrs. Steadman, Van Praagh, and Gaylor.]

Chan. Div. (Clauson, J.) 1928. Jan. 26.

FARR v. GINNINGS.*

Landlord and Tenant — Lease — Assignment—Consent of lessor—Refusal—Lessee's breach of covenant to repair—Whether a justification.

Where a lease contains a covenant by the lessee to repair and a provision that the lessor's consent to an assignment by the lessee is not to be unreasonably withheld, the mere fact that the lessee is committing a continuing breach of the covenant to repair does not necessarily entitle the lessor to refuse his consent to an assignment, at all events where the amount of disrepair is not very serious.

* Reported by G. P. Langworthy, Esq., Barrister-at-Law.

The plaintiff, Mr. Walter Frederick Farr, by this summons asked for a declaration that, on the true construction of a lease granted to him of No. 44, Crouch End-hill, Hornsey, Middlesex, and in the events which had happened, the refusal of the defendant, Mrs. Sarah Ann Ginnings, to grant him a licence to assign such lease to Mr. Ernest Peronne was unreasonable; and that notwithstanding such refusal the plaintiff was entitled to assign without any licence.

The summons raised the question whether, if a tenant has committed a breach of his covenant to keep the premises in repair, he has, nevertheless, on submitting to his landlord a responsible person to whom to assign the premises, a right to the consent of the landlord to the assignment on the ground that the refusal of the consent because of the want of repair would be unreasonable.

The lease to the plaintiff was for a term of 21 years from September 29, 1917, at the rent of £60 per annum. The lease contained the usual covenant to repair, and the plaintiff, as lessee, further covenanted not to assign the premises without the consent in writing of the defendant, the lessor, "such consent not to be unreasonably withheld."

In January, 1926, on applying for the quarter's rent, the solicitors for the defendant called upon the plaintiff to carry out the terms of the repairing covenant. The plaintiff did not do the repairs, and by a letter dated October 18, 1927, he was again requested to repair the premises.

On October 20, 1927, the solicitors for the plaintiff wrote to the defendant saying that the plaintiff proposed to sell his interest in the lease to Mr. E. Peronne, and asking for her consent to the assignment. The defendant's solicitors in reply stated they had twice complained of the want of repair of the premises, and regretted that, as the repairs had not been carried out, the defendant could not consent to the assignment. They suggested, however, that the plaintiff should negotiate for a surrender. The repairs necessary were estimated to cost £100.

Mr. L. W. Byrne appeared for the plaintiff; Mr. A. de W. Mulligan for the defendant.

Mr. Justice Clauson, in giving judgment in favour of the plaintiff, said that the amount of disrepair was not very serious, and nothing was done about it between January, 1926, and the letter of October 18, 1927. The plaintiff on November 8, 1927, informed the defendant that the proposed purchaser, Mr. Peronne, intended to spend a considerable amount in putting the property in repair. The defendant made no objection to the references given with regard to the responsibility of Mr. Peronne as assignee. There had here been no pressure on the plaintiff to do the repairs, as nearly two years elapsed before the second application was made for the repairs to be done. It was quite different from the case of *Goldstein v. Sanders* ([1915] 1 Ch., 549), where the state of things as to repairs was "little short of being outrageous."

The effect of the assignment would be that the defendant would not only retain her right to damages for breach of covenant against the plaintiff, but would also have a right against the proposed assignee to compel him to put the premises in repair, under pain of forfeiture. The position of the defendant, therefore, would be made better by the assignment. It was perhaps significant that the lessor suggested a surrender of the lease. The declaration asked for would be granted.

[Solicitors—Messrs. Lake and Son; Messrs. Law and Worssam.]

K.B. Div. (Wright, J.) 1928. Jan. 26.

FOREMAN AND ELLAMS, LIMITED v. FEDERAL STEAM NAVIGATION COMPANY, LIMITED.*

Carriage of Goods by Sea—Damage—Carrier's liability—Exception—Default of servants "in the management of the ship"—Management of refrigerating machinery—Sea Carriage of Goods Act, 1924 (Australian Statute)—Carriage of Goods by Sea Act, 1924 (14 and 15 Geo. V., c. 22), Schedule, Art. IV. (2) (*a*).

The exception in Art. IV. (2) (*a*) of the Carriage of Goods by Sea Act, 1924, which protects the carrier from liability for damage resulting from an act, neglect, or default of his servants "in the management of the ship," does not cover a default in the management of refrigerating machinery.

This was an action in which the plaintiffs, Foreman and Ellams, Limited, claimed from the defendants, the Federal Steam Navigation Company, Limited, damages for breach of contract and/or duty in respect of the carriage of goods by sea.

Mr. A. T. Miller, K.C., and Mr. David Davies appeared for the plaintiffs; Mr. Jowitt, K.C., and Mr. G. St. C. Pilcher for the defendants.

On November 24, 1925, a quantity of frozen beef was shipped on the defendants' steamer Rimutaka at Gladstone, in Queensland, Australia, for carriage to Liverpool. The plaintiffs stated that they were owners of the beef as indorsees of the bills of lading under which it was shipped, and that when the beef was delivered at Liverpool they found that it was in a "mouldy, perished, broken, dirty, and discoloured" condition, and they claimed damages.

The bills of lading were subject to the Australian Sea Carriage of Goods Act, 1924, the material provisions of which were identical with those of the corresponding British Act. The plaintiffs alleged that in breach of Article III., Rule 1, of the Schedule to that Act the defendants had not exercised due diligence to make the vessel seaworthy and fit to carry the particular cargo. They also alleged that there had been unreasonable deviation and delay in the course of the voyage, which had taken more than twice the usual time, and that therefore the defendants could not rely on the exceptions provided by the bills of lading.

By their defence the defendants pleaded that if the beef was delivered damaged, which they denied, the damage was due to inherent vice in that the beef was of poor quality when shipped. With regard to deviation, the ship, after loading the plaintiffs' cargo, went to a number of other Australian ports to pick up other cargo, but the defendants denied that that constituted a deviation. With regard to delay, they said that the vessel was detained in Australia owing to the strike of seamen and firemen, and that after the vessel started on the voyage the firemen practised "ca' canny," with the result that steam could not be properly maintained in the boilers. They relied on Article IV., Rule 2, (*a*) or (*q*), of the Schedule to the Carriage of Goods by Sea Act, 1924.

Mr. Miller, in opening, said that the plaintiffs were meat importers at Liverpool. When the meat in question arrived it was found to be in a bad state, and he could show that many other parcels of meat brought on that voyage from Australia for other shippers at other ports were also delivered in bad condition. The bills of lading admitted receipt in apparent good order and condition, and there was also the official certificate of inspection before shipment. That being so, he submitted that the onus was upon the defendants to show how the damage was caused and to prove that they were free from liability.

The bills of lading contained a very wide deviation clause:—

". . . with liberty either before or after proceeding towards the port of discharge to proceed to and stay at and/or return to any ports or places whatsoever (although in a contrary direction to or out of the route to or beyond the said port of discharge) once or oftener in any order . . . for any purpose whatsoever. . . . All the said liabilities, exceptions, and conditions shall apply (any warranty, implied term, custom, or rule of law to the contrary notwithstanding), although the vessel may have deviated from the contract voyage. . . ."

Another clause in the bills of lading provided that:—

"The carriers shall not be accountable for the condition of goods shipped under this bill of lading nor for any loss or damage thereto, whether arising from failure or breakdown of machinery, insulation or other appliances, refrigerating or otherwise, or from any other cause whatsoever. . . ."

Those clauses, said Mr. Miller, were so wide that they would practically leave the ship free from liability of every kind; but that would be illegal under Rule 8 of Article III. of the Schedule to the Carriage of Goods by Sea Act, 1924, and the clauses, therefore, must be regarded as of no effect.

The onus being on the defendants, Mr. Jowitt opened on their behalf. He said that after the termination of the strike in Australia the position of the defendants was very difficult. The men were in a sullen temper, many of them had been in prison, and the officers could not make them work as well as they might have worked. He submitted that the failure of the stokers to keep up steam was a neglect in the management of the ship within Article IV., Rule 2 (*a*), of the Schedule to the Act, and by the decision of the Court of Appeal in the *Gosse Millard* case (44 *The Times* L.R., 143) the defendants must be held not liable. In fact, the result of the decision in that case was, he submitted, that a shipowner who had properly stowed the goods could hardly be accountable for anything that happened to them afterwards. A large part of the meat cargo carried on this voyage was delivered in good condition, and he would call evidence to show that, in spite of all difficulties, the engineers succeeded in keeping the temperature of the refrigerators so low that, if the beef in this case had been sound when it started, it would have been sound when it arrived. The alleged deviation simply consisted in the fact that the vessel came home round the south of Australia instead of coming, as originally intended, by the northern route, because the master was afraid of the effect on the cargo of the great heat then prevailing on the northern route. If there had been a deviation the plaintiffs had not suffered any damage from it.

Evidence was then called on behalf of the defendants. The chief engineer said that the Australian coal which they had to buy was bad, and as the steamer had been detained so long owing to the strike her bottom was very dirty, and the speed was, therefore, very low. He had, however, enough steam to keep the refrigerators working properly.

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

Other evidence showed that the temperature at which the meat in question was carried was higher than usual, but that it was sufficiently low to be safe. The normal temperature for carrying frozen meat was from 16deg. to 20deg. F. Mould was due to pollen, which was on the meat at the time of shipment. White mould by itself did not damage the meat from a pecuniary point of view ; one merely wiped it off. Thirty per cent. of the plaintiffs' meat was damaged.

At the close of the defendants' case Mr. MILLER called evidence to show that other consignments of meat carried on that voyage were delivered in bad condition. Temperature should be kept at from 15deg. to 18deg. F. in the holds carrying refrigerated meat ; anything higher than 18deg. was dangerous for the meat. The cause of the damage to the plaintiffs' meat was that, after the meat was put into the hold, the temperature was not lowered quickly enough or far enough. The temperature at which meat would freeze was not known ; the freezing point of fat was different from that of lean, and the freezing point of any piece of meat would depend on the proportions of fat and lean.

At the conclusion of the evidence, MR. JUSTICE WRIGHT said that he would like Mr. Miller to address him first, but that he would like to know in outline what were the points on which Mr. Jowitt relied.

Mr. JOWITT then said that his points were : the damage was due to the condition of the meat when shipped ; the damage in fact was only slight and the defendants had done very well in getting the meat home in so good a state, considering all the difficulties and the delay caused by the strike ; the temperatures of the holds were such that the damage could not have been suffered on board ; if in fact the temperatures were insufficiently low that was due to the "ca' canny" action of the men or to an error in judgment by the engineers in not using the extra refrigerating engine, a default in the management of the ship for which, under the Act, the defendants were not responsible ; there was no deviation and there was no unseaworthiness.

Mr. MILLER contended that although there might not have been enough steam to keep the second refrigerator engine running while the vessel was at sea, the second engine might at least have been used while the vessel was in port. If it had been so used the temperature of the hold might have been got down so low that it would never have risen again sufficiently to give trouble.

As to deviation, the Act only allowed a reasonable deviation, and this was not reasonable. Management of the refrigerating machinery was not management of the ship within the meaning of Article IV., Rule 2 (*a*), of the Schedule, and the defendants were, therefore, not protected by the exception. Further, the real fault was the failure to use the second refrigerating engine, and "management" was a word which referred to something active and did not cover an omission to do something.

Mr. JOWITT replied. As to deviation, the deviation clause in the contract could not be ignored. Even if there were a deviation, which he did not admit, and it was unreasonable, which he did not admit, the parties were free under the Act to make their own contract with regard to the deviation, and here they had done so.

The meat must have been bad on shipment. The men had been on strike and were still working badly, and they probably left the meat lying exposed to the tropical sun before they put it on board. The damage was only slight. If in fact the temperatures were insufficiently low, that was due to the "ca' canny" action of the men or to an error in judgment by the engineers in not using the extra refrigerating engine, a default in the management of the ship for which, under the Act, the defendants were not responsible.

MR. JUSTICE WRIGHT delivered the following considered judgment.—In this case the plaintiffs claim as bill of lading holders under a bill of lading for refrigerated cargo dated Gladstone, which is a port in North Queensland, November 24, 1925, in respect of 697 hind quarters of ox beef which were shipped by the steamship Rimutaka in good order and condition and are described as "hard frozen" to be delivered at Liverpool. The bill of lading, which contained the elaborate series of clauses in small print which were previously common, contained also what is called the clause paramount in these terms : "This Bill of Lading is to be read and construed as if every clause therein contained which is rendered illegal or null and void by the Sea Carriage of Goods Act, 1924, had never been inserted therein or had been cancelled and eliminated therefrom prior to the execution thereof, and is issued subject to all the terms and provisions of and to all the exemptions from liability contained in such Act." That clause paramount renders it unnecessary to consider in this action any of the small print clauses except perhaps the deviation clause. The goods were marked "I.C.E.," which is the third quality produced by the Gladstone Works. On delivery at Liverpool they were found to be damaged to the extent of about 3 per cent. of the invoice value. The damage was small in amount and the proportion of damage was not large in itself, but it was made clear in the course of the action that this is only one claim, and there are other claims of a similar character in respect of refrigerated goods shipped by different shippers and some at other loading ports and of different brands. These claims amount in all to a very substantial sum.

The Rimutaka was owned by the New Zealand Shipping Company, but on the voyage in question was operated by the Federal Steam Navigation Company, Limited, who are the actual defendants and who were putting this vessel as a cargo liner on their line, which is known as the Federal Line. According to the cargo plan there are four insulated holds, of which Nos. 1, 2, and 3 are refrigerated by what is called the battery system, which means that dry cooled air is driven in at the bottom of the hold and sucked out at the top, and in that way it removes part of the heat in the holds and reduces the temperature. The fourth hold, which is abaft the engine space, is refrigerated by a different system, the brine system, but no question in connexion with that hold arises in this action. I have noticed, though I was not referred to it at the trial, from the plan that there is a small ship's chamber which appears to be insulated, but no evidence has been given and no point has been taken as to that chamber, which is obviously very small, relatively to the refrigerated holds.

The plaintiffs' cargo was stowed at the bottom of Nos. 1 and 3 lower holds. The Rimutaka was generally employed on the New Zealand service, loading in New Zealand ports and going to Europe by means of the Panama Canal. The voyage on which she was engaged at the time in question was, therefore, somewhat unusual so far as she was concerned. It was also unusual in other and important respects. The original intention was that she should leave Sydney on August 22, 1925, and she was then booked to proceed to various North Queensland ports and to return to Sydney after completing loading and start from Sydney to European ports of discharge by September 29, 1925. She left Sydney in fact on

August 19, 1925, having taken there 557 tons of bunkers and, I think, some cargo, and she reached Brisbane on August 21, but there she was held up by a strike, and was actually detained until November 1. She then went to Newcastle, New South Wales, where she took 1,385 tons of bunker coal, and then sailed for Gladstone, where she arrived on November 15. She there took in a considerable quantity of refrigerated cargo, including the parcel in respect of which this action is brought, from the Gladstone Works, who are a well-known freezing company at that port. On November 26 she went back to Brisbane, apparently to procure coal. She, apparently, only took 188 tons and that was of poor quality. She left Brisbane on December 5, went to Port Alma, and loaded a refrigerated cargo there, being in that port from December 7 to 11. She then proceeded to Cairns, which is the most northerly port of loading, to lift further refrigerated and other cargo, and remained there from December 14 to December 23. At that time it was intended that she should proceed on her voyage by the northerly route, which is by the Torres Straits and Batavia. She went from Cairns to Townsville, which was going back on her course, but, as I see from the papers in this case, proceeding so was rendered necessary by questions relating to her draught. She was at Townsville from December 24, 1925, to January 7, 1926; there she loaded a considerable quantity of cargo and also took 705 tons of bunkers. At Townsville an important decision was taken on the advice of the master. His view was that it was necessary to change the vessel's route from the northerly route and, instead of that, to go south, that is to say round the south coast of Australia, which means down the Australian Bight, and then proceed to Colombo and so on to the Mediterranean through the Suez Canal. The reason for that decision was that there was very great heat at the loading ports and it was found that great difficulty was experienced in keeping the temperatures down in the refrigerated holds. These North Queensland ports are in the tropics, and the season was midsummer. The shipping season for frozen meat generally ends somewhere about September, though indeed, as appears from a list put in on behalf of the defendants, it is not by any means unexampled to load frozen refrigerated cargoes in those North Queensland ports in December or January. From Townsville the vessel went south to Sydney, where she arrived on January 13 and took in 1,304 tons of coal. She then proceeded south of the Australian coast, called at Albany, Western Australia, on January 24, and took 200 tons of coal. She then went to Colombo, where she again coaled, and then Port Said, where she took in further coal and discharged some cargo, and then discharged at Trieste, Genoa, London, Antwerp, and finally at Liverpool, where she arrived on April 12, 1926. The voyage included many ports of loading and discharge, but it is not suggested that in the main it was not such a voyage as would reasonably be expected in the case of a cargo liner engaged in this trade. Such a vessel would normally go to a considerable range of loading ports in order to fill up and a considerable range of discharging ports in order to discharge her various parcels of cargo. There could be no idea in the case of such a vessel of proceeding from the port at which she loaded for a shipper a particular parcel to the discharging port for that particular parcel, and a shipper who demanded any such course would have to pay a freight which would be entirely prohibitive, and indeed, in ordinary shipping business, there is no idea of any such requirement. The plaintiffs, therefore, do not complain in general of the course which the voyage took, nor do they complain that the original intention to proceed north about was changed to a voyage round the south of Australia. They have, however, put forward a plea of deviation and, as I understand it, all that remained at the end of the case of that plea consisted of two matters. I disregard the fact that the voyage was very long, because that depended on other circumstances and, I think, constitutes on the facts of this case no deviation. They rely, I suppose, under that plea on two circumstances, one, that the vessel proceeded to Brisbane after the plaintiffs' cargo was loaded. That, however, was not pleaded, and the pleadings have not been amended, the defendants saying that they had prepared no evidence on that point. The other complaint which, as I understand, remains under this head is that the vessel went to Cairns before she went to Townsville to load and did so at a time when she was intended to proceed by the northerly route. The captain was not called, being away on another voyage, but his letters were read in evidence, and I find in these letters, and particularly in the telegram of November 25, 1925, the explanation of that course, and that is that if she had loaded the substantial part of the cargo which she was booked to load at Townsville it would not have enabled her to proceed to Cairns and to load. I find, therefore, that there was no unreasonable deviation under the Sea Carriage of Goods Act, which deals with deviation by Article IV., paragraph 4. In fact, as it turned out, proceeding from Cairns to Townsville was on the line of her route when it was decided that she should go south. That decision, however, was only made at Townsville, but the fact of that decision would in any case, I think, prevent any damage from being recovered in respect of that course being taken, even if I thought it was an unreasonable deviation. The words of the Act about deviation are far from clear and many questions will no doubt some day have to be decided upon them. In particular the expression "reasonable deviation" may give rise to considerable difficulties. I think it is clear that a deviation would not be reasonable merely because it was convenient to the shipowner. Its reasonableness must depend upon what would be contemplated reasonably by both parties having regard to the well-known exigencies of the route, known, or assumed to be known, to both parties, and I think in this case that shippers on a cargo liner of this type must be deemed to have known the circumstances of mercantile geography, such as the position as to the amount of water available at Cairns and the probable draught of a vessel of this type, and it is on that ground that I do not think the deviation here, the only deviation which I think is before me, can be regarded as unreasonable. In addition to that, account would have to be taken, I think, of the various terms in the deviation clause. The deviation clause here is very wide and I think too wide to receive complete effect in every part, because every deviation clause must be construed with reference to the contemplated adventure. But I think that the language which gives "liberty to proceed to and stay at, and/or return to any ports or places whatsoever (although in a contrary direction to, or out of the route to or beyond the said port of discharge) once or oftener, in any order, backwards or forwards, for the purpose of dry docking (even with cargo on board) or loading or discharging cargo, coal or passengers, or for any purpose whatsoever" ought to receive a reasonable construction in view of the ordinary methods of voyaging adopted by a cargo liner on an adventure of this character, and quite apart from what I have said as to the reasonableness

of calling at Townsville, I think calling at Townsville would also have been justified as reasonable having regard to the terms of the deviation clause which I have read. I hold, therefore, that there was no unreasonable deviation and it is, therefore, unnecessary for me to consider what, under the provisions of the Act, would be the effect if there was a deviation which, in the words of the Act, constituted "an infringement or breach of these rules or of the contract of carriage." As I have said, the voyage here was very protracted; in the case of this particular parcel it lasted for four and a half months from the time of loading. But that was due to a series of difficulties and to the low speeds at which the vessel was proceeding, and, as I have said, such delay in my judgment did not constitute an unreasonable deviation. In any case, the evidence is that, with proper temperatures in the hold, the length of time during which the voyage continued would cause no damage to the cargo. It is not suggested by either side that the ship was unseaworthy in any respect, the plea which the defendants had put on the record having been definitely abandoned.

What then was the cause of the damage to this cargo? In the end there are two theories put forward. The plaintiffs say that the temperatures in the hold were too high and were not uniform enough for the safe carriage of this cargo. The defendants say that the damage was due to the character of the meat when it was shipped, namely, that it was of low grade, and they rely on inherent vice under Article IV., 2 (*m*) of the Act. The damage on arrival was mould, and by that is meant white mould. The meat was perished and discoloured, the lean portions being dark brown and spongy and the fat pale and rancid. I have heard a good deal of evidence on this point but I find that the evidence relied upon by the plaintiffs is right. I accept in particular the evidence of Mr. Roland Clarke who surveyed the cargo on arrival and, as I find, made the survey in a reasonable and fair way and on a fair and customary sample. The mark "I.C.E." is a well-known brand of refrigerated meat. It is the third or lowest quality of the shippers. It is, however, a generally good class and to a large extent it consists of good quality meat which has become bruised and therefore has had to be scraped or partly cut off. It may be that some part of it is rather lean. The bill of lading says that the meat was shipped in apparent good order and condition or hard frozen. It is true that it was loaded in very hot weather and in that way perhaps there was some surface thawing. That, however, would not be extraordinary under such circumstances and is a matter which I think should be dealt with in the holds. The Freezing Certificates which accompanied the shipment referred to it as certifying that it was shipped "in good condition, properly dressed, cooled, and frozen . . . and the period between the time the meat was received into the freezing chambers and shipped per the Rimutaka did not exceed 90 days," and that the meat was despatched direct from the works to the ship. There is also a Government Certificate, but I disregard that because it seems to me rather to refer to the condition of the meat at the time when its preparation was completed than to its actual condition on shipment. I say no more about that. It appears on evidence put before me that such damage as was experienced as regards this parcel was not peculiar to this parcel but that similar damage was found in goods loaded by different shippers at different ports in different holds and of different qualities. On the whole I accept the evidence that the damage was due to the meat being carried at excessive temperatures and with excessive variations of temperature and I find that there is no ground for attack on the quality of the meat as responsible for the damage and no relation between the quality or condition of the meat on shipment and the damage ascertained on discharge. But excessive and irregular temperatures would, in the absence of unseaworthiness, which is not alleged, or some maritime casualty, which is not suggested, *prima facie* indicate some negligence or default in the care of the cargo on the ship, because the primary duty in carrying refrigerated cargoes is to maintain proper temperatures. In fact it is scarcely disputed that the temperatures on this voyage shown by the refrigerating logs were higher than customary, that is to say, up to Suez where they first became normal. The Captain wrote various letters from time to time which I think throw light on the feelings of those on board on this matter. The chief engineer who gave evidence gave some opinions somewhat at variance with these contemporaneous documents, but I think great weight must be given to the letters which were written at the time. No doubt the Captain writing about the temperatures in the holds would do so on the intimation of the chief engineer and after consultation with him. He wrote: "The temperatures in all holds came down to about normal after leaving Port Said, the sea and air being then colder." Before that they had not been normal, but a source of great anxiety to the Captain and engineer, at least whenever the sea temperatures were high, as appears from the Captain's letters. Thus at Cairns on December 17, 1925, the Captain wrote: "The refrigerating engine is only holding its own with the temperatures from 18deg. to 22deg. F." At Townsville the Captain gives the temperatures and adds: "The machine is just holding its own." That no doubt was in high temperatures, but the ship undertook to carry the cargo under the conditions which actually prevailed. At Townsville again the Captain writes and presses to be allowed to go by the southerly route. He writes again from Sydney that "due to the very high temperature of sea water and air" they could not bring the temperatures below an average of 20deg. F. "thereby running a great risk of the cargo going bad." Then he adds: "Refrigerator. This machine has done well. To time of ship sailing from Townsville it had been running for nearly five months," and then he says that but for the strike they would have loaded three months earlier "and no doubt the refrigerator would have been able to contend with the work required." He further referred to the coal which, as I explain below, does not appear to me to be material. At Albany on January 24, 1926, in cooler water he says: "The temperatures of the frozen meat holds are in a safe condition, being at an average of 16deg. to 17deg. F." They rose again, however, to an average of 18deg. with certain temperatures of 20deg. or 22deg. in some holds when the ship was in the Indian Ocean. At Colombo it is reported that the refrigerator is working well and holding its own at an average temperature in the hold of 18deg. F. A careful chart of the temperatures during the voyage up to Suez, as shown in the refrigerating logs, has been prepared by the plaintiffs. It gives as the margin of safety 18deg. F. and takes a lower limit of 16deg. F., and shows that the lower thermometers in the holds were sometimes above these temperatures and the upper thermometers were constantly considerably above that range of safety. It is agreed that this is the proper range. The chief engineer in the correspon-

dence said that the thermometer readings at 22deg. or 23deg. F. caused him anxiety, and he also said in evidence that 15deg. F. was the proper carrying temperature and that he aimed at that or at 16deg., and that the actual temperatures were generally higher than normal and higher than what he would desire. It is, however, clear on the evidence that a piece of meat will be safe, if hard frozen to start with, if kept at 27deg. F. for lean meat and 22deg. F. for fat. This may appear to be at variance with what I find to be the recognized requirement, that the safe temperature should be about 15deg. or 16deg. F., with a danger limit of 18deg. F. Mr. Swainston says that this margin of safety is provided in case of a breakdown. That is to some extent true, but I think it is not the whole truth. I think the true explanation is that the temperatures shown on the thermometers cannot be relied on to show the temperatures throughout the hold or affecting large portions of meat in the hold, perhaps not even the correct temperatures at the bottom of the hold. In each hold there are twelve thermometers suspended, six at the top and six at the bottom. These thermometers are all eight feet from the outer side of the ship, or rather, I should say, of the insulation, and they are about one and a half feet from the bottom of the holds, or bottom of the insulation, and one and a half feet from the top, and they are fifteen feet or so apart. Between the thermometers and the side of the ship, and between the thermometers and the bottom of the ship, there is a risk of greater heating because those parts are nearer the water which may be at high temperatures. There is also a risk of hot pockets affecting pieces of cargo and of varying air currents, and, further than that, as you go higher in the hold the temperatures will become higher. For instance, the temperature shown by a thermometer one and a half feet above the bottom of the hold may be lower than the temperature even two feet above that. It is, I think, because of these reasons that 16deg. F. or thereabouts is generally taken as the safe limit, because that ensures that no piece of cargo can be dangerously higher. The main cause of damage was, as I find, that adequate steps were not at once taken, whenever the holds were closed down after loading, to reduce the temperatures and taken in proper time. The vessel had two refrigerating machines which were used alternatively or simultaneously. But, in the actual facts of the case, only one was ever used on the voyage. It worked at full capacity and it worked efficiently. That would, no doubt, have sufficed for the ordinary course of the voyage if the course, as I understand, recommended by Mr. Swainston as a wise precautionary measure had been taken, namely, to put on the second machine for a short period until the temperatures came down each time after loading and after the hatch covers were put on. Mr. Williams, the plaintiffs' principal expert, also said that the second machine should have been put on along with the first at that time, and Mr. Daniels also agreed. The reason given is that during loading, and especially in hot temperatures such as existed during this voyage on loading, the temperatures in the hold must rise ; indeed, the men will not work unless the temperature is brought up to, say, 20deg., and at the top of the hold it may rise to 30deg. or more. Furthermore, in hot weather meat, even if hard frozen in the proper sense of the term, may have superficial thawing and moisture, due to temporary exposure to the atmosphere. If there is such moisture on the meat, pollen, which is always present in the atmosphere, will settle upon it and white mould will develop unless the surface moisture is frozen before the pollen can germinate, which would be in about 24 or 48 hours. Rapid freezing of this surface moisture will stop germination and prevent mould, and once the temperatures are reduced quickly after closing the hold a single machine will cope sufficiently with the situation, and, as I find, would have coped sufficiently with the situation on this ship. Mr. Williams thinks that in that way the two machines would sufficiently cool the air and freeze the surface moisture in 24 hours. Even if it took longer, as Mr. Swainston seems to think (though his estimate of nine days refers to more complete cooling), and steam was not available in sufficient quantities both for driving the ship and working both refrigerating machines, the ship could have been kept in port, as indeed Mr. Swainston seems to think, until the temperatures were sufficiently down. She was not going at express speed, and a few days longer on such a voyage would not have made much difference. In any case, the ship's duty was to preserve the cargo. I hold that the chief engineer was guilty of an error of judgment in not taking these precautions, that is to say, in not putting on the second machine, as these precautions, I think, would have prevented the damage which the cargo suffered. The chief engineer impressed me as a capable and zealous officer and he was a most fair and candid witness, though some of his opinions I do not accept. His error of judgment was, I think considering all the circumstances, venial, especially considering the difficulties in which he had been placed by the strike, the heat due to the postponement of the voyage, and possibly troubles with the firemen and with the bunker coal. He had been accustomed to the New Zealand trade and found himself in conditions which were somewhat novel to him. All the same, I find that his error of judgment constituted a failure to exercise due care in the custody of the cargo. Much was said about the firemen who may have been rather slack by reason of discontent at having been worsted in the strike, though I feel that enthusiasm in firemen in the stokehold of the Rimutaka under the tropical conditions prevailing was very much to expect. I am sure that the engineers did their best to keep them up to their work. As to the coal, the chief engineer said that he did not find fault with some of the coal, but the Brisbane coal, which was bad, only consisted of 188 tons. Much of the other coal was excessive in ash, and none of it was as good as English or Welsh or even New Zealand coal. The ship's speed was poor, at times very poor. The chief engineer put the ship's speed with Australian coal at ten and a half knots, no doubt on the high side, not making allowances for head winds or difficulties of that type. The vessel's bottom at this time was very foul, and allowance has to be made for head winds and currents as well as for the usual cleaning of the furnaces in each watch, which obviously reduces the speed while it goes on. It was said that that source of delay was more than usual on this voyage owing to the high percentage of ash in the coal, but the chief engineer always had steam enough, though he was economising his steam, to work one refrigerating machine to its full capacity and to put on the other if he did not stop in port until he got the temperatures down, as it only reduced the speed from one-half to one knot. His lowest speeds on the Australian coast after leaving Brisbane averaged for the day over 6.63 knots with three exceptions of 6, 6.49, and 6.27 knots. Apart from that the average daily speeds up to Sydney were between 7.12 and 9.21 knots. There are at most only about five days

when, allowing even one knot loss of average speed for the second refrigerating machine, the ship, with the two refrigerating machines working, would not have done the six knots which the chief mate said he "pretty well" wanted in going down the Barrier Reef. It might have been necessary to wait a few hours to get the temperatures down by the second machine at Gladstone, Brisbane, or Port Alma, though I am not satisfied as to that, but not at any later port. However that may be, if it was necessary to wait, then I think it was a proper and necessary step to take for the preservation of the cargo. In truth, the chief engineer, as he candidly said, never thought of putting on the second refrigerating machine except when they contemplated going by the Torres Straits. Apart from that he said he did not put on another refrigerating machine because he did not think it necessary, but he could have done so if he had considered it necessary. I am not disposed to blame him, but I hold that he committed an error of judgment and that that error, in my opinion, caused the damage to the cargo. For that, in my judgment, the defendants are liable unless they succeed in their defence in law, and for that defence they rely on the exception contained in Article IV., Subsection 2 (*a*), of the Sea Carriage of Goods Act.

It thus falls to be decided for the first time under the Sea Carriage of Goods Act, 1924 (I treat the Australian Act as identical with the British Act), what is the extent of the shipowner's obligation where refrigerated cargo during its carriage on shipboard is damaged by the negligent management of the refrigerating machinery by the shipowner's servants. Article III., 2, is in these terms, "Subject to the provisions of Article IV., the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." Article III., 8, provides that, "Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connexion with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect." It is clear that the obligation to carry, keep, and care for the goods between stowage and discharge is to be performed not by the carrier personally but by his servants, especially those on board the ship during the voyage. A refrigerated cargo depends for its preservation on being carried in insulated holds, kept at the proper temperatures by the due and proper management of the refrigerating machinery. The putting into further insulated holds appertains to the loading and stowage. Until discharge practically the whole duty as regards the proper caring for the cargo as such is summed up in the due management of the refrigerating machinery so as to maintain correct temperatures. Article III., 2, is, however, subject to Article IV., which is in the nature of an exception clause. The only relevant "exception," to adopt the expression of Article IV., 2 (*q*) is Article IV., 2 (*a*), which is in the following terms, "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship." It is apparent that if "management of the ship" here includes management of the refrigerating machinery resulting in improper temperatures in the hold to the detriment of the cargo, there is in effect nothing left of the obligation properly to care for such a cargo under Article III., 2. On that view in effect the exception is a general negligence exception, but in the absence of very clear words where words of positive obligation are subject to words of exception, the presumption is that the exception is narrower than the obligation. Refrigerated cargoes are of sufficient importance to call for special reference in Article III., 1 (*c*), but indeed the contention that management of refrigerating machinery is included in the phrase "navigation and management of the cargo," is only part of a general contention that the phrase is a general exception of any negligence in the care of the cargo where such care depends on the "management" of any appliance or part of the ship provided for or adapted to the care of the cargo, such as pipelines and pumping appliances, in the case of liquid cargoes, ventilating appliances, and any special appliances or parts of the ship, such as ventilators, ventilating fans and pumps, the due handling of which is necessary for the proper care of the cargo. In many cases of particular cargoes the effect of the suggested construction of the exception is entirely, and in other case, largely, to neutralize the positive obligation properly to care for the cargo. No doubt the obligation is "subject to" the exception, but it is necessary to construe the words of the obligation and of the exception together so as to decide if the words of the latter are explicit enough to justify the effect which is contended for. These questions are not limited to caring for the goods during carriage, but also arise in reference to loading and discharging, which operations may be performed by means either of shore cranes or of the ship's derricks and winches. To say that "navigation and management of the ship" includes management of any part of the structure of the ship, even if only used for cargo purposes, would mean that the shipowner would be relieved of liability for damage to cargo caused by the negligent handling of the ship's derricks and winches, and relieved of any obligation by his servants to care for the same, whereas if identically the same operation was carried out in loading or discharging with the same negligence by shore cranes he would be liable —a somewhat anomalous distinction.

Apart from authority, which I shall consider later, I do not think the scope of Article IV., 2 (*a*), is as wide as the defendants contend, or is so wide as to cover negligence in the due performance of the obligation to care for the refrigerated cargo by keeping down the temperatures in the hold by means of the refrigerating machinery. A negligence or exception clause in a statute, as in a contract, ought, I think, to be strictly construed. The words of Article IV., 2 (*a*), appear to be connected with matters directly affecting the ship as a ship, and not with matters, affecting exclusively, or even primarily, the cargo, even though such latter matters involve the user of parts of the ship. The word "navigation" is clearly only applicable to the ship as such, and I think the more general word "management" should be read as *ejusdem generis* and the word "ship" should receive the same connotation with each of the substantives on which it is dependent, the word "management" covering many acts directly affecting the ship which could not well be covered by navigation. The words of the exception are not "in the navigation or in the management of the ship or of any part of the ship necessary for the proper and due care of the cargo," nor are the words, to put it differently, "in the management of the cargo by the use of the ship's parts or appliances." I see no difficulty in the broad demarcation of the distinction I have just indicated, though there may be border line cases. The distinction is (to adopt the words of Lord Justice Stirling in *Rowson v. Atlantic Transport Co.*, 19 *The Times*

L.R., 668 ; [1903] 2 K.B., 666, at p. 682) between negligent acts which have to do with the general management of the vessel and negligent acts which have to do with the management of a portion of the vessel appropriated to the cargo. A modern steamship is not only a complicated steel structure of frames, girders, and plates, but contains complicated machinery such as propelling engines and boilers (which have supplanted masts, sails, and rigging), steam steering gear, ballast tanks and pumps and elaborate piping. Negligence in handling these directly affects the ship in its essential functions of floating, being water-tight, being steered and navigated safely and correctly. If a ship is stranded or sunk, if the sea connexions are improperly opened, and so on, there is a fault in navigation and management which directly affects the ship, but there is also, in so far as the cargo is thereby damaged by such negligence, a breach of the obligation to care for the cargo, and it is to such negligence in my opinion that the exception of Article IV., 2 (*a*) applies. On the other hand many modern steamships like the Rimutaka have holds which are insulated and which can be cooled by elaborate refrigerating machinery and apparatus. All this constitutes parts of the ship and of its equipment, but these are solely provided for the care of the special cargo. The ship can, as a seagoing vessel, be safely and efficiently navigated and managed even though the refrigerating equipment is in disorder and the cargo perishing. This equipment is not in use at all on voyages where no refrigerated cargo is being carried. The same is true of the elaborate system of tanks, pipes, and pumps necessary for the carriage of fuel oil. I take these illustrations as sufficient to indicate the distinction between navigation and management of the ship on the one hand and management of the cargo on the other. There are also some parts of the ship which for this purpose may be regarded as *ancipitis usus*, for instance, the hatches may in one aspect be regarded as part of the outer skin of the vessel, as when decks are actually or potentially swept by seas, so that the proper battening down of the hatches with tarpaulins and cleats is as much a part of the management of the ship as the closing of port holes. Under other circumstances as in dock or in calm waters the hatches belong to the management of the cargo, either because they have to be removed for ventilation or kept tight to keep wet from perishable cargo. Similarly ship's derricks and winches may be used for ship's purposes so as to appertain to the management of the ship.

The construction I have ventured to propound must depend on the precise words of this Statute, reading all parts together, but it is, I think, generally in accord with the cases decided on the words "navigation and management of the ship" contained in the American Act of Congress, 1893, generally known as the Harter Act, which in the Courts of the United States has been construed as a statute, and in the Courts of this country as having contractual force when embodied in the bill of lading. The distinction explained above has in such cases (with perhaps one exception) been drawn. The Harter Act contains two clauses prohibiting in contracts of affreightment the insertion of clauses relieving the shipowner from liability for proper care in regard to the cargo or lessening his liability to exercise due diligence to provide a seaworthy ship. In the third clause it gives a conditional statutory exception of (*inter alia*) "faults or errors in the navigation or in the management of the vessel."

Of the English authorities I may refer to two decisions of Divisional Courts in Admiralty. In *The Glenochil* ([1896] P., 10) goods were damaged by water geting into the hold through a broken pipe when the ballast tank was being pumped up to trim the vessel. That was held to be management of the vessel, though not navigation. Mr. Justice Barnes said : "There will be found a strong and marked contrast in the provisions which deal with the care of the cargo and those which deal with the management of the ship herself." In *The Rodney* (16 *The Times* L.R., 183 ; [1900] P., 112), the boatswain in order to rid the forecastle of water during heavy weather, in clearing a pipe poked a hole by which seawater got into the hold, and it was held to be an act of management of the ship. Mr. Justice Barnes said : "The words 'faults or errors in the management of the vessel' include improper handling of the ship, as a ship, which affects the safety of the cargo." In neither of these cases had the act done any direct or indirect reference to the cargo ; in each case the continuity of the ship's defences against the inlet of seawater was interfered with. Certain American decisions do exemplify cases where parts of the ship have been used solely or primarily for the care of the cargo and where these acts have not been held to constitute acts in the management of the vessel but acts in the care and custody of the cargo. In the case of *Andean Trading Company v. Pacific Steam Navigation Company* (263 Fed. Rep., 559), the Circuit Court of Appeals (Federal) New York held that damage to cargo due to hatches being improperly left open for ventilation was not an act primarily "connected with the navigation or management of the vessel and not with the cargo." They adopted this mode of expressing the differentiation from the Supreme Court decision in the case of *Knott v. Botany Mills* (179 U.S., 69), where cargo stowed in the fore part of a hold was damaged by drainage from cargo stowed aft of it, the ship being put slightly down by the head so as in no way to affect her seaworthiness. That was held to be neglect in the care of the cargo and not in the navigation or management of the vessel. In the case of *The Jean Bart* (197 Fed. Rep., 1002), a failure to make during the voyage proper use of ventilating apparatus so that cargo was damaged was held not to be an act in the management of the ship, but a failure in proper care of the cargo. In the case of *The Germanic* (196 U.S., 589), the Supreme Court again adopted the limitation of the exception of faults in management of the ship to "faults primarily connected with the navigation or management of the vessel and not with the cargo." The application of the principle to the facts in that case was somewhat striking.

There are two earlier authorities dealing with the care of refrigerated cargoes, one in this country, the case of *Rowson v. Atlantic Transport Company, per* Mr. Justice Kennedy (19 *The Times* L.R., 67 ; [1903] 1 K.B., 114) and in the Court of Appeal (19 *The Times* L.R., 668 ; [1903] 2 K.B., 666), the other in America, the case of *The Samland* (7 Fed. Rep., 2nd Series, 155). In *Rowson's* case (*supra*) Mr. Justice Kennedy held that want of due diligence in the user of the refrigerating apparatus was "negligence in the management of the ship of which that machinery is a part" (at p. 117). He seems to arrive at that conclusion by considering that the original fitness of the refrigerating machinery is necessary to constitute the ship seaworthy, in the artificial sense of being fit to carry the special cargo. In the Court of Appeal the gist of the argument on behalf of the owners of the goods may be found in the following passage from the report in [1903]

2 K.B., at p. 671 : "Attending to refrigerating machinery cannot be said to be included in the management of the ship merely because it happens to be bolted to the ship and is operated by the ship's engines. It may be that on a particular voyage the machinery may not be required to be used at all. It is essentially an arrangement for the care and custody of the cargo, and the shipowner can only escape liability for his negligent default as regards such care and custody by clear, definite, and express language : mere words of general exemption are insufficient to protect him. Here the successful carriage of these goods depended upon the refrigerating machinery being kept in good working order." The Court of Appeal, while affirming the decision of Mr. Justice Kennedy in the result, did so on the limited ground that the refrigerating apparatus and machinery was not merely used for purposes of the cargo but also for cooling the ship's provisions. The most careful judgment is that of Lord Justice Stirling who quotes with approval the expressions of the Court to be found in the judgment in *The Glenochil* (*supra*) and *The Rodney* (*supra*). The learned Lord Justice draws a distinction between a negligent act which had nothing to do with the general management of the vessel but simply with the management of a portion of the vessel which was exclusively appropriated to the care of the cargo. Lord Justice Vaughan Williams at page 675 says : "What . . . is the meaning of the words 'in the management of said vessel'? I say they mean in the management of the said vessel *qua* vessel." He adds, on the hypothesis that the refrigerating apparatus was solely for the cargo, "I should, I think, not have been able to persuade myself to come to the conclusion that mismanagement of that special apparatus was a mismanagement of the vessel." No such distinction arises in the Rimutaka. It is true that the plan shows a ship's chamber apparently insulated, but it is shown as empty and no point was taken or evidence given that it was refrigerated on the voyage or at all. The ground of distinction is, I venture to think, somewhat artificial and would enable shipowners, by adding an insulated cool chamber for the ship's provisions and keeping them refrigerated, essentially to change the ambit of their obligation to care for refrigerated cargo, and thus escape liability. The ship's chamber must be almost negligible in size compared with the refrigerated cargo holds. I respectfully think that the matter should be dealt with on a broader ground. The limitation in question has not been approved in the United States, see the case of *The Samland* (*supra*), where it was held that failure properly to control the refrigerating appliances was not a fault in the management of the vessel. The Judge said of *Rowson's* case (*supra*) : "This case, however, has not been followed by Judge Dietrich in *The Jean Bart* (*supra*), and the Circuit Court of Appeals in this (New York) Circuit in *Andean Trading Company v. Pacific Steam Navigation Company* (*supra*)." It is clearly established that section 3 of the Harter Act is limited in its application to faults "primarily connected with the management of the vessel and not with the cargo." I may add that even if the provision of refrigerated food for the crew is equalled with the provision of fuel for the propulsion of the ship, so that the refrigeration of the ship's chamber forms part of the management of the ship, and the same refrigerating machinery is used for the crew's food and for the cargo, these facts ought not to affect the conclusion that, *quoad* the refrigeration of the cargo holds, it is the management of the cargo and not of the ship which is involved. But the point does not arise in this case.

There remain to be considered two decisions of the English Court of Appeal under the Carriage of Goods by Sea Act of 1924. In *R. F. Brown and Co., Limited v. T. and J. Harrison* (43 *The Times* L.R., 633) goods had been stolen during discharge by stevedore men. It was contended for the shipowners that they were exempted from liability for the theft by Article IV. 2 (*a*) of the Act as being a default in the management of the ship. Lord Justice Bankes quotes and relies on the various English and American decisions under the Harter Act and applies their principles to the words of the statute in the case before him. Lord Justice Atkin, however, while agreeing with Lord Justice Bankes, adds this caution. He refers to the fact "that at the present day a part of the proper equipment of cargo-carrying ships is very largely concerned with appliances for the safe carrying of the cargo, appliances that have nothing to do with the navigation of the ship but have everything to do with the safety of the cargo, and among other things one would mention in particular the refrigerating machinery." He adds in conclusion : "For my part, at the present moment, I have a difficulty in seeing, if there was a defect in the management of those appliances in the ship which are an essential part of the ship, that that would not be a defect in the management of the ship." It is, I think, clear that the learned Lord Justice is not committing himself to any final expression of opinion. The point was not before him and I do not know what authorities were cited. I need not say how carefully I have considered even the tentative opinions or questioning of the Lord Justice, but I do not conceive I can be bound by it.

The other case is *Gosse Millard, Limited v. Canadian Government Merchant Marine, Limited* (44 *The Times* L.R., 143). In that case the Court of Appeal by a majority reversed the decision of the trial Judge who had held that damage to perishable cargo in the ship's hold by rain water, while the ship was in dock, through the hatches or tarpaulins not being properly attended to for the protection of the cargo, fell within Article III., 2, and did not fall within the exception of Article IV., 2 (*a*). There was some difference of opinion in the Court of Appeal. Lord Justice Greer agreed with the Judge in the view he had taken of the facts, whereas Lord Justice Sargant differed on the facts, but both seem to assume that management of the hatches is not necessarily management of the vessel. Lord Justice Scrutton, however, who agreed with Lord Justice Sargant that the appeal should be allowed, did so on the express ground that any user of any part of the ship, even if solely directed to the benefit of the cargo, came within the exception of Article IV., 2 (*a*). He says in terms : "Negligent management of the propelling machinery, which is hardly 'navigation,' and negligent management of the refrigerating or ventilating or pumping machinery, seem all equally to be management of the ship." The Lord Justice would clearly decide this case in a contrary sense to what I am now deciding. As his opinion was not necessary for the decision of the case, and as the other Lord Justices did not express the same opinion, I cannot treat it as binding upon me. I need not say with what anxiety and diffidence I have expressed a view different from that of the learned Lord Justice, but as the question is of vital importance for shippers and receivers of refrigerated cargo and for shipowners, and now arises for the first time under the Act, I

have felt it my duty to form and express my own opinion.

In my opinion the exception does not protect the shipowner in this case and in the result the plaintiffs will recover the amount of their damages.

[Solicitors—Messrs. Thos. Cooper and Co., for Messrs. Hill, Dickinson and Co., Liverpool; Messrs. William A. Crump and Son.]

Chan. Div. (Clauson, J.) 1928. Jan. 27.

WING AND OTHERS v. BURN AND OTHERS.*

Action (Cause of) — Association — Action by representative plaintiffs — Affiliation — Cancellation — Claim for damages—No deprivation of any right of property—Statement of claim struck out.

The defendants, Mr. A. J. Burn, Mr. C. de La Quintana, and Mr. Percy Longhurst, who were sued on behalf of themselves and all other members of the National Amateur Wrestling Association, asked by this motion that the statement of claim delivered in the action on December 9, 1927, by the plaintiffs, Mr. A. M. Wing, Mr. J. C. Wright, and Mr. W. E. Dowling, suing on behalf of themselves and all other members of the Lancashire County Amateur Wrestling Association, should be ordered to be struck out as disclosing no reasonable cause of action, and that the action might be dismissed, with costs.

The plaintiffs and the defendants were the vice-presidents, honorary treasurers, and honorary secretaries of their respective associations. The Lancashire Association was affiliated to the National Association on November 8, 1923, subject to the payment of the annual subscription of three guineas. On April 22, 1927, the National Amateur Wrestling Association passed a resolution cancelling the affiliation of the Lancashire Association on the ground that they had refused to recognize the authority of the National Association.

In the statement of claim the plaintiffs denied that they had refused to recognize the authority of the National Association. They said that they arranged championship competitions in Lancashire for July and August, 1927, the bantam-weight, feather-weight, and light-weight championships and the welter-weight championship; that the organizing body in each case undertook to pay the fee to the Lancashire Association of 12 guineas, a total sum of £50 8s.; that the National Association proclaimed those meetings as unregistered meetings, and gave notice that the affiliation of the Lancashire Association had been cancelled. By reason thereof the championship competitions so arranged could not be held.

The plaintiffs claimed an injunction restraining the defendants from cancelling the affiliation and a declaration that such purported cancellation was illegal, *ultra vires* and contrary to natural justice, and the sum of £50 8s. by way of damages, and general damages.

Mr. Meyrick J. L. Beebee appeared for the defendants and Mr. J. W. F. Beaumont for the plaintiffs.

MR. JUSTICE CLAUSON, in giving judgment, said that the plaintiffs had previously claimed an injunction before him, and on that occasion he had decided that the matters in respect of which an injunction was claimed were of such a character that, having regard to the law as stated by Sir George Jessel, Master of the Rolls, in *Rigby v. Connol* (14 Ch.D., 482), the Court would not grant an injunction as the plaintiffs were not seeking to enforce any right of property or something for which they had paid any value. The plaintiffs had now put in a statement of claim, and claimed £50 8s. by way of damages. Having regard to the decision in *Markt and Co. v. Knight Steamship Company, Limited* ([1910] 2 K.B., 1021), he was bound to hold that no claim for damages in such a case as this could be made by representative plaintiffs such as were suing here, and that that was applicable also to the claim for general damages.

The plaintiffs, as representatives of the association, had not proved that they were deprived by any action of the defendants of any right of property. As the pleadings stood, therefore, there was no cause of action, and the statement of claim must be struck out, but he was not prepared to stay the action altogether. The costs of the defendants' application must be taxed and paid by the plaintiffs.

[Solicitors—Messrs. Woolfe and Woolfe; Mr. G. de G. Griffith.]

* Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.

Court of Appeal. (Scrutton and Atkin, L.JJ., and Eve, J.) 1928. Jan. 23.

COLESHILL v. MANCHESTER CORPORATION.*

Negligence—Bare licensee—Obvious danger in road—Road not a public highway—Injury to licensee—No liability on owners of road.

Practice—Trial—Cause partly heard—Death of Judge—Continuance of trial by another Judge—Reading notes of evidence already given—Witnesses not recalled—Request of parties—Precedent not to be followed.

The defendants, a local authority, were engaged in making, in connexion with a building estate of theirs, a road which was a *cul-de-sac* and was not a public highway and was still unlighted at night. People were in the habit of using the road to gain access through a hole in the fence to the defendants' land for the purpose of making a short cut to a golf links, and the defendants had done nothing to stop them. The plaintiff went along the road in daylight to reach the short cut to the golf links, and he failed to notice that there was across the road an open trench which had been made for the purpose of laying an electric main. In returning after dark the plaintiff was injured by falling into the trench, which was unlighted and unfenced. In an action for damages,

Held, that the plaintiff's position could not be put higher than that of a bare licensee, and, as he entered the road on the first occasion in daylight and the trench was obvious and the road was obviously unfinished, there was no evidence of the defendants' having exposed the

* Reported by T. W. MORGAN and E. J. M. CHAPLIN, Esqrs., Barristers-at-Law.

plaintiff to a danger which was not obvious or not reasonably to be expected, and the action failed.

Per Scrutton, L.J. : Where on a trial with a jury, after some of the witnesses have been called, the Judge dies, another Judge ought not, even at the request of the parties, to continue the trial after reading the shorthand notes of the evidence already given, but the witnesses ought to be recalled.

This was an appeal by the defendants, the Manchester Corporation, from a verdict and judgment in favour of the plaintiff for £300 damages for personal injuries in an action tried by Mr. Justice Acton and a special jury at Manchester Assizes. The facts are stated in the judgments.

Mr. Merriman, K.C., and Mr. N. J. Laski appeared for the appellants ; Mr. Singleton, K.C., and Mr. Harold Rhodes for the respondent.

The following considered judgments were delivered.

Lord Justice Scrutton.—This case, on comparatively simple facts not much in dispute, raises questions on which the authorities are by no means clear. The claim of the plaintiff is for personal injuries caused by falling into a trench on a road which was being made by the defendants, the Manchester Corporation, in connexion with the development of a building estate of theirs. The road in question, which was agreed at the trial not to be a public highway, was a *cul-de-sac* about 260 yards long, at one end running into a public highway, the Errwood-road, at the other end terminating in a quickset hedge. On the north side the corporation were building houses, none of which were occupied at the time of the accident, though they were sufficiently completed for the tenants to move in a week after. The road itself was 50 feet wide, 24 feet being roadway, the remaining 26 feet being made up of two grass pathways, which had been kerbed. On the day of the accident there was a trench cut across the roadway to lay an electric main to an electric standard for lighting. No lights were yet installed in the roadway, and the trench itself was at night unlighted and unfenced. The whole road, indeed, was unlighted at night, the lighting not having been installed at the time of the accident. The condition of the pathways a fortnight after the accident was described by the plaintiff's surveyor thus : "The footpath on the side on which the houses were built was more or less impassable. There had been an excavation for some sort of main—I think an electric main. . . . The footpath on the other side—you could walk along it in parts . . . but a good deal of it was very rough. There were heaps of soil and so forth." The surveyor said that it was obviously not a completed road ; the father of the plaintiff also said that it was obviously not a finished road. Mr. Willoughby, one of the earliest tenants, who knew the road before September 5, 1926, said that he had never before that date seen vehicles on the road. But parts of the road and footpaths, especially at its entrance to Errwood-road, were level before the accident, though the surface of the road was not finished.

The land on the south of the road was owned by the Manchester Corporation, though not yet built on. It was divided from the road by a two-barred fence. South of this land again was a golf links which had public footpaths across it, and was apparently a favourite walk of the neighbours, especially on Sundays. At some point of the fence one of its top bars had been broken, so that by stepping over the broken bar you could get into the field, and people walking through this gap towards the golf links had made a sort of rough footpath. A good many people had taken this short cut, particularly on Sundays, and the corporation, if they knew of it, had done nothing to stop them, though when the houses on the south side of the road were built the short cut would of course be stopped.

The plaintiff was engaged to a young lady who lived in the neighbourhood and he had walked with her on the golf links, reaching them by a public footpath further down Errwood-road. He had never been on the unfinished road in question before, but on this Sunday, seeing some people coming up the grassy short cut, he and the lady walked down the road about 5 o'clock, a quarter of an hour after sunset. He said, "The road looked quite well to walk on. . . . I did not notice the road going. I walked on the right-hand side of the road, the footpath. . . . I came upon a hole in the footpath, and went through a gap in the fence." He said that he did not see the excavation across the road or any earth thrown up from it. In fact, on the given dimensions, over two cubic yards of earth must have been thrown up from the excavation somewhere. He stayed about a quarter of an hour on the golf links and came back through the gap in the fence, entering the road after 9 o'clock, when it was growing dark. He then fell into the trench and sustained the injuries for which he sued.

The case was heard under melancholy circumstances, for Mr. Justice Fraser, who began the case on a Thursday, hearing three of the plaintiff's witnesses, was taken ill during the night and died on the Friday. Mr. Justice Acton was sent down from London on the Sunday, and having read Thursday's shorthand notes, at the urgent request of the parties continued the case with the same jury on the Monday, the Thursday's witnesses not being recalled. I can understand that in the unprecedented and painful circumstances it is unnecessary to take any objection to what happened, but I think it is a precedent which should not be followed in future. I doubt whether a Judge has any jurisdiction to continue the hearing of a case in which witnesses have been called in Court in the course of the trial before the jury and another Judge, it not being a case of evidence on commission or before an examiner.

In the result Mr. Justice Acton, who had not been referred to any authorities except *Oldham v. Sheffield Corporation* (43 *The Times* L.R., 222) and *Murley Brothers v. Grove* (46 J.P., 360), rejected the submission of the defendants' counsel that there was no case to go to the jury, and framed certain questions, the defendants' counsel not assisting. These questions were apparently based on the *Sheffield Corporation* case (*supra*) and on the lines that the corporation had represented to reasonable passers-by, by the appearance of the road and by not stopping them, that this was a highway on which they might safely walk, and were not addressed in any way to the position of the plaintiff as a trespasser, bare licensee, or invitee, in the sense in which these terms have been used in recent cases. The plaintiff's original contention that the road was a highway was abandoned early in the trial.

The questions and answers were as follows : "(1) Would any reasonable member of the public reasonably have supposed that he had either the invitation or the permission of the defendants to use the part of the roadway between Errwood-road and the golf

links ?—A. Yes. (2) Did the plaintiff so suppose ?—A. Yes. (3) Did the plaintiff, when he entered the said part of the roadway, either (*a*) mean to leave the highway or (*b*) know that he was leaving the highway ?—A. No. (4) Was the excavation left in a dangerous condition at the time when the plaintiff fell in ?—A. Yes. (5) Was there contributory negligence on the part of the plaintiff ?—A. No. The somewhat unusual form of these questions is explained by the fact referred to above that apparently only two cases had been cited to Mr. Justice Acton—*Oldham v. Sheffield Corporation* (*supra*) and *Murley Brothers v. Grove* (*supra*). In *Oldham's* case (*supra*) the plaintiff, driving a motor-car along a lighted highway at night, saw in front of him an apparently continuous line of lights, suggesting a continuous highway. In fact there was on the line an unbridged ravine, approached by a private road in course of construction, barred at the end approaching the ravine by an unlighted hoarding. On the other side of the ravine there was a lighted highway, and the Sheffield Corporation were intending to join the two highways by a bridge and the dedication of the private road when constructed. Mr. Justice Salter, who tried the case, was faced with the decision in *Murley Brothers v. Grove* (*supra*), where a driver at night drove into an unlighted trench on an undedicated road connecting two highways and the owner of the land was held under no liability to the licensee. He distinguished it on the ground that in *Murley Brothers v. Grove* (*supra*) the plaintiff, making a short cut from one highway to another, knew that he had left the highway, whereas in *Oldham's* case (*supra*) the plaintiff was misled by the line of lights and failure to warn into thinking he was still on the highway. This seems to explain the form of the first three questions. The first question is rather unfortunate, as there is no "roadway between Errwood-road and the golf course." To reach the golf course you get through a gap in a broken fence over a bar, and proceed through rough grass trodden down by passers-by until you reach an admitted public footpath. From the plaintiff's point of view he went along the unfinished road for two reasons : (1) he was going to the golf course, which he had always previously reached by another route, and saw people coming up through the grass, so he assumed that he could get through ; (2) the beginning of the *cul-de-sac* road looked finished. From these two facts he seems to have inferred that he might go, and he seems not to have been dissuaded from going by the facts that, as he walked along, the road was obviously unfinished, containing improperly filled-up trenches and holes, and that he had to get through and over a broken gap in the fence to get on the way to the links. On the other hand, the case against the defendants is put on the ground that, as they had not in the past stopped people from going along the road and through the fence, they must be taken to have licensed all such people in the future, and so came under an obligation, after they had failed to stop the first trespasser, not to set a trap for the subsequent licensees.

The plaintiff went along the road for the first time in broad daylight, and, assuming that he had then tumbled into the trench, it is impossible to think that he could have succeeded in an action. The danger was an obvious one to anyone who used his eyes. It was not placed there to injure him, but in the ordinary use of a road which was being made and lighted. It was there before ever he used the road. A similar position would arise if, in getting over the lower bar of the fence, he had stumbled. It would, I think, have been impossible to say that in daylight that bar in the path was a trap ; it was, if you walked straight in, a danger, but an obvious one. I take the same view of an accident at the fence when the plaintiff returned half an hour later ; he knew that there was such a bar, and he could not complain if he came to grief in getting over it in the dark. There remains the question whether he can complain of the trench across the road, which he did not in fact see when he walked along the road, though it was there, and into which he fell when he returned in the dark.

It is clear that the plaintiff's position cannot be put higher than that of a bare licensee. Lord Sumner in *Mersey Docks and Harbour Board v. Procter* (39 *The Times* L.R., 275 ; [1923] A.C., 253, at p. 272) distinguished invitee and licensee thus : "In the case of the former, invitor and invitee have a common interest, while, in the latter, licensor and licensee have none." There was clearly no common interest between the plaintiff and the defendants here. If the plaintiff is to be treated as a licensee and not a trespasser, because, though he did not know it, other people had not been stopped from doing the same thing, his position as a licensee is thus defined by Lord Sumner in the same case at page 274 : "A licensee takes premises, which he is merely permitted to enter, just as he finds them. The one exception to this is that, as it is put shortly, the occupier must not lay a trap for him or expose him to a danger not obvious nor to be expected there under the circumstances. If the danger is obvious, the licensee must look out for himself ; if it is one to be expected, he must expect it and take his own precautions. If he will walk blindfold, he walks at his peril, even though he is blindfolded by the action of the elements. As usual in cases of duties of care, the reasonable man is the standard on both sides. The licensor must act with reasonable diligence to prevent his premises from misleading or entrapping a licensee, who on his side uses reasonable judgment and conduct under circumstances that can be reasonably foreseen. The licensee is to take reasonable care of himself and cannot call a thing a trap, the existence of which a reasonable man would have expected or suspected, so as to guard himself from falling into it." This is only repeating what had been said by Lord Justice Farwell in *Latham v. R. Johnson and Nephew* (*Limited*) (29 *The Times* L.R., 124 ; [1913] 1 K.B., 398). When this licensee entered these premises in daylight there was an open trench across the road with thrown-up earth heaped around it. The owner of the land must not expose the licensee to a danger not obvious or not to be expected there under the circumstances. In my opinion it is impossible on the evidence to say that this trench in daylight was not obvious or that the road was not obviously in daylight an unfinished road, with buildings and road in course of construction and development, and I use "obvious" in the sense in which Lord Wrenbury uses it in *Fairman v. Perpetual Investment Building Society* (39 *The Times* L.R., 54 ; [1923] A.C., 74).

Approaching the case from this point of view, the question at the end of the plaintiff's case appears to be : Is there any evidence on which a jury could reasonably find that the defendants had exposed the plaintiff to a danger not obvious or not reasonably to be expected in the circumstances ? And having regard to the fact that the plaintiff entered the road in daylight, and that on the evidence of his own witnesses it was obviously an unfinished and unlighted road, I cannot see any evidence on which a

jury could find a concealed danger. There appears to me to be nothing in the nature of a representation of a safe highway, such as the continuous line of lights in *Oldham's* case (*supra*), nothing in the nature of an obstacle which was known by the defendants to be dangerous, but which the plaintiff would reasonably think not dangerous, such as the horse with a tendency to bite mankind, in *Lowery v. Walker* (27 *The Times* L.R., 83 ; [1911] A.C., 10).

This is enough to dispose of the case, but I desire to add that I am disposed to think that failure to interfere with people walking about in the daytime does not constitute a licence to walk about at night. I also think the question of the obligation of a person who does not stop people from walking on his land to disclose natural objects of which he knows, and of which the walkers may not know, may require further consideration. I doubt whether the owner of a mountain, with rock faces, when he knows that the rock holds are unstable, is bound to warn every one whom he sees about to climb that the rocks are not safe ; or whether the owner of East Coast cliffs, which have an unpleasant habit of sliding down on to the beach, is bound to warn every one of the risk of the cliff falling.

For these reasons, I think Mr. Justice Acton, at the end of the plaintiff's case, should have withdrawn the case from the jury on the ground that the danger to which the plaintiff was exposed was, on his own evidence, obvious to a reasonable man, and one reasonably to be expected in the circumstances ; and that, the plaintiff being at the best a bare licensee (and I doubt if he was that by right), the defendants owed no duty to him in respect of such a danger.

The appeal, in my opinion, should be allowed, and judgment entered for the defendants, with costs here and below.

Lord Justice Atkin.—In this case, the facts of which I need not recapitulate, the jury by their answers appear to have found that the plaintiff was permitted by the defendants to enter the roadway in question ; that he was misled by the defendants into assuming that the roadway was an ordinary highway and that he fell without negligence into a trench dug by the defendants in such highway. Upon these findings the Judge has entered judgment for the plaintiff, as I think he was entitled to do. The question before us is whether there is any evidence to support the jury's findings. I think there was evidence to support the finding that the plaintiff was impliedly permitted to enter the roadway ; in other words, that he was a licensee ; and in the course of the argument we so intimated to counsel. The substantial question is whether there was evidence to support any finding that the defendants misled the plaintiff into believing that the roadway in question was a highway. Apart from such a finding I think it clear that the plaintiff could not recover. This part of the Shawbrook-road was at the time of the accident in the course of being made up into an ordinary road with carriage-way and side pavements for the purpose of affording access to houses which had been built or were to be built on either side of it. Its exact condition I will consider presently ; but it had not been completed, still less dedicated to the public ; none of the houses abutting on it had been occupied, and it was, in fact, still the private property of the defendants. The plaintiff therefore met with his accident while traversing, as a licensee, the property of the defendants ; and it is clear that, with certain qualifications, he has to pass over the property as it is and takes the risk of such dangers as he finds on it.

It is no doubt unfortunate that the law relating to the obligation of owners of property towards those who come upon it compels distinctions to be drawn which are subtle and apt to be confused. On the other hand, they correspond to real differences in the nature of the user of property, and in the reasonable claims to protection of those who are permitted such use. As to the rights of bare licensees I find three recent authorities which appear to afford safe guidance. In *Latham v. Richard Johnson and Nephew, Limited* (29 *The Times* L.R., 124 ; [1913] 1 K.B., 398, at p. 411), Lord Justice Hamilton says : "The rule as to licensees, too, is that they must take the premises as they find them apart from concealed sources of danger ; where dangers are obvious they run the risk of them. In darkness, where they cannot see whether there is danger or not, if they will walk they walk at their peril : *Gautret v. Egerton* (L.R., 2 C.P., 371) ; *Lewis v. Ronald* (26 *The Times* L.R., 30) ; and see generally *Indermaur v. Dames* (L.R., 2 C.P., 311) ; *Collis v. Selden* (L.R., 3 C.P., 495) ; *Holmes v. North Eastern Railway Co.* (L.R., 4 Ex., 254 ; L.R., 6 Ex., 123) ; *Batchelor v. Fortescue* (11 Q.B.D., 474). Where 'the owners allowed all persons who chose to do so, for recreation or for business, to go upon the waste without complaint. . . . One who thus uses the waste has no right to complain of an excavation he finds there. He must take the permission with its concomitant conditions, and, it may be, perils' : *per* Mr. Justice Williams in *Hounsell v. Smyth* (7 C.B.N.S., 731, at p. 743), and see *Wilkinson v. Fairrie* (1 H. and C., 633) ; *Binks v. South Yorkshire Railway and River Dun Company* (32 L.J., Q.B., 26), and *Hardcastle v. South Yorkshire Railway Company* (28 L.J., Ex., 139). 'The licensee or visitor must take care of himself, in using the premises as he finds them ; . . . he is not entitled to be protected from the existing risks of the premises in their ordinary state, by the care of the owner' : *per* Chief Baron Pigot in *Sullivan v. Waters* (14 Ir. C.L.R., 460, at p. 469). Again, Scotch law is the same. 'When a person uses by permission private property where a pond or other dangerous excavation exists, he must take the benefit of the use subject to the risk which attends it' : *per* Lord Shand in *Prentice v. Assets Company, Limited* (17 R., 484, at p. 489) ; and *Ross v. Keith* (16 R., 86)."

In *Hayward v. Drury Lane Theatre, Limited, and Moss' Empires, Limited* (33 *The Times* L.R., 557 ; [1917] 2 K.B., 899, at p. 913), Lord Justice Scrutton says: "A bare or mere licensee, one who has no common interest with the owner of the premises but is there by the owner's permission, takes the premises as he finds them, with all their dangers and traps, a trap being a danger which a person who does not know the premises could not avoid by reasonable care and skill. The owner is under no liability as to existing traps unless he intentionally set them for the licensee, but must not create new traps without taking precautions to protect licensees against them : see the judgment of Mr. Justice Willes in *Gautret v. Egerton* (*supra*)," and later on at page 914 he says : "The difference between the bare licensee and the invitee or licensee with an interest is that as to existing traps the owner incurs liability to the latter and not to the former." In *Mersey Docks and Harbour Board v. Procter* (39 *The Times* L.R., 275 ; [1923] A.C., 253, at p. 274), Lord Sumner uses the words which have been read by my Lord and which I need not repeat.

Taking these passages as guides, one has to consider whether there is any evidence that the defendants in this case omitted to act with reasonable

diligence to prevent their premises from misleading or entrapping the plaintiff. It is true that the word "entrapping" is not unambiguous, and that there are dicta which appear to extend the obligation of the owner beyond what I should consider the ordinary meaning of an obligation to avoid entrapping. For instance, I find that Lord Halsbury in *Lowery v. Walker* (27 *The Times* L.R., 83; [1911] A.C., 10, at p. 14), says: "If he has acquiesced in their doing so" (*i.e.*, crossing his ground), "he is bound to take the ordinary precautions to prevent persons going into a dangerous place where he knows they are going, and going by his acquiescence without notice or warning or any form of security to prevent the injury happening which did happen." I think this statement must be read in relation to the actual decision, which was that the owner of a field could not with impunity place in the field an animal which he knew to be dangerous or likely to injure those whom he permitted to use the field; in other words, could not create a special danger directed to his licensees or set a trap for them. In ordinary circumstances I cannot reconcile the statement with the undoubted law that a licensee must take dangerous premises as he finds them.

Preferring, therefore, the statements of the law which I have above set out, and asking myself the question just propounded, I have come to the conclusion that there is no evidence of an omission by the defendants to act with reasonable diligence not to mislead or entrap the plaintiff. It is clear from the evidence that the ground in question presented the ordinary appearance of a building estate under construction, including the uncompleted road to serve the houses. On the north side the margin of the road between the actual roadway and the curtilage of the houses was impassable by reason of building materials, heaps of earth, and longitudinal trenches; on the south side the margin could be used for walking, as it was by the plaintiff and his friend, in passing to the golf links. But there were obstructions in it, and a hole possibly made for a lamp-post, which they had to avoid by walking on the kerb. The actual roadway was not completed; it had not had its final surface put on, though the actual surface was smooth towards the edges, but rougher in the centre. It was kerbed for part of its length, and it had a large trench right across it 2 feet wide and 18 inches deep. The houses at the far end were still being built. I cannot find any evidence that the defendants by their conduct led the plaintiff to believe that it was anything other than what it was, an uncompleted road, part of an uncompleted building scheme. The trench across was in daylight an obvious danger, and cogent proof of incompletion. It is true that the plaintiff did not notice it as he passed up in daylight, and may well have omitted to notice it without negligence. But it was there to be seen, an obvious advertisement of the road's condition, and the defendants can hardly be blamed because the plaintiff, even without negligence, omitted to see what was plain to be seen. If the defendants could not be held to blame if the plaintiff had fallen into the pit when he passed up the road in daylight, as I think is the case, I do not see how they can be blamed because he fell into the pit on returning in the dusk. They held out no more extensive invitation, and made no further representation in dusk than in light. The premises were on the evidence obviously premises where building and construction were in the process of being carried on, and it was over such premises in such condition that the plaintiff was permitted passage. What were the defendants to do? Were they to light the whole of the road or to fence or light the trench across the road? If so, why not the trenches alongside the road, or the hole which the plaintiff found on the south side? I think that there was no evidence upon which the jury could have found that the defendants by their conduct led the plaintiff to believe that he would be travelling over an unobstructed roadway, still less that it was part of a highway. In these circumstances the defendants have been guilty of no wrong, and the verdict and judgment must be set aside and judgment entered for the defendants.

MR. JUSTICE EVE.—On the evening of Sunday, September 26, 1926, the plaintiff fell into an excavation upon land belonging to and occupied by the defendants at Levenshulme, in the county of Lancaster, and sustained a compound fracture of his left leg. He alleged that the accident was due to negligence or breach of duty on the part of the defendants, and by this action claims to recover damages from them. The defendants admit the plaintiff's injuries, but they deny that they were guilty of any negligence or breach of duty.

The material facts are that on the evening in question the plaintiff, accompanied by a young lady, started for a stroll in the direction of the golf links situate in the vicinity of the defendants' land, and having proceeded along a highway known as Errwood-road to a point where there was a road—theretofore unknown to the plaintiff, but which appeared to him to lead towards the golf links—turned off the highway on to this road and proceeded along it in the direction of the golf links. Walking a short distance along the southern and right-hand side of this road, the pair passed on to the links through a gap in the fence dividing the road from the links, and after a short interval of time returned through the same gap on to the road, and in the increasing darkness hurried back along the middle of the road in the direction of Errwood-road on their way home. About midway between the spot where they passed from the links on to the road and Errwood-road a trench had been dug across the whole breadth of the road—some 24 feet long and 2 feet deep—and the injury to the plaintiff was caused by his falling into this trench.

The road was, and is, the property of the defendants, and the trench had been dug for lighting purposes connected with the development of their adjoining land as a residential estate. The road is not a highway, it ends in a *cul-de-sac*, and is described in the evidence of the surveyor called by the plaintiff as "a road in process of construction on an estate in process of construction—an uncompleted road—something going to be a road when the top surface is on—obviously not an adopted road, obviously not a highway, an unadopted road, by which I mean the road surface and footpaths were not completed." Building operations were in progress along the north side, and the footpath on that side was more or less impassable in consequence of such operations. The footpath on the southern side was not so encumbered, part of it had been levelled, part was rough, and as the plaintiff and his companion passed along on their outward journey on that side they came upon an excavation in the footpath, to avoid which they had to step aside on to the kerbstones and so pass it in safety. The kerbstones were laid on both sides for some distance up the road.

The allegations of negligence on the part of the defendants on which the plaintiff bases his claim are, neglect to place a barrier across or to fence off the entrance to the road, to light or affix lamps or danger signals to such entrance, or to have a watchman in attendance to prevent the public from passing along

the road. By reason of these omissions and by letting to tenants some of the houses already built on the estate, he maintains that the defendants invited the public to use and pass along the road when the same was in fact dangerous and constituted a trap by reason of the transverse excavation. There had been no actual letting of any of the houses at that time, and, in my opinion, there was no evidence to support the allegation that the public were invited to make use of the road. It is true they were not warned to keep off it, nor was there any physical barrier to keep them from entering upon it, but its appearance and condition and the work in progress along the northern frontage must have brought home to the mind of any person of ordinary intelligence and possessing reasonable powers of observation its true characteristics as a road in course of construction and serviceable in the main for the purposes of the estate development. That the public did in fact use it and without any protest on the part of the defendants was proved, more particularly on Saturdays and Sundays, when, for the purposes of recreation, they passed by this route to and from the open country lying beyond the houses in course of building, but in so doing they were no more than licensees of the defendants, and it is upon the basis of this relationship that the liability of the defendants as owners and occupiers of the road to the plaintiff has to be ascertained. The extent of that liability is, I think, determined by the extracts which have been read from the judgments in *Latham v. Richard Johnson and Nephew, Limited* (29 *The Times* L.R., 124 ; [1913] 1 K.B., 398) and *Fairman v. Perpetual Investment Building Society* (39 *The Times* L.R., 54 ; [1923] A.C., 74). The grant of the licence creates no right ; it merely affords an answer to a charge of trespass ; it is a mere permission, and those who take it must take it with all chances of meeting with accidents ; but the licensor, although not bound to make the premises safe for the use of the licensee, is bound to warn him of any concealed danger which he knows to be existing on the premises at the date of the licence, or subsequently created. A concealed danger is one which is not known to the licensee or not obvious to the licensee using reasonable care. I think the law on this point is accurately summed up in the passage I am about to read from the 6th Edition of Sir John Salmond's book on Torts. At page 439 he says : "Even if the licensee does not actually know of the danger, he has no cause of action if the danger was so visible, obvious, or usual on that class of premises that a licensee using due care for his own safety would have discovered it for himself before coming to any harm. Against such dangers the occupier is not bound to warn his licensee. The licensee can recover only if he can prove that the occupier led him into a trap by permitting him to enter on premises which, using due care on his own part, he reasonably supposed to be safe." Can it properly be said that the existence of this trench was a concealed danger to anyone using reasonable care and in the nature of a trap ? The plaintiff, possibly with a mind otherwise preoccupied, says that he did not notice it when they passed up the road, nor did he notice that the road was in process of construction, or see any building material about. His companion noticed earth in the middle of the road. Accepting these statements as true, it is still impossible to regard this danger as a concealed one, or otherwise than as an obvious one to anyone passing along the road or using reasonable care.

There was, in my opinion, no failure on the part of the defendants in any duty owing by them to the plaintiff, who voluntarily elected to take the risk of returning in the growing darkness along a road the character and condition of which he had had full opportunity of observing some hour or more before in the daylight, and in which, be it remembered, he certainly knew there lurked the one source of danger which he and his companion had avoided on their way up.

I do not think there was any case to leave to the jury, and the appeal ought, in my opinion, to be allowed.

Mr. LASKI.—Your Lordships allow the appeal, and order judgment to be entered for the defendants, with costs here and below ?

LORD JUSTICE SCRUTTON.—Yes.

[Solicitors—Mr. Percy Melville Heath, Manchester ; Messrs. Slater, Heelis and Co., Manchester, for Messrs. William Johnston and Co., Stockport.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) } 1928. Jan. 26.

PLOWS v. PLOWS.*

Divorce — Wife's petition—Husband's adultery — Conduct conducing — Wife's refusal of marital intercourse—Grant of decree *nisi*.

In this defended suit, which had been adjourned from York Assizes, Mrs. Madeline May Plows, *née* Sawdon, of Muston-road, Filey, Yorkshire, sought the dissolution of her marriage with Mr. Harold William Plows, a clerk, of Harehills, Leeds, on the ground of his adultery with Doris May Hargrave. By his answer the respondent admitted the charge of adultery, but said that his wife had deserted him and had been guilty of conduct conducing to his adultery by refusing to consummate the marriage. By her reply the petitioner joined issue with the respondent on the cross-charges, and said that she left him owing to his violent conduct to her on one occasion.

Mr. John Neal appeared for the petitioner. The respondent appeared in person.

LORD MERRIVALE, in giving judgment, said that it was a very unhappy case. The parties were married at Linthorpe parish church, Middlesbrough, on October 1, 1925, the husband then being 25 years of age and the wife 22. Having no means of their own for a livelihood or for providing a home—and the husband being under a very serious disability, which he (his Lordship) hoped that he had got over, as he said that he had—after a secret marriage they went to live at the home of the husband's parents. The wife decided that their troubles should not be increased by the birth of children until they could support them, and refused sexual intercourse with her husband. Then there arose a deplorable state of things which came to an end six months after the marriage when, on Good Friday of 1926, the wife resolved to go back to her home. Her husband resisted this intention and in his resistance inflicted bruises upon her. He wrote her letters imploring her to return, and on both sides letters were written showing that it had been a marriage of affection. Presently the husband insisted on a resumption of cohabitation, or demanded that he should know something about his future position. His wife said that she would not live with him. He wrote suggesting that she should divorce him if he gave her the

* Reported by WILLIAM LATEY, Esq., Barrister-at-Law.

necessary evidence. The wife was advised of the peril of collusive proceedings and made no reply to the suggestion.

Eighteen months after the separation he became on affectionate terms with another young woman and ceased to have affection for his wife. On being told that the girl with whom he had associated was pregnant, he married her bigamously. He was brought to trial and bound over. He now said that his wife conduced to his adultery. That was in a sense true. He complained that there was no possibility of performing marital obligations at that time, and that their health broke down under the strain. Did his wife's refusal conduce to his adultery and bigamous marriage with another woman, and ought he (his Lordship) on that account to refuse her a decree? The husband, whatever his faults might have been—and he said that he made good after his early error which put his wife's parents against him—was passionately fond of his wife at that time. She stedfastly refused his demands that they should live together as man and wife. Therefore he (his Lordship) held that there had been conduct conducing by the wife.

But the mutual affection was dead. The husband said that he would like to get a decree of nullity, but there was no indication of sufficient grounds for supporting such a petition. Yet there were such circumstances in the case, and each of the parties was put in such an intolerable position, that he (his Lordship) did not take the view that the conduct conducing was of such an inexcusable degree that it should be visited with the penalty of refusing the decree.

His LORDSHIP granted a decree *nisi*, but made no order as to costs.

[Solicitors—Messrs. Corbin, Greener, and Cook, for Messrs. Lambert and Parkinson, Bridlington.]

Chan. Div. (Astbury, J.) } 1928. Jan. 26.

HAROLD DRABBLE, LIMITED, AND ANOTHER v. HYCOLITE MANUFACTURING COMPANY AND OTHERS.*

Copyright — Advertisement — Preparation by advertising agent—Intention of parties—Ownership of copyright.

Where an advertisement agent prepares an advertisement on instructions and information given to him by the advertiser, the Court will, in the absence of evidence to the contrary, draw the inference that it was the intention of both parties that the copyright in the advertisement should belong to the advertiser.

This was an action by Harold Drabble, Limited, advertising agents, of Norfolk-street, Strand, and Mr. Harold Drabble, their managing director, against Mr. George Edward Heyl (trading as the Hycolite Manufacturing Company) and the Morning Post, Limited, for an injunction to restrain the defendants from infringing the plaintiffs' copyright in an advertisement (prepared by the plaintiffs to advertise the goods of the Hycolite Manufacturing Company) by inserting such advertisement in the *Morning Post* without the plaintiffs' consent.

* Reported by E. K. CORRIE, Esq., Barrister-at-Law.

The action raised the question whether the copyright in an advertisement belonged to the agent who prepared it, or to the person on whose behalf it was prepared.

The Hycolite Manufacturing Company instructed the plaintiff company, as advertising agents, to prepare an advertisement of their invention, Hycolite Liquid Wallpaper, and supplied information for the advertisement. The advertisement was prepared by the plaintiff, Mr. Harold Drabble, from information he procured, and the plaintiff company was paid for the materials used. In such a case the agent was paid a commission by the newspaper in which the advertisement appeared. The Hycolite Company subsequently, without the consent of the plaintiffs, caused the advertisement to be inserted in the *Morning Post* of April 30, 1927.

Mr. Gavin Simonds, K.C., and Mr. Macgillivray appeared for the plaintiffs; Mr. Gover, K.C., and Mr. Swords for the defendants, the Hycolite Manufacturing Company; and Mr. Vaisey, K.C., Mr. Skone James, and Mr. J. Leonard Stone for the Morning Post, Limited.

Mr. GAVIN SIMONDS said that though the question of a single advertisement might not be an important matter there was an important principle involved, affecting the rights of advertising agents. If the copyright of the advertisement was not in the agent who prepared it, the advertiser for whom it was prepared might, after the agent had received a commission for one insertion, go to other agents, who would obtain commission for other insertions by means of the original agent's work. The agent's remuneration was by commission from the newspaper. He submitted that the advertisement was a literary work within the Copyright Acts and that the plaintiff, Mr. Harold Drabble, was the author.

Mr. Drabble, in evidence, said that he had carried on the business of an advertising agent since 1915 and had formed the plaintiff company to carry on such business. He prepared the advertisement in question. The Hycolite Company instructed him to prepare it, and he obtained the matter for doing so. He prepared it as the result of his previous experience of many years. The only material that he had was an advertisement which had appeared in 1926 in the *Daily Mail* and a picture of the tin in which the stuff was supplied. From this he worked up the advertisement now in question. The advertisement appeared in the *Morning Post* of January 26, 1927. On his own account he prepared a revised version of the advertisement which appeared in the *Morning Post* of February 12, 1927.

The witness, cross-examined by Mr. GOVER, said that he did not remember a case in which a claim had been made similar to that made in this case. There were editorial notes about "Liquid Wallpaper" in the *Morning Post* of January 22 and January 29, 1927. The Hycolite Company sent him a booklet descriptive of the material, with testimonials, on January 20. It was forwarded to the *Morning Post* by his secretary without his seeing it.

He had written to the Hycolite Company on June 21, 1926, offering to improve their advertisement (which had appeared in the *Daily Mail*) in the hope of getting a new client. The advertisement which he prepared on July 5, 1926, was his original composition. Most of the details were in the advertisement in the *Daily Mail*. He composed the advertisement which appeared in the *Morning Post* on January 22, 1927. He did not know that an advertisement of Hycolite Liquid Wallpaper had appeared in the *Daily Mail* of November 18, 1926,

and he had never seen it. He did not take the details of his advertisement from the booklet.

He did not claim any copyright in the block of the picture in the advertisement, nor did his company. He instructed Mr. Thompson, the artist, to prepare the block, but did not indicate to him the kind of pot and brush which were shown, nor did he send him any materials for his design. He paid Mr. Thompson for the design. Before preparing the further edition of the advertisement which appeared on February 12, 1927, he asked the Hycolite Company for further materials, but he received none. He took a small portion of the advertisement from an editorial in the *Morning Post* of February 5, 1927, but did not get the consent of the *Morning Post* to his doing so. Part of the advertisement was substantially the same as the editorial, though it was not the fact that nearly every word in the advertisement was taken, or colourably imitated, from documents which had already appeared. He could not suggest any damage which he had suffered at the hands of the Hycolite Company by the publication of the advertisement without his consent except the loss of his commission. He did not claim the right to reproduce the advertisement.

Cross-examined by Mr. VAISEY, he said that the "lay-out" of the advertisement was not the work of the compositors of the *Morning Post*. They carried out his instructions. He had no copy of those instructions. A document was produced to the witness, and he said that he felt certain that it was not the instructions which he gave. He had several telephone conversations in March and April, 1927, with Mr. Woodward, the assistant advertisement manager of the *Morning Post*. He told Mr. Woodward that he had received no payment from the Hycolite Company and had finished with them. He did not say that he had no further interest in the advertisement. Mr. Woodward mentioned a cheque which he had received from Mr. Heyl, but did not say that it was for a re-insertion of the advertisement. Mr. Woodward only asked whether he would be safe in taking a post-dated cheque, and he (the witness) had no idea that Mr. Woodward was referring to the advertisement.

Re-examined, the witness said that he never knew of a case where an advertising agent's claims had been disputed. The letterpress of what was called the second edition was compiled before he gave instructions to Mr. Thompson for the drawing. He wrote to him on January 18, 1927. A pot and a brush provided an obvious suggestion for the picture of a liquid material and were commonly used in advertisements. The value of an advertisement depended on the draping of the facts, and he had given his skill and labour to achieving that.

In reply to MR. JUSTICE ASTBURY, he said that he had seen the editorials in the *Morning Post* and knew that the information in them must have come from the Hycolite Company. The proof of the advertisement of January 22, 1927, was sent to the Hycolite Company beforehand and was not altered by them.

Mr. P. R. Thompson said that he received a letter from Mr. Drabble on January 18, 1927, asking him to prepare a drawing for the advertisement, and this he did. He had no particular instructions as to form. The paint tin and brush in the drawing were imaginative, and so was the oval surrounding of the name. He had already made a rough drawing in 1926, but heard nothing more till January, 1927. The drawing that he then made was a finished copy in ink of the original. He was paid a guinea, and 3s. 6d. for the rough draft.

Mr. GOVER submitted that the plaintiffs had no copyright in the advertisement; that they had no right to reproduce it; that they had not suffered, and in no circumstances could suffer, any damage; and that the Court could infer from the circumstances that there was an unconditional consent to the free use of the advertisement by the Hycolite Company. To obtain copyright, it must be shown that the plaintiff was the author of an original literary work. The authorities had gone so far that he would not submit that this was not a literary work, but it was not original. Substantially every bit of it had been taken from the other advertisements of which the defendant company had the copyright, or from the editorials, of which the *Morning Post* had the copyright. One could not have copyright in the infringement of another man's copyright. It was clear from the evidence of Mr. Drabble that this work did not originate with him, but was substantially copied from other works.

The evidence of Mr. Henry Percy Woodward, who was, till December, 1927, assistant advertisement manager of the *Morning Post*, was interposed. He could not say whether Mr. Drabble or the Hycolite Company first gave him instructions for the insertion of the advertisement, but he believed that it was Mr. Drabble. The subsequent insertions in February and March, 1927, were ordered by Mr. Drabble. After March 12 he canvassed Mr. Drabble in the ordinary way, and was told that he was no longer placing advertisements for the Hycolite Company. The witness then applied to the company, who ordered the insertion of April 30. He spoke to Mr. Drabble, who did not say that he objected to the insertion of the advertisement.

Cross-examined by Mr. SIMONDS, he said that his communication with Mr. Drabble was a matter of courtesy. He did not think of asking specially for his consent.

Re-examined, he said that he told Mr. Drabble that Mr. Heyl proposed to insert his advertisement, but he did not discuss whether it was the same advertisement.

Mr. GOVER, continuing his speech for the defendants, the Hycolite Company, reserved, in case the action went further, the position under section 5 of the Copyright Act, 1911. He said that the plaintiffs had no right to reproduce the advertisement containing the company's materials even if they had technically, by their arrangement of the materials, a copyright under the Act. No damage had been suffered or could be suffered by the plaintiffs, except the loss of their commission. It would be a case of *injuria sine damno*. He cited *Birn Brothers, Limited v. Keene and Co., Limited* ([1918] 2 Ch., 281) as to the measure of possible damages, and *Borthwick* v. *Evening Post* (4 *The Times* L.R., 234; 37 Ch.D., 449, at p. 463). Even if the plaintiffs had some copyright there was, in the circumstances, a consent by them to the reproduction.

Mr. SKONE JAMES, for the Morning Post, Limited, cited, as regards the question of originality, *Macmillan and Co., Limited v. Cooper* (40 *The Times* L.R., 186). He contended that there was an implied term in an arrangement between an advertiser and an agent that, even though there was copyright in the advertisement in the agent, the advertiser had a perpetual licence to use it.

Mr. MACGILLIVRAY, for the plaintiffs, replied. The advertisements of February 12 and March 12, which were the same as the advertisement of April 30, which was complained of, contained a good deal of matter which was in the advertisement of January 22. That last advertisement was composed before any of

the editorials were published. It was, therefore, original literary work, and there must be copyright in it. There could be consent to reproduction, but that could not be by way of a perpetual licence. Counsel would have copyright in his opinion, and the client would have no right to publish it. The question of professional confidence would arise, as it would in the case of a draft drawn by a solicitor.

The Copyright Act, 1911, applied to equitable as well as to legal assignments and rights. (See *Performing Right Society, Limited v. London Theatre of Varieties, Limited*, 40 *The Times* L.R., 52 ; [1924] A.C., 1.) *Eaton v. Lake* (4 *The Times* L.R., 230 ; 20 Q.B.D., 378) was a strong case in the plaintiffs' favour.

Parties could not contract out of the Copyright Act, 1911, except by a written assignment. There was here clearly no express consent by Mr. Drabble, nor was there any implied consent. He did not consent to the insertion of the advertisement on March 12, 1927, except through himself. An irrevocable consent would be a grant of an interest in the copyright, and under section 5 (2) must be in writing to be valid. He cited *L. French and Co., Limited v. Leeston Shipping Company, Limited* (38 *The Times* L.R., 459 ; [1922] 1 A.C., 451) and Lord Buckmaster's speech on the question of implication. There was no reason to imply any terms here. There was here copyright in Mr. Heyl in the *Daily Mail* advertisement and in other work of his own, and in Mr. Drabble in the part composed by him, and neither could use the joint production without the consent of the other. There might be copyright in a document which the author could not reproduce or publish on account either of confidential relations or of libel. *Byrne v. Statist Company* (30 *The Times* L.R., 254 ; [1914] 1 K.B., 622) was very similar to the present case as to the interest of the author where the advertiser had given permission for the reproduction.

Mr. Justice Astbury, after stating the facts, said that the action was of a novel character. Mr. Drabble obtained the agreement of the Hycolite Company to his improving the advertisement of the company, which paid him for his material, and he was to obtain a commission from the newspaper that inserted the advertisement. Mr. Drabble's business appeared to include writing to firms asking their consent to the improvement by him of their advertisements, as he did in this case. The Hycolite Company agreed to his submitting a copy, which he did on July 5, 1926, describing it as "slightly revised copy" of the company's advertisement which had appeared in the *Daily Mail*. Mr. Drabble had claimed copyright in this as an original literary work. It was, in fact, only a colourable imitation of the *Daily Mail* advertisement, using most of the phrases verbatim or rearranging them. He (his Lordship) was of opinion that this was in no way an original literary work, even if it was a literary work at all. The matter then remained in abeyance until January, 1927, as the Hycolite Company had arranged for their advertisements for some time ahead. On January 4 Mr. Drabble sent a circular to the Hycolite Company, and later submitted to them what he called a reader's copy of his suggested advertisement, and also suggested the "Women's Corner" in the *Morning Post* as an advertising medium. That reader's copy had been lost.

His Lordship then read the correspondence, in which it was suggested that there should be an editorial in the "Women's Corner," for which purpose the Hycolite Company were said to have sent Mr. Drabble a booklet to provide information. His Lordship said that the circumstances of what was called the second edition of the advertisement, which appeared in the *Morning Post* of January 22, 1927, gave him great difficulty. Mr. Drabble was a most unsatisfactory witness. He swore that this advertisement was prepared by him without any further information being supplied to him by the company, and that he never saw the booklet. The advertisement contained matter which no honest or truthful person could have inserted in it if he had had no information except the original advertisement in the *Daily Mail*. His Lordship must not assume that Mr. Drabble had seen the booklet which he swore he had not seen, but he was not prepared to accept as proved statements made on oath by Mr. Drabble without corroboration. He might be right, and there was no evidence to the contrary.

On the question of originality, the onus of convincing his Lordship was on the plaintiffs, and they had not convinced him. The third edition of the advertisement, which was the same as the one complained of in this action, appeared in the *Morning Post* of February 12. His Lordship then dealt with the phrases in this advertisement, and said that, before it appeared, editorials had appeared in the *Morning Post* of January 29 and February 5, which Mr. Drabble admitted were taken from the booklet. A quarrel ensued later between Mr. Drabble and the Hycolite Company, and, eventually, on April 30, the advertisement was inserted in the *Morning Post* by the company without Mr. Drabble being concerned. The Morning Post, Limited, in its defence, pleaded that Mr. Drabble consented to this insertion, but, so far as any *ad hoc* consent was concerned, that defence had not been made out.

The issues were (1) whether the advertisement was an "original literary work" within the Copyright Act, 1911 ; and (2) whether a consent by the plaintiffs to its insertion must not be implied. On the first point his Lordship held that the advertisement was not an original literary work. On the second point, if there were any copyright in the advertisement, many matters required consideration. It seemed at first sight amazing that an agent could claim copyright in a work which had been prepared by him on instructions and information given to him by the advertiser. He thought that here it was necessary to infer that it was intended by both parties that the plaintiffs should only act as the agents of the Hycolite Company to put the advertisement in the newspaper and that the advertisement should remain the property of the company. As far as he could judge from the correspondence he doubted whether Mr. Drabble ever thought of claiming any rights until some time after the quarrel. Even if he were held to have produced an original work, he could only claim copyright in such part of it as was his own work and could not claim copyright in the work of the advertiser. In his Lordship's opinion there must be inferred a plain consent that the advertisement should remain the property of the company to insert whenever they chose. Mr. Macgillivray, in his very able argument, referred to section 5 (1) (*b*) of the Copyright Act, 1911, and said that the subsection had been construed judicially as referring only to a distinct contract of service, and his Lordship could not hold that in this case there was any contract of service. It appeared that this was the first time that any advertising agent had claimed the right by his copyright in an advertisement to restrain his employer from using it as he pleased. The defendants wished to give evidence that no such claim had

been made, but such evidence was objected to and he had allowed the objection. But, in fact, the objection was as valuable to the defendants as the evidence would have been. Counsel had argued that an agreement between employer and agent as to the copyright would be an equitable assignment. He had been referred to observations of Lord Sumner in *Performing Right Society, Limited v. London Theatre of Varieties, Limited* (40 *The Times* L.R., 52 ; [1924] A.C., 1) as to such equitable assignment having to be in writing under section 5 (2), but those observations dealt with a different question. He was also referred to *Eaton v. Lake* (4 *The Times* L.R., 230 ; 20 Q.B.D., 378), but that dealt with an entirely different case under a different statute. He did not think that there was anything in the Copyright Act, 1911, to prevent parties from contracting out of the Act between themselves. He did not believe that any Court would grant an injunction in cases where it would involve breach of faith and breach of contract. One answer would be that there was a consent under section 2, which need not be in writing.

In his Lordship's opinion the plaintiffs prepared the advertisement on the instructions of their client upon the footing that they should derive benefit from it as long as their client continued to advertise through them. In his opinion there was here no original literary work within the Copyright Act, 1911, but even if there was such a work the plaintiffs had by contract rendered it impossible for the Court to grant any injunction to restrain the defendants from publishing the advertisement.

The action against both defendants must be dismissed with costs.

[Solicitors—Messrs. Ravenscroft, Woodward and Co. ; Messrs. Cruesemann and Rouse ; and Messrs. Preston and Foster.]

Judicial Committee of the Privy Council.
(Viscount Cave, L.C., Lord Buckmaster, Lord Carson, Lord Darling, and Lord Warrington of Clyffe.)

1928. Jan. 19.

ROYAL BANK OF CANADA (ATTORNEY-GENERAL FOR QUEBEC INTERVENANT) v. LARUE AND OTHERS.*

Canada — Bankruptcy Acts — Collocation of judicial hypothecs.

Under the Canadian Bankruptcy Acts a judicial hypothec upon real estate of a debtor resulting from the registration of a notice under Article 2121 of the Civil Code of Quebec is intended to be postponed to a subsequent authorized assignment for the benefit of his creditors. The Bankruptcy Act, 1919, to that effect is within the legislative authority of the Dominion Parliament under the British North America Act, 1867.

This was an appeal from a judgment of the Supreme Court of Canada (Mr. Justice Rinfret dissenting) which reversed decisions of the Court of King's Bench of Quebec and the Trial Judge (Chief Justice Lemieux).

Sir John Simon, K.C., Mr. Lanctot, K.C. (of the Canadian Bar), and Mr. Maurice Alexander (K.C., Canada) appeared for the appellants ; Mr. Macmillan, K.C. (of the Scottish Bar), and Mr. Theobald Mathew for the Attorney-General for Quebec ; Mr. St. Laurent, K.C. (of the Canadian Bar), and Mr. Horace Douglas for the respondents.

The Lord Chancellor, delivering their Lordships' judgment, said :—

The facts leading up to this litigation are undisputed, and may be very shortly stated. On March 25, 1922, the claimant, the Royal Bank of Canada (which will be referred to as "the Bank"), obtained judgment against one Bélanger for $14,036.44 with interest and costs. On April 6, 1922, the Bank caused this judgment to be registered in the Registration Division of Quebec, and at the same time caused to be registered (in accordance with Article 2121 of the Civil Code of Quebec) a notice describing certain real estate of the debtor situate in that Division, so establishing a judicial hypothec upon that property resulting from the judgment. On April 11, 1922, the Bank registered a second notice describing other real estate of the debtor situate in the same Division, to be also affected by the judgment and the judicial hypothec thereby created. On December 24, 1923—no further steps having in the meantime been taken for enforcing the judgment and hypothec—Bélanger made an authorized assignment for the benefit of his creditors under the Bankruptcy Act of the Dominion (chapter 36 of 1919), and the respondents, Larue, Trudel, and Picher, were shortly afterwards appointed trustees under the assignment. The assignment and appointment were duly registered. The Bank filed a claim with the trustees, asserting a privilege in the nature of a judicial hypothec upon the real estate of the debtor described in the notices of April 6 and 11, 1922 ; but the trustees, on the authority of section 11 (10) of the Bankruptcy Act, rejected the claim of privilege except as regards the costs of the judgment. The Bank appealed against this rejection to the Superior Court of Quebec, which allowed the appeal and declared the Bank entitled to the preference which it claimed ; and this decision was affirmed by the Court of King's Bench of Quebec. But, on a further appeal by the trustees to the Supreme Court of Canada, that Court by a majority (consisting of Chief Justice Anglin and Mr. Justice Duff, Mr. Justice Mignault, and Mr. Justice Newcombe, Mr. Justice Rinfret dissenting) reversed the decision of the Court of King's Bench and confirmed the disallowance by the trustees of the Bank's claim for privilege. The Bank now appeals to His Majesty in Council.

The questions at issue between the parties are two in number, namely (1) whether on the true construction of the Bankruptcy Acts of the Dominion a judicial hypothec upon real estate of a debtor resulting from the registration of a notice under Article 2121 of the Civil Code of Quebec is intended to be postponed to a subsequent authorized assignment by the debtor for the benefit of his creditors ; and (2) if on the true construction of the Bankruptcy Acts such a hypothec is intended to be so postponed, whether the Acts are in that respect within the legislative authority of the Dominion Parliament under the British North America Act of 1867. It is only if both these questions are answered in the affirmative that the judgment of the Supreme Court of Canada can stand ; and it is convenient to deal with them in the above order.

1. The relevant provisions of section 11 of the Dominion Bankruptcy Act of 1919 as originally enacted were as follows :—

11. (1) "Every receiving order and every author-

* Reported by Sir W. J. Soulsby, Barrister-at-Law.

ized assignment made in pursuance of this Act shall take precedence over :

"(*a*) all attachments of debts by way of garnishment unless the debt involved has been actually paid over to the garnishing creditor or his agent ; and

"(*b*) all other attachments, executions, or other process against property, except such thereof as have been completely executed by payment to the execution or other creditor ; but shall be subject to a lien for one only bill of costs, including sheriff's fees, which shall be payable to the garnishing attaching or execution creditor who has first attached by way of garnishment or lodged with the sheriff an attachment, execution or other process against property ; Provided that this paragraph shall not apply to any execution or other process issued against real or immovable property under or by virtue of a judgment registered prior to the coming into operation of this Act, which judgment, as the result of such registration, became, under the laws of the Province wherein it was entered, a charge, lien or hypothec upon or of such real or immovable property."

. . . .

(8) "Every receiving order and every authorized assignment (or a true copy certified as to such order by the registrar or other clerical officer of the court which has made it, and as to such assignment certified by the trustee therein named) shall be registered or filed by or on behalf of the trustee in the proper office in every district, county or territory in which the whole or any part of any real or immovable property which the bankrupt or assignor owns or in which he has any interest or estate is situate."

. . . .

(10) "From and after such registration or filing or tender thereof within the proper office to the registrar or other proper officer, such order or assignment shall have precedence of all certificates of judgment, judgments operating as hypothecs, executions and attachments against land (except such thereof as have been completely executed by payment) within such office, or within the district, county or territory which is served by such office, but subject to a lien for the costs of registration and sheriff's fees of such judgment, execution or attaching creditors as have registered or filed within such proper office their judgments, executions or attachments."

The coming into force of the above Act had been postponed to July 1, 1920, and before it came into force it was amended by chapter 34 of the statutes of that year. By section 6 of the last-mentioned statute the proviso to paragraph (*b*) of section 11 (1), which excepted from the application of that paragraph judgments registered before the coming into operation of the Act, was repealed, and all judgments whether registered before or after July 1, 1920, were left to be governed by the general rule. Further, by section 7 of the same Act of 1920 it was enacted as follows :—

"7. Section 11 of the said Act is hereby amended by adding thereto the following sub-section :—

"'(16) The provisions of paragraphs one and ten of this section shall not apply to any judgment or certificate of judgment registered against real or immovable property in either of the provinces of Nova Scotia and New Brunswick prior to the coming into force of this Act, which became, under the laws of the Province wherein it was registered, a charge, lien or hypothec upon such real or immovable property.'"

In 1925 this sub-section (16) was amended so as to include judgments registered against real estate in the Province of Quebec before the coming into force of the Bankruptcy Act, and this was done by 15-16 George V., chapter 31, section 5, which reads as follows :—

"5. Sub-section (16) of section 11 of the said Act, as that sub-section is enacted by section 7 of the chapter 34 of the Statutes of 1920, is hereby repealed and the following is substituted therefor :—

"'(16) The provisions of sub-sections (1) and (10) of this section shall not apply to any judgment or certificate of judgment registered against real or immovable property in any of the provinces of Nova Scotia, New Brunswick or Quebec, prior to the coming into force of this Act, which became, under the laws of the Province wherein it was registered, a lien or hypothec upon such real or immovable property.'"

Upon a review of these enactments their Lordships are of opinion that they have been correctly interpreted by the Supreme Court as having the effect of postponing a judicial hypothec upon real estate of the debtor to an authorized assignment by the debtor for the benefit of his creditors. Sub-section (1) of section 11 of the Act of 1919 gives to an authorized assignment precedence over all executions against property not completed by payment to the execution creditor ; and sub-section (10) carries the process a step further by giving to such an assignment, when duly registered in any district, precedence over all "certificates of judgment, judgments operating as hypothecs, executions, and attachments against lands (except such thereof as have been completely executed by payment)" within the district. It was stated by the learned Judges of the Quebec Courts that the words "certificates of judgment, judgments operating as hypothecs" were unknown in the jurisprudence of that Province, and their Lordships of course accept that statement as showing that the precise phrase used in the statute is new to Quebec ; but the Quebec Civil Code speaks (in Article 2020) of a judicial hypothec as "resulting from" a judgment and (in Article 2121) of a judgment as "conferring" a hypothec when registered, and the expression "judgments operating as hypothecs" is a not inapt paraphrase of this language. The view taken by Chief Justice Lemieux in the Superior Court that the intention of sub-section (10) was only to transfer to the trustee of the assignment the power of realizing the property affected by the hypothec, leaving to the hypothecary creditor an effective charge on the proceeds of realization, does not appear to their Lordships to give full effect to the enactment in sub-section (10) that the assignment is to have precedence over the judgment operating as a hypothec ; and their Lordships agree with the opinion of Mr. Justice Newcombe (who gave the reasons for the judgment of the majority of the Supreme Court) that the intention of these enactments was that the assignment should have precedence of all judgments operating as hypothecs for all purposes, including the distribution as well as the realization of the assets. The suggestion, put forward by counsel for the appellants on this appeal, that the sub-section was intended to give the assignment precedence over the judgment only and not over the hypothec following upon the judgment, appears to their Lordships to have no substance ; for if a judgment operating as a hypothec is postponed to the assignment, the hypothec which it operates must surely undergo the same process.

This conclusion, which their Lordships would have been disposed to adopt on a reading of the earlier part of section 11 (10) taken by itself, is confirmed

by a consideration of the latter part of that subsection, which reserves to a judgment creditor who has duly registered his judgment a lien on the land for his costs of registration and sheriff's fees; for if the intention of the Legislature had been to leave to the hypothecary creditor his full charge on the land subject to the hypothec, it would have been unnecessary to preserve his lien for costs. Further, section 7 (16) of the Act of 1920, which excepted from section 11 (10) of the Act of 1919 any judgment registered against real property in Nova Scotia or New Brunswick before the coming into force of that Act which became under the law of the Province a charge, lien or hypothec against such property, carries a plain implication that such a judgment if registered after the coming into force of the Act of 1919 is intended to be affected by section 11 (10) of the Act. The Act of 1925 above cited was passed after the present dispute arose; but section 5 of that Act, which extends the operation of section 7 of the Act of 1920 to Quebec, shows plainly that the Dominion Legislature in 1925 interpreted the Act of 1919 as applying to that Province in the same sense.

For these reasons, which agree in substance with those given by Mr. Justice Newcombe on behalf of the majority of the Supreme Court, their Lordships are of opinion that the first of the two questions above set out should be answered in the affirmative.

Their Lordships now turn to the second question arising on this appeal—namely, whether the enactment of section 11 (10) of the Bankruptcy Act of 1919, as above construed, was within the powers conferred upon the Dominion Parliament by section 91 of the British North America Act, 1867, which entrusts to that Parliament exclusive legislative authority over all matters coming within certain classes of subject there enumerated, including "bankruptcy and insolvency," or whether it infringes upon the exclusive power given by section 92 of the same Act to a provincial Legislature to make laws in respect of "property and civil rights" in the Province.

The expression "bankruptcy and insolvency" in paragraph (21) of section 91 of the British North America Act, 1867, was referred to by Lord Selborne in *L'Union St. Jaques de Montréal v. Bélisle* (L.R. 6 P.C. 31) as "describing in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation." In *Attorney-General for Ontario v. Attorney-General for Canada* (10 *The Times* L.R., 305; [1894] A.C., 189) Lord Herschell observed that a system of bankruptcy legislation might frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated, and added, at page 200: "It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial Legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial Legislature would doubtless be then precluded from interfering with this legislation, inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament." Taking these observations as affording assistance in the construction of paragraph (21) of section 91 of the Act of 1867, their Lordships are of opinion that the exclusive authority thereby given to the Dominion Parliament to deal with all matters arising within the domain of bankruptcy and insolvency enables that Parliament to determine by legislation the relative priorities of creditors under a bankruptcy or an authorized assignment. A creditor who has obtained judgment for his debt and has issued execution upon the debtor's lands or goods remains a creditor; and it is entirely within the authority of the Dominion Parliament to declare that such a creditor, although (as Mr. Justice Newcombe expressed it) he has been "first in the race for execution" but has not yet proceeded upon his execution and become satisfied by payment, shall on the occurrence of bankruptcy or a *cessio bonorum* be reduced to an equality with the general body of creditors. Then is there anything in the nature of a judicial hypothec in the Province of Quebec which exempts it from the possibility of being affected in like manner by the bankruptcy law of the Dominion? In their Lordships' opinion there is nothing in the Quebec law which can have that effect. It is true that judicial hypothec is classed in the Civil Code with legal and conventional hypothecs and is there said to establish a real right; but notwithstanding these provisions the hypothecary creditor remains a judgment creditor, and his hypothec, whether it may or may not be properly called a mode of execution, is at all events closely analogous to that process. Indeed, their Lordships were informed that Article 614 of the Civil Code of Procedure of Quebec has been held to require such a creditor to cause the movable goods of the debtor to be realized under the judgment before he can enforce his hypothec against the land. There is nothing therefore in the nature of a judicial hypothec which for the purpose now in question distinguishes it from an execution levied upon land, and Lord Herschell's judgment above cited shows clearly that such an execution may lawfully be postponed by a Dominion Act.

The contention that the enactment of section 11 (10) of the Bankruptcy Act infringes the authority of the provincial Legislature to deal with property and civil rights is effectively dealt with by Mr. Justice Newcombe. No doubt it was within the competence of the provincial Legislature to give to a judicial hypothec the quality of a real right; but if and so soon as that enactment comes into conflict with a Dominion statute duly passed under the authority of section 91 of the Act of 1867, then the Dominion statute prevails over the provincial legislation and takes effect according to its tenor. The decisions of this Board relating to what is sometimes called the "unoccupied field" are referred to in the judgment of Mr. Justice Newcombe, and conclusively establish this point.

The thesis that a postponement or annulment of the rights of creditors who under a provincial law have obtained preferential rights is within the domain of bankruptcy legislation receives support by reference to a series of provincial statutes to which Mr. St. Laurent in an able argument called their Lordships' attention. The Assignments and Preferences Act of Ontario (R.S.O. 1914, c. 134) enacted (by section 14) that an assignment for the general benefit of creditors under that Act should take precedence of attachments, garnishee orders, judgments, executions not completely executed by payment, and orders appointing receivers by way of equitable execution, subject to a lien for the execution creditor's costs. Similar provisions were contained in

the Assignments Act of Manitoba (R.S.M. 1913, c. 12, section 8), the Assignments Act of Saskatchewan (R.S.S. 1909, c. 142, section 9), the Creditors' Trust Deeds Act of British Columbia (R.S.B.C. 1911, c. 13, section 14), the Act of New Brunswick respecting Assignments and Preferences by Insolvent Persons (R.S.N.B. 1903, c. 141, section 9), and (except as to lands) the Assignments Act of Nova Scotia (R.S.N.S. 1923, c. 200, section 46). In all these cases the provincial Legislatures when dealing with assignments by insolvents included in their legislation provisions postponing an execution to the general right of an assignee for the benefit of creditors; and it would be difficult to reconcile the course so taken by these Legislatures with the contention that such a postponement is not within the domain of bankruptcy law. It may be added that, since the "unoccupied field" where such priorities are regulated has been occupied by the Bankruptcy Acts of the Dominion, most of these provincial enactments have been repealed.

In the result their Lordships find themselves in agreement upon both questions with the reasoning and conclusions of the majority of the Supreme Court of Canada, and they will humbly advise his Majesty that this appeal fails and should be dismissed. The appellants will pay the costs of the respondent trustees.

[Solicitors—Messrs. Blake and Redden; Messrs. Charles Russell and Co.; Messrs. Lawrence Jones and Co.]

Court of Appeal.
(Lord Hanworth, M.R., Atkin and Lawrence, L.JJ.)

1928.
Jan. 11.

SOCIÉTÉ ANONYME PÊCHERIES OSTENDAISES v. MERCHANTS MARINE INSURANCE COMPANY, LIMITED.*

Practice—Action—Costs—Order for stay of proceedings—Action ultimately settled upon terms that defendants pay plaintiffs' costs—Costs incurred by plaintiffs between stay and settlement—Whether premature—Costs incurred before issue of writ—Whether incurred usefully—Discretion of Taxing Master.

An order in an action for stay of proceedings does not necessarily mean that all activities should be stayed. Therefore, if one of the parties during a stay incurs costs for some useful purpose, as, for instance, the taking of the evidence of seamen before they become dispersed, and afterwards becomes entitled to his costs of the action, the costs incurred during the stay may be allowed.

It is a matter within the discretion of the Taxing Master to say whether costs so incurred were incurred prematurely, or whether the outlay was advisable and useful for the purposes of litigation still liable to take place. In his discretion the Master may even allow costs incurred before issue of the writ in the action, provided that he is satisfied of the advisability of incurring them.

This was an appeal from Mr. Justice MacKinnon.

* Reported by G. T. Whitfield-Hayes, Esq., Barrister-at-Law.

The facts were stated by the Master of the Rolls as follows:—

The case is this: On February 25, 1926, there was a loss of a trawler. That trawler was insured by the defendants in this action. The trawler belonged to the plaintiffs, and very soon after the facts as to the loss were ascertained it was notified on May 7, 1926, by a letter written to the plaintiffs, that the underwriters had determined to fight the case on the ground that the loss was not due to a peril insured against. The trawler had foundered, and it is not difficult to see that, among the possible charges which arise from that attitude taken up by the insurers, it might be possible that they were charging the plaintiffs with having scuttled the vessel. Whether that was specifically their intention or not, the plaintiffs were at any rate told that for the purpose of their success in the action it would be necessary for them to be prepared with evidence which should overcome the allegation of the underwriters that the loss was not due to a peril insured against.

Now in June, 1926, in consequence of that notification, the plaintiffs and their advisers sent over to the Continent to take the statements of the crew of the trawler. The members of the crew were said to be under contract to serve in other vessels, and it was quite possible that they would be so engaged and upon the high seas, in different directions, and their evidence would be lost if steps were not taken immediately to secure it. On July 20, 1926, the writ was issued, and on the 21st a letter was written by the defendants as to the usual agreement which was to be obtained, that all the underwriters would be bound by the decision in the action. On July 28 there was a summons for directions, and under that summons for directions an order was made for ship's papers, the usual order for ship's papers. That order is in the usual form, and it stated that there should be a stay until the order for the ship's papers had been complied with. The actual words are these. First of all, there was an order for security for costs in £100, with a stay meantime; and then there was the order for ship's papers; and then it was ordered "that in the meantime all further proceedings be stayed." In October some further statements of witnesses were obtained, and the opinion of the engineer, Mr. Camps, was also obtained. On January 25, 1927, the affidavit of ship's papers was prepared, but it was not communicated to the defendants. In March the documents which had been catalogued in the affidavit of ship's papers were ready, and then, and not until then, communication was made to the other side that the ship's papers were ready for delivery, and on March 5 the ship's papers were filed.

On May 20, 1927, the action was settled on terms under which the plaintiffs recovered, and were to be paid by the defendants their taxed costs. Now upon the taxation questions arose as to the three categories of costs. There were the costs which had been incurred before the action was commenced at all; there were, secondly, the costs which had been incurred after the writ had been issued, and which had been incurred before the time when the order for ship's papers was made; and, thirdly, there were the costs which had been incurred during the time when there was the stay of proceedings laid down or directed in the order for ship's papers. When the costs were brought before the Master, objection was taken to them that there had been a stay of proceedings and an order for security for costs and ship's papers, and the defendants submitted that the items

which had been incurred up to the time when that stay was removed were premature ; and the Master answered that in a manner which I will deal with in a moment.

Upon the Master's answer being given, he made an order allowing in form both some costs which had been incurred apparently before action, some costs which had been incurred (such as obtaining evidence of witnesses) before the stay was imposed by the order for ship's papers, and also some costs which were incurred during the time when the stay operated.

Mr. Justice MacKinnon, on December 19, disagreed with the decision of the Master, and ordered that these costs to which I have referred should be disallowed ; and from that decision the appeal is taken to this Court. The result is that the question is raised, first, whether any costs at all could be allowed before action brought ; and, secondly, whether any of the costs could be allowed during the time when the stay operated.

Mr. Le Quesne, K.C., and Mr. K. S. Carpmael appeared for the appellants ; Mr. R. I. Simey for the respondents.

The Master of the Rolls.—In my judgment, this appeal succeeds. It raises a somewhat novel point, and no doubt, from the large bearing that it may have, an important point.

[His Lordship stated the facts, as above, and continued :—]

Now, with regard to costs generally, it must be borne in mind that Order LXV., Rule 27, sub-rule 29, allows a very wide discretion to the Taxing Master, and I do not desire to say anything in any way to circumscribe that discretion. It is to be used by the Taxing Master, and the rule has been drawn in the terms in which it is, in order to give a wide latitude to the Taxing Master's discretion.

It is said that no costs ought to be allowed which have been incurred before action brought. That would be to state the proposition far too widely. It could not be supported in that form. In the case to which our attention has been called, a case which came before Mr. Justice Swinfen Eady, of *Bright's Trustee v. Sellar* (20 *The Times* L.R., 210 ; [1904] 1 Ch., 369), the observation is made by Mr. Justice Swinfen Eady ([1904] 1 Ch., at p. 371) : "Can he" —that is, the Master—"allow the costs of a transcript obtained before action ?" And it is answered in this way : "It is a matter of discretion. . . . His discretion is not confined to costs incurred after action," and a reference is made to the sub-rule to which I have already referred. Mr. Justice Swinfen Eady in that case did allow and adopt the Master's view that there should be certain expenses allowed in the bill which had been incurred before the action was brought, and for the reason that the expenses proved useful in the action and had been incurred at a time when it was right and proper that the outlay should be made in order to safeguard the position of the intending litigant.

It appears to me, therefore, that there is a power in the Masters to allow some costs which may have been incurred before action brought ; and, if the expense is an outlay made upon materials ultimately proving of use and service in the action, the Master has a discretion, which he probably would exercise in favour of the party incurring that outlay, to allow these costs, because the materials have been used during the course of and at the trial.

Then I come to the next class of costs—namely, the costs which have been incurred before the stay. As to those, it appears clear that, just as all other costs which have been incurred in the action and during the action subsequently to writ issued are in the discretion of the Master, so such costs to which objection has been taken—namely, in obtaining the evidence—would fall within the discretion of the Master. It is said that it cannot be clear at that moment what would be the issues as defined between the parties at a later stage of the trial, and therefore that the outlay then made was obviously unnecessary and ought not to be allowed. The answer is that, if it was a prudent outlay, then the Master has power to allow it, and it is for him to judge whether an outlay made subsequently to the issue of the writ was such as might reasonably be included in the costs to be taxed between the parties.

Then comes the more important point upon which the appeal has been presented to us. Mr. Justice MacKinnon has held, apparently, that the stay of proceedings included in the order for ship's papers prevents any costs incurred while that stay was operative from being recovered. I take note that the stay is of "All further proceedings." It is not a stay of activity. The steps which prudence dictates are not forbidden. The question whether the steps that are taken are or are not premature is a matter for the Taxing Master. I agree with the answer made by Sir George King in these terms : "I do not understand that this order entirely paralyses the plaintiff so that he cannot do anything by way of preparation for his real proceedings," &c. If this is so the question whether any act by the plaintiff during that period is or is not premature must be like every other question about premature acts, a question of "reasonableness to be decided by me." I think that Sir George King has rightly answered the objection carried in.

In the case of *Harrison v. Leutner* (16 Ch.D., 559) Sir George Jessel approved of the answers made by the Taxing Masters, who said (16 Ch.D., at pp. 559, 560) : "We have always acted upon the principle that the costs of all work in preparing, briefing, or otherwise relating to affidavits or pleadings, reasonably and properly and not prematurely done, down to the time of any notice which stops the work, is allowable ; and . . . the Taxing Master, having regard to the circumstances of each case, must decide whether the work was reasonable and proper and the time for doing it had arrived." Those words seem to contain a working rule which properly exhibits the discretion which is entrusted to the Masters.

I also would adopt, myself, the words used by Mr. Justice North in considering a matter akin to the question, namely, as to whether or not the activities of the parties' advisers have been paralysed or sterilized, whichever you like to call it. He said this (*Whiteley Exerciser, Ltd. v. Gamage* [1898] 2 Ch., 405, at p. 411) : "If he had said that he was prevented from preparing them"—that is, the affidavits —"by the order which stayed the plaintiffs' proceedings until security for costs had been given, he might have expected that the Court would laugh at him."

When one comes to consider the purpose of this order for staying proceedings, and the good sense of it, it appears to me to be clear that it was not intended to do more than prevent unnecessary steps from being taken in the action itself, and that it was not intended to prevent such activity as would contribute to the success of the party ultimately, and when a step was necessary, such as the collection of evidence, because the witnesses might be dispersed, it cannot be said that it was within the purview of the order made staying proceedings that no such expense

should be undertaken and no such activity engaged in.

For those reasons, it appears to me that the Master's answers to the objections were right, and that Mr. Justice MacKinnon's order setting those answers aside is wrong. The appeal must be allowed, and the answers of the Master to the objections upheld with the taxation.

Lord Justice Atkin.—I agree. This case has been put before us as one of some importance to underwriters, and I agree that it is. The question arises in respect of costs incurred in an action on a marine policy, partly before the action was brought, and partly during the time during which there was a stay of proceedings under an order for ship's papers. The action was begun in July of 1926, and there was an order made in that month for ship's papers, and that order was not in fact complied with until a date in March of 1927, so that there was a long period during which the stay made under the usual order for ship's papers was operative.

Now in the first place it is necessary to consider what are the actual terms of the order. The terms of the order are: "That the plaintiffs and all persons interested do produce and show all papers," and so on, "and that in the meantime all further proceedings be stayed." I think it is important to compare that with a similar and concurrent stay which was imposed in the same order, an order that the plaintiffs (who were foreign plaintiffs) should give security for costs within a month, "otherwise all further proceedings in this action be stayed." As far as the legal operation of those two forms of words is concerned, I find myself quite unable to discern any difference. I think they have precisely the same effect, and therefore, in dealing with the question of costs incurred while a stay of proceedings is current, you have to my mind to consider the matter as though it made no difference whether the stay was granted by reason of security for costs, or an order for ship's papers, or upon any other ground.

The contention, or one of the contentions, made by the defendants, was that the effect of the stay of proceedings was such that the plaintiffs could not recover any costs incurred by them during that period—that they were, as the Taxing Master has put it in his answers to the objections, "paralysed." Now that seems to me to be quite an incorrect view of the effect of the order. All that the order does is to stay proceedings, and "proceedings" obviously do not include the preparations which may be made by the parties by seeing witnesses, taking proofs, indulging in correspondence, and so forth. "Proceedings" are such proceedings as are, for instance, taken into account when you have to deal with the provisions of the staying clause in the Arbitration Act, 1889, for example, a delivery of a pleading, or some step analogous thereto, such as taking out a summons, or appearing on a summons, and so forth; and to my mind it is quite a mistake to suppose that an order to stay directs the parties to hold their hands from the time when the order is made and to pursue no further activities with a view to ascertaining what the facts are and procuring evidence and so forth. Such a view, it is within everybody's experience, would be quite contrary to the ordinary practice. There is no doubt that, while a stay is pending for security for costs or for any other reason, it is the common practice of diligent plaintiffs and diligent defendants to use that time in making some preparation for the trial of the case. They may, of course, go too far—they may make excessive preparation; and, if they make excessive preparation, it may well be that the costs will not be allowed; but it is quite plain that nobody understands the order as being an order directing them to do nothing in the action, and I am quite clear that that is not the legal effect of it.

Now, what then is the position? The position seems to me to be that the Court has ordered, in the case of an action on a marine policy, a stay in order that the defendants may be put in possession of all the written documents that are in the possession of the plaintiffs or parties interested, or which they can reasonably procure under the order; and I have no doubt that one reason for which that order is made is to give the defendants information which otherwise would not be in their possession, to enable them to make up their minds as to what they are going to do in the case—whether they are going to fight it or whether they are going to yield, or whether they are going to admit part of it, and so forth. I think that that object ought always to be borne in mind when the Master is dealing with the question of costs incurred during that period; but inasmuch as, as I have said, it is not true that the parties are stricken with paralysis, and it is not true that no costs can be recovered merely because they have been incurred in that period, it is always a question of fact for the Taxing Master whether the costs were or were not reasonably incurred during that period, always bearing in mind the fact that there is a stay, and also (especially in marine insurance actions) bearing in mind the purpose for which the stay is granted. But subject to that, it seems to me that it is a pure question of fact for the Taxing Master: Was it or was it not reasonable under the circumstances for the plaintiff to have incurred the costs that he did incur, at the time at which he incurred them?

If nothing had been said by the underwriters, and there was no reason to suppose that they would or would not resist the claim, it might very well be that the plaintiffs would find themselves in a difficulty if they incurred elaborate expenditure to prove liability, if in fact the underwriters subsequently admitted liability. But that is not this case, because in this case the defendants' solicitors had written at a very early stage intimating that the defendants intended to resist liability, and expressing their reason in language which certainly might give rise to an apprehension at any rate, and a reasonable apprehension on the part of the plaintiffs' advisers, that the plaintiffs were going to be charged with fraud, because the trawler in this case undoubtedly foundered at sea, and the suggestion was that she was lost, not by a peril insured against. That would certainly, or might, convey to anybody concerned in those matters the suggestion that there was some wilful act alleged other than a peril of the sea.

In those circumstances the Taxing Master might, I think, very well take the view that it was reasonable, at the earliest stage possible, for the plaintiffs to take the evidence of the crew and the master of the trawler for the purpose of establishing what the true cause of the loss was, and also to take the evidence of an experienced surveyor who could survey the vessel before she was repaired with a view of indicating that the loss was in fact a loss from a peril insured against, and was not the result of wilful damage. The ship, I believe, had foundered, and therefore the surveyor would have to report upon the reports of the ship's condition before she had gone to the bottom of the sea.

Now, the Taxing Master has taken all this into account here, and it appears to me to be purely a question of fact for him, and therefore I think in

this particular case there is no reason for upholding the objections which have been taken. It is for him to decide whether the costs were prematurely incurred or not ; he has in the circumstances of the case decided that they were not, and it is entirely a matter for him.

The other matter that arises is as to the costs incurred before the action was commenced. Upon that one has nothing to do with the question of a stay of the proceedings, but it is a pure question as to whether or not the costs incurred before the writ was actually issued are costs which the plaintiff can recover under an order for the costs of the action ; and upon that it appears to me to be very important to bear in mind that the Taxing Masters have to apply the words of Order LXV., Rule 27, sub-rule 29. That rule is the guiding rule in the taxation of costs. It was intended to sum up generally the principles upon which costs are awarded, and I cannot help thinking that if that rule were really rigorously applied by everybody—and by "rigorously applied" I mean applied in all cases, and giving full effect to the width of its language—there would be far fewer complaints brought by successful litigants than are brought at the present moment, because it is a rule which is intended to give to the successful litigant a full indemnity for all costs reasonably incurred by him in relation to the action. I think it says so in terms, that it is to allow "all such costs as shall appear to him to have been necessary or proper for the attainment of justice." That is the whole principle on which the Taxing Master has to determine.

Now it is quite obvious that those costs are not limited to costs incurred after the writ has been issued. Costs are allowed every day, as appears by the Taxing Masters' rules, which are not binding, but which govern the practice in a limited form. I am not at all sure that the conventions fixed by the Masters are not too narrow ; but they may be very wise, because those may be the costs which are commonly in dispute and commonly raised, and it is desirable to deal with them ; but the costs certainly extend beyond that. The Taxing Master has discretion in every case to decide whether the costs incurred before the action were necessary or proper for the attainment of justice, and it may very well be that the costs that the Taxing Master approves are included in that term, as in the case which was put in argument, the case of an accident where a bridge breaks down and it is replaced forthwith, and the state of the bridge is the cause of the action, and where it is essential therefore that there should be an inspection by skilled witnesses at once of the state of that bridge. In those circumstances it may very well be that the Taxing Master might hold that such costs incurred before the issue of the writ were necessary for the attainment of justice, because the actual facts to be ascertained from such an inspection could not be ascertained at a later date, and of course the Taxing Master upon that would have to consider the probability of the defendant disputing liability or not disputing liability. That again is purely a question of fact for the Taxing Master, and here he has not misdirected himself. He says that certain costs were properly incurred in taking evidence, and by the professional gentlemen concerned doing what was necessary for the purpose of taking that evidence. I agree that the Taxing Master in this case seems to have been liberal. The costs incurred in this case seem to strike one as being on a liberal scale, but then that is entirely a question for him and not a question on which we can interfere.

There is one other point which was raised by Mr. Simey, and it was this, that no costs can be incurred (that is to say, properly incurred at all, as I understand him, in the action) until the issues have been determined (that is to say, have been defined) ; and he says that these costs were incurred before the defendants had delivered their defence or indicated what their defence would be. All that I can say is that that goes very much too far. That would mean this, that the litigant would never be entitled to recover any costs, save the actual costs of proceedings, until the defendant had delivered his defence, because until then the issues are not defined. That, again, does not seem to be the right view. The question is, in every case, what is the reasonable thing to do, and the Taxing Master is not bound by any such limit of time as is mentioned.

For these reasons it appears to me that the learned Taxing Master in his answer to the objections gave expression to what I cannot help believing is not only the law, but also has been the general practice in these cases. I think he exercised his discretion as to whether or not the costs incurred were premature or not. It seems to me that that is the only question which he had to determine, and in those circumstances I think the objection fails.

The result is that this appeal should be allowed, and the objections should be dismissed, with costs, here and below.

Lord Justice Lawrence.—I agree. The only objection made by the defendants to the taxation by the Taxing Master of the plaintiffs' bill of costs in respect of the relevant items, and therefore the only objection open to them in this Court, was in these terms : "As there was a stay of proceedings for security for costs and ship's papers the defendants submit that these items were premature." Now that objection was, I think, intended to raise a question of principle, at all events it was so treated by the Taxing Master, and the only question of principle that I myself can extract from that objection is that an order for a stay, whether it be pending security for costs or pending delivery of ship's papers, operates not only to stay the proceedings in the action, but also operates to stay what the Master's rule has aptly described as the "activities" of the parties in getting up their case, or looking further after the interests of their clients.

The Taxing Master has evidently had that question argued before him ; his answer shows it, and to my mind it is really the only question of principle that can be raised upon that objection, because of course the order itself would be a factor to take into account as to whether certain costs were premature, just as much as any other fact, but that would not make the question decided by the Taxing Master a question of principle.

Now Mr. Simey was reluctant, when I pressed him on the matter, to say that the order stayed the proceedings in the sense that it stayed the hands of the solicitors for either party pending the operation of the stay. All that he would say was this, that when such an order had been made the Taxing Master was bound to hold that any costs incurred by the parties pending the stay were premature and would have to be disallowed as a matter of principle. Now I think in that he was wrong. There can be no doubt, I think, that an order staying proceedings does not apply to staying the ordinary work of solicitors in getting up the case. As I have stated, they have to be careful in what they do pending such an order,

because the Taxing Master would no doubt consider the fact of the order in coming to a conclusion whether the work was premature or not.

That leaves only the question whether in fact these costs were prematurely incurred, and in that I agree with my colleagues that it is a pure question for the Taxing Master, and is not open to review in this or any other Court. It is for him to say whether, in the special circumstances of the particular case, the costs were or were not prematurely incurred; and in considering that question he must, and did no doubt, have in mind the fact that an order to stay proceedings had been made, and no doubt other factors. He having once come to the conclusion, as he has done, that the costs objected to in the present case were not prematurely incurred, in my judgment that is not open to review.

I therefore agree that this appeal succeeds, and ought to be allowed, and that the Taxing Master's answers were perfectly right.

[Solicitors—Messrs. Thomas Cooper and Co.; Messrs. Waltons and Co.]

Prob., Divorce, and Adm. Div. } 1928.
(Lord Merrivale, P.) } Jan. 18

DEWE v. DEWE.
SNOWDON v. SNOWDON.*

Husband and Wife — Maintenance — Order refused by magistrate—Wife's appeal—Separation deed — Covenant for maintenance — Husband's bankruptcy — Wife proves for capitalized value of provision in deed — Fractional dividend—Bankruptcy Act, 1914 (4 and 5 Geo. V., c. 59)—Summary Jurisdiction (Married Women) Act, 1895 (58 and 59 Vict., c. 39)—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 and 16 Geo. V., c. 51).

A bankrupt is not relieved of his common law liability to support his wife by the discharge of his liability, on being adjudged bankrupt, under a separation deed to maintain his wife, whether she has proved in the bankruptcy for the capital value of the weekly sums which he covenanted under the deed to pay or whether she has not proved in the bankruptcy. On the extinction of the husband's liability under the deed by the bankruptcy, the wife's common law right is revived.

These were two appeals from justices raising analogous points: (1) Whether a bankrupt is by his discharge relieved of his common law duty to support his wife by reason of her having proved in the bankruptcy for the capitalized value of the husband's covenant in a deed to pay her a weekly sum for life for maintenance; (2) whether an undischarged bankrupt, on adjudication, is relieved of the same obligation under a similar covenant.

Mrs. Beatrix A. Dewe was the first appellant. She appealed from a decision of Mr. Bingley, the magistrate sitting at Marylebone Police Court, on October 10, 1927, dismissing a summons which she had issued against her husband, Mr. Albert Ernest Dewe, a dentist, of Market Harborough, Leicestershire, under the Summary Jurisdiction Acts for maintenance on the ground that he had wilfully neglected to provide her with reasonable maintenance. On December 9, 1919, the parties entered into a deed of separation by which he covenanted to pay her £2 10s. a week for their joint lives and, if he predeceased her, until she should remarry.

The relevant clauses of the deed were as follows:—

1. The said Beatrix Annie Dewe may at all times hereafter live separate and apart from the said Albert Ernest Dewe and from his marital control and authority as if she were sole and unmarried, and may from time to time reside at such place or places and in such manner as she shall think proper without any interference on the part of the said Albert Ernest Dewe.

2. Neither of them, the said Albert Ernest Dewe and Beatrix Annie Dewe, shall directly or indirectly molest or interfere with the other of them or compel or endeavour to compel the other of them to cohabit or live with him or her by any legal proceedings for restitution of conjugal rights or otherwise howsoever.

3. The said Albert Ernest Dewe shall during the lives of himself and the said Beatrix Annie Dewe, or until they shall mutually agree to live together again, pay to the said Beatrix Annie Dewe as her separate estate, but without power of anticipation, by equal weekly payments the weekly sum of two pounds ten shillings, the first of such weekly payments to be made on the day of the date hereof and future payments to become due and be made on Monday in each succeeding week, Provided Always that if the said Beatrix Annie Dewe shall survive the said Albert Ernest Dewe, and the said weekly payment shall not have been forfeited or otherwise determined in his lifetime, then the representative of the said Ernest Albert Dewe shall continue to pay such weekly payment in manner aforesaid until the said Beatrice Annie Dewe shall again marry or die.

5. If the said Beatrice Annie Dewe shall die in the lifetime of the said Albert Ernest Dewe all her separate estate and property, real and personal, of which she shall not have disposed in her lifetime or by will shall, subject to her debts and liabilities, go and belong to the persons or person who would have become entitled thereto if the said Beatrice Annie Dewe had then died intestate and a spinster, and in the same event the said Albert Ernest Dewe shall permit her will (if any) to be proved or administration to her personal estate and effects to be taken out by the persons or person who would have been entitled to do so if she had then died a spinster.

6. The said Beatrice Annie Dewe shall at all times hereafter keep indemnified the said Albert Ernest Dewe against all future debts and liabilities contracted or incurred by the said Beatrice Annie Dewe, and in case the said Albert Ernest Dewe shall at any time or times hereafter be called upon to pay or discharge and shall actually pay or discharge any such future debt or liability contracted or incurred, then and in every case it shall be lawful for the said Albert Ernest Dewe to deduct, retain and reimburse to himself out of the said weekly sum of two pounds ten shillings the amount which he, the said Albert Ernest Dewe, shall have so paid in respect of such debt or liability.

7. In case the said Albert Ernest Dewe and Beatrix Annie Dewe shall at any time hereafter with their mutual consent come together and cohabit with each other, or if their marriage shall be dissolved or if they shall be judicially separated from each other in respect of anything done or suffered by either party after the execution of these presents, then and in either of such cases the said weekly

*Reported by WILLIAM LATEY, Esq., Barrister-at-Law.

payment of two pounds ten shillings shall cease and be no longer payable and thenceforth all the covenants and provisions herein contained shall become void.

On September 12, 1923, the husband was adjudicated bankrupt. The wife, who had sued him on the deed in the High Court and been granted judgments, lodged a claim for £1,380 as the capitalized value of her claim under the deed. On the basis of the only dividend of 6d. in the £ she received £37 17s. 6d. in settlement, and had received nothing from him since.

The relevant subsections of the Bankruptcy Act, 1914, are :—

"28.—(2) An order of discharge shall release the bankrupt from all other debts [*i.e.*, other than certain debts of a character not arising in this case] provable in bankruptcy."

"30.—(1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust shall not be provable in bankruptcy.

"(2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice.

"(3) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy."

Before the magistrate it was argued that by reason of the wife's proving in her husband's bankruptcy he had got rid of any liability to maintain her, and the wife had compromised the future payments due to her under the deed.

Mr. Bingley referred to the wife's having proved in bankruptcy and said :—

"I cannot see that in the face of this the wife can now turn round and say 'You have wilfully neglected to maintain me.'

"Obviously things have turned out very badly for her. But supposing there had been no bankruptcy and that this lady had said 'Instead of paying me this £2 10s. a week, I wish you would pay me £1,500 down to start a business,' and then supposing she failed, is it conceivable that, having got the money, she could then turn round and say, 'It is true, I did capitalize my claim on you under the deed, but still all the same you are liable to maintain me for the rest of my life'?

"I cannot believe that that is the law of the land. I am sorry I am against this lady. She has made an extremely bad bargain. She has not to my thinking made out her case, and it must therefore be dismissed."

Mr. N. R. Fox-Andrews, for the appellant, submitted that the magistrate had taken a wrong view. The law did not say that because a man was discharged from bankruptcy he should be regarded as being in the same position as if he had performed his contract. The effect of the bankruptcy law was to absolve him from the performance of his contract, but the law did not say that because he was discharged from bankruptcy he should be regarded as having performed the obligations in respect of which he had been discharged. Counsel referred to *Jones v. Newtown and Llanidloes Guardians* (36 *The Times* L.R., 758 ; [1920] 3 K.B., 381), in which Mr. Justice Shearman said :—

"The case presents some little difficulty and is bare of direct authority, but I think it must be decided upon the cardinal principle that by the common law of England a husband is bound to support his wife. . . . To the general principle that the husband is bound to maintain his wife there is one exception, and that is where the wife is guilty of adultery, in which case the husband is discharged from all liability thereafter to maintain her or to recoup the guardians for her maintenance. . . . But that is, so far as I am aware, the only case in which the husband's obligation is permanently determined."

Lord Merrivale.—That was a different obligation, by a citizen to a public authority. Assume the husband to have provided an ample fund for the wife : assume that she squanders it. The question arises if she has compounded with her husband for future maintenance. Distinctions may arise between maintenance presently provided and an agreement for future provision. In this case, even if the wife had not proved in the bankruptcy, the debt under the deed would have been discharged.

Counsel referred to *Victor v. Victor* (28 *The Times* L.R., 131 ; [1912] 1 K.B., 247), in which it was held by the Court of Appeal that on a husband being adjudged bankrupt his wife could not maintain an action on his covenant in a separation deed to pay her an annuity, though she had not proved in the bankruptcy. He read the following passage from the judgment of Lord Justice Moulton :—

"The mere fact that a man has become bankrupt does not free him from his obligation to support his wife, and an order for alimony is an act of the Divorce Court enforcing that surviving obligation."

He also referred to *McQuiban v. McQuiban* (29 *The Times* L.R., 766 ; [1913] P., 208), in which Sir Samuel Evans, P., held that, no action being maintainable by the wife against her husband, on his discharge from bankruptcy, under his covenant in a separation deed to pay her an annual sum, the deed was no bar to proceedings taken by her subsequently for restitution of conjugal rights.

Lord Merrivale.—What do you say is the present position of this deed ? Is it still subsisting ?

Mr. Fox-Andrews.—No, it has gone. It is a nullity in law, there having been a mutual discharge owing to the bankruptcy.

Continuing, he said that if the contention of the other side were right it would open the door to serious fraud. A husband, well knowing that he was likely to go bankrupt and also that his wife was unaware of it, and being on bad terms with her, might induce her to enter into a deed of this sort, and then engineer his bankruptcy and thereby rid himself of his obligations to his wife for the rest of his life. It would not matter whether she proved or not. It would open the door to very undesirable practices by husbands who wanted to get rid of their wives. He submitted that when the deed came to an end the common law obligation revived, and in this case the failure of the husband to pay maintenance constituted wilful neglect under the Summary Jurisdiction Acts. He referred to *Diggins v. Diggins* (43 *The Times* L.R., 37 ; [1927] P., 88).

Mr. Honeyman, for the respondent, submitted that under the Bankruptcy Act, 1914, the husband's pecuniary obligations were satisfied as if the wife had taken the full amount for which she proved.

Lord Merrivale.—If she came to this Court for restitution of conjugal rights and afterwards for a judicial separation, this Court would not be debarred from ordering the husband to make provision for her.

Mr. HONEYMAN cited the following passage from the judgment of the Master of the Rolls (Sir H. H. Cozens-Hardy) in *Victor v. Victor* (*supra*) :—

"It seems to me that the whole policy of the Bankruptcy Act is that the bankrupt is to get complete discharge from contractual obligations to pay sums of money, and the only right of the person under the terms of the contract, whatever the pecuniary claim is, is to come in."

Counsel said that here the husband would not have gone bankrupt if his wife had not secured two judgments against him. He referred to *Ex parte Bates* (11 Ch.D., 914), in which Lord Justice James said in his judgment :—

"The present case is simply that of an annuity payable by A to B. The provision of the statute (the Bankruptcy Act, 1869, 32 and 33 Vict., c. 71, s. 31) is plain. It says that such future or contingent debts or liabilities of a bankrupt are to be valued in the best way possible, and that, when the value has been ascertained, the sum so assessed is to be provable as a debt in the bankruptcy . . . both parties, the creditor and the trustee, taking the proof for better or for worse."

LORD MERRIVALE.—Do you say that under the statute he has compounded his liability to support his wife ?

Mr. HONEYMAN.—Yes, by the determination of her pecuniary rights under the deed.

In the second case of *Snowdon v. Snowdon,* Mr. John Snowdon appealed from an order of the Huddersfield justices, which directed him to pay 12s. 6d. a week for his wife's maintenance on the ground that he had wilfully neglected to provide reasonable maintenance for her. In 1922 they entered into a deed of separation, by which he agreed to pay her £3 a week for the support of herself and four children, reducible in certain circumstances to £2 5s. In July, 1926, he was adjudicated bankrupt, and his wife proved for £844 as the capitalized value of his liability under the deed. In fact, on a payment of a dividend of 8¾d. in the £, she received about £29.

Mr. H. B. D. GRAZEBROOK, for the appellant, adopted Mr. Honeyman's arguments, but added that in this case the husband was an undischarged bankrupt. The wife voluntarily proved in the bankruptcy "for better or for worse," and thus agreed to accept in full satisfaction of her rights whatever dividend was paid. If she had not proved in bankruptcy, she might on his discharge be entitled to maintenance. Under section 39 (1) of the Bankruptcy Act, 1914, if the appellant were discharged and again became bankrupt the trustee in the first bankruptcy would be entitled to prove in the second bankruptcy in respect of debts not satisfied in the first. In these circumstances there had been no wilful neglect to maintain.

Mr. H. W. BARNARD, for the respondent, adopted Mr. Fox-Andrews's arguments, adding that the deed had gone and the wife thus started *de novo.*

LORD MERRIVALE delivered the following considered judgment :—

The case of *Dewe v. Dewe* is an appeal by a wife from the dismissal by a Metropolitan magistrate of her application under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, for an order for maintenance against her husband. The parties were married in 1915 and have two children. In 1919 they separated and agreed to live apart upon terms which were embodied in a deed dated December 9, 1919. The deed recited the agreement to live apart and an agreement by the husband to pay to the wife during their lives £2 10s. per week for the maintenance and support of herself and of the children, of whom the deed stated that the parties had agreed that the wife should have the custody, and witnessed that in pursuance of the agreement and of provisions of the deed the parties entered into the various mutual covenants therein contained. These are usual covenants in a separation deed. The covenant as to maintenance bound the husband to pay to the wife as her separate estate without power to anticipate £2 10s. weekly during their joint lives, and provided that in case the wife should survive the husband and the said weekly payment should not have been forfeited or otherwise determined in the husband's lifetime, his "representative" should continue such weekly payments until she should marry again or die. The wife covenanted for indemnity to the husband against any future debt or liability of hers and for a right of reimbursement out of the weekly allowance in case of breach of this obligation. There were also covenants for living apart and against proceedings to compel cohabitation and a proviso for determination of the weekly payments and avoidance of the deed in case of renewed cohabitation, dissolution of the marriage, or judicial separation in respect of causes arising after the making of the deed.

After proceedings by the wife in the High Court in an action for arrears under the deed, the husband, in 1923, was adjudicated bankrupt. The wife proved in the bankruptcy in respect of her rights under the deed as to moneys payable by the husband during the joint lives of the parties. In January, 1924, a first and final dividend of 6d. in the £ was declared and paid, and the wife received in respect of the claim so proved by her a sum of £36 17s. 6d.

The wife in 1926 called upon the husband to contribute towards her maintenance. Then, and at all material times, as is alleged, the husband was engaged in a profitable practice as a dentist. He made no contribution, and in October, 1927, the wife caused to be issued at Marylebone Police Court a summons alleging against the husband wilful neglect to provide reasonable maintenance for his wife. The husband at the hearing relied upon the receipt by the wife of a dividend in his bankruptcy, in respect of the estimated capital value of the sums payable by the husband under the deed. It was submitted on his behalf that inasmuch as the wife was not obliged to claim in the bankruptcy for sums which would thereafter have been payable under the deed, but which had not accrued due at the bankruptcy, she had thus made claim and acceptance of the sum paid by the trustee extinguished her rights against her husband and discharged him from future liability for her maintenance. To these submissions the learned magistrate gave his assent, and he accordingly dismissed the summons. The material passage in the statement by the learned magistrate of his reasons for the decision at which he arrived is in these words :—"To my mind, it cannot be said that this man has wilfully neglected to provide reasonable maintenance for his wife, because they have separated under a properly drawn deed of separation approved by the wife's solicitors and providing her with £2 10s. per week for life. Unfortunately, the man went bankrupt, and in his bankruptcy, rightly or wrongly, she was advised to capitalize her claim—not to claim for the smaller amount of arrears then due—but to capitalize her claim for life to the extent of thirteen or fourteen hundred pounds. Unfortunately, she only got sixpence in the pound. I cannot see that in the face of this the wife can now turn round and say, 'You have wilfully neglected to maintain me.'"

Before the learned magistrate the wife's rights appear to have been treated as purely contractual

rights conferred by a deed which had been satisfied by operation of law. Before us it was more persuasively argued that the wife had accepted the provisions of the deed in satisfaction of all right to maintenance, however arising, and that the husband's liability in respect of any such claim had been discharged by his bankruptcy or by the wife's acceptance of a dividend upon the capital value of the agreed amounts. Reliance was placed on the husband's behalf upon numerous cases which established long since the right of a wife situated as the now appellant to prove in bankruptcy for the whole value of an agreement for payments by her husband in respect of maintenance, and upon cases which established that, after bankruptcy, a wife so situated has no cause of action under the agreement for maintenance. From a judgment of Lord Justice James in *Ex parte Bates* (11 Ch.D., 914) these words were cited : " The statute has converted the annuity for the purpose of proof into a gross sum immediately payable, and on that sum the creditor is entitled to receive dividend ; . . . both parties, the creditor and the trustee, taking the proof for better or for worse." A judgment of Sir H. H. Cozens-Hardy, M.R., in *Victor v. Victor* (28 *The Times* L.R., 131 ; [1912] 1 K.B., 247) was cited for this statement : " It seems to me that the whole policy of the Bankruptcy Act is that the bankrupt is to get complete discharge from contractual obligations to pay sums of money, and the only right of the person under the terms of the contract, whatever the pecuniary claim is, is to come in." The various authorities relied upon do, of course, establish that bankruptcy is an answer to any claim under a separation deed made before bankruptcy for payment of agreed sums under it. They do not, however, deal with the question of marital rights which is here involved, and the amplitude of the language used in some of the cases may be misleading if it is considered without due regard to the subject matter which was then under consideration.

The practical objection to the conclusion sought to be reached is that it would convert an agreement to live apart with an allowance for maintenance into an agreement to live apart without provision for maintenance. Whether in the case of an agreement for maintenance between strangers the effect of bankruptcy would be what is suggested here would depend, no doubt, upon the tenor of the agreement as a whole. Here, however, it is necessary to have definitely in mind the position in law of the appellant as a married woman. Though the juristic capacity of married women has been, broadly speaking, equalized in recent years with that of other citizens, the changes made have not eliminated some of their privileges. The course of events, mainly legislative, which has given to married women capacity to contract and to sue and be sued, has not abrogated certain rules of law as to the consequences of marriage which affect disputes like the present, but they are apt to be forgotten. Behind the relevant statutory enactments is a historic development of law whereby contractual dealings with matrimonial rights have become cognizable by the Courts instead of being excluded as contrary to public policy. The judgment of Lord Brougham in the well-known case of *Warrender v. Warrender* (2 Cl. and Fin., 488), in 1835, and the arguments and judgment in the more important case of *Wilson v. Wilson* (1 H.L. Cas., 538), in 1848, give some information as to this matter.

All the changes in question have left married women possessed of exceptional rights which are relevant to the matters now under consideration. It is necessary, then, to see what is the nature in point of law of a wife's right to maintenance by her husband and to what extent the right is necessarily affected by a separation deed containing an agreement to pay moneys for maintenance. The right of a wife to maintenance as against her husband is not contractual in its nature. It is an incident under the common law of the status or estate of matrimony, which is thus summarily expressed in Bacon's Abridgement (I., 713) : " A husband is obliged to maintain his wife and may by law be compelled to find her necessaries as meat, drink, clothes, physic, &c., suitable to the husband's degree, estate, or circumstances." Among the authorities cited is the famous case seven times argued of *Manby v. Scott* (1 Sid., 109), wherein as to one resolution all the Judges agreed (at p. 120) : " Fuit resolve per touts les Justices d'Angleterre que baron doint maintaine lour femes ove necessaries." One of the next familiar illustrations of the wife's right of maintenance is her power to pledge her husband's credit for necessaries, and very often in actions for debt for necessaries supplied to a married woman living apart from her husband under an agreement for maintenance the liability of the husband has been found to depend upon an inquiry whether the husband had paid as agreed. In *Ozard v. Darnford* (Selwyn, N.P., 13th edition, 229) Lord Mansfield stated the rule as to exemptions from liability for necessaries to the wife in this concise phrase : " If upon separation the husband agrees to make her a sufficient allowance and pays it . . . the husband is not liable." The language is the more striking for its brevity—" agrees " and " pays." Besides the *prima facie* authority of the wife to pledge the husband's credit, another expression of the obligation which is inherent in the marriage tie is the liability of the husband to reimburse costs of maintenance of his wife which may fall on any Poor Law authority. This is statutory and intact. How and to what extent a wife can relieve her husband of liability for her maintenance is not necessary for consideration here. The effect of a separation agreement in common form with common form clauses as to maintenance is alone in question. An agreement for this provision suspends the common law right of the wife, but does not annul it. Without some express provision to the contrary, the right would become operative in its entirety upon a return of the parties to cohabitation. As from the bankruptcy of the husband there ceased to be in existence any agreement of his providing for the discharge of his common law obligation, or capable of being set up in answer to the wife's claim thereunder. The equitable right of the husband to set up the agreement made in limitation of the primary right is gone. How far, and for what purposes the separation agreement subsists, if at all, depends upon considerations not necessary for examination in this case.

That there is no combined effect, of a separation deed with provisions for maintenance and the subsequent occurrence of bankruptcy, which deprives a wife of her claim against her husband to be provided for as a wife, is declared in a considered judgment of Sir Samuel Evans, P., delivered in 1913 in the case of *McQuiban v. McQuiban* (29 *The Times* L.R., 766 ; [1913] P., 208). The facts bore some likeness to the facts in this case. The deed contained an agreement for maintenance and a covenant against any suit for restitution of conjugal rights, but the learned President declared that the foundation of such a deed is the obligation to maintain, and, in view of the decisions which preclude an action on the deed after bankruptcy, held that the husband's refusal of cohabitation and of maintenance founded a right in the wife to a decree of restitution, a decree

which in case of disobedience might be made the ground of a decree of judicial separation, with due provision for maintenance. Besides raising the defence founded on the bankruptcy, the husband relies on the wife's action in making proof of a claim under the agreement and receiving a dividend from the estate. The receipt of this dividend is said to be by way of composition, novation, or satisfaction under a matrimonial agreement. It is to be observed, however, that the claim and receipt of dividend were not incidents in a transaction between husband and wife. The husband's estate came to be distributed according to law, and the wife, having an agreement for certain payments of money which gave right of proof, proved upon it, without any new bargain with the husband. Whether she proved or not, the husband's liability under that agreement went upon bankruptcy. If there is the appearance of inconsistency it arises from the statutory provisions governing bankruptcy. The argument comes back to the position that the common law right of wife against husband, which has been suspended during the existence of the agreement for periodical payment, revived as soon as that agreement was gone, and it revived notwithstanding the receipt of dividends payable by reason of the agreement. The wife in this case is not, then, disabled in point of law by the separation agreement and the husband's bankruptcy from alleging that her husband is "guilty of wilful neglect to provide reasonable maintenance for her" within the terms of the statutes under which her summons was issued. The husband is not relieved by the facts on which he has relied from his common law liability, and he does not provide maintenance for his wife. It is proper, therefore, that the case should go back to the learned magistrate in order that he may determine the extent of the contribution that the husband should be ordered to make, having regard to the wife's position, the husband's resources, and the provisions of the statutes.

On the application of Mr. HONEYMAN, his Lordship gave leave to appeal, subject to the husband's giving security for the wife's costs within a reasonable time.

In the case of *Snowdon v. Snowdon,* his Lordship said that the above judgment applied, and the appeal from the order of the justices was dismissed, with costs.

MR. JUSTICE BATESON concurred in both judgments.

[Solicitors—Messrs. Lawrence Jones and Co. ; Mr. H. W. Clarkson, for Messrs. Herbert Simpson and Bennett, Leicester ; Messrs. Upton, Britton, and Lumb, for Messrs. Wilmshurst and Kaye, Huddersfield ; Messrs. Firth and Co., for Messrs. Cartwright and Fieldhouse, Huddersfield.]

Court of Appeal.
(Scrutton and Sargant, L.JJ., and Eve, J.)

1928.
Jan. 30.

ROE v. RUSSELL.*

Landlord and Tenant—Restrictions—Statutory tenant—Right to sublet—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 15 (1).

A "statutory tenant" (*i.e.,* a tenant who after the expiration of his tenancy at common law holds over under the Rent Restriction Acts against the will of the landlord, or any other person who is protected from eviction by the Acts) has a right to sublet a portion of the premises occupied by him to a sub-tenant, if he was not forbidden to sublet in his original contract of tenancy.

Decision of the Divisional Court (44 *The Times* L.R., 177) reversed.

This was an appeal from a decision of a Divisional Court, Mr. Justice Shearman and Mr. Justice Finlay (44 *The Times* L.R., 177).

In September, 1915, a Mr. Jamieson became the tenant of certain premises within the Rent Restriction Acts, and the rooms which were the subject of the present proceedings formed part of these premises. The landlord of the whole premises was then a Mrs. Alders, and under his tenancy agreement Mr. Jamieson was not forbidden to sublet. In November, 1919, Mrs. Alders assigned her interest in the premises to the plaintiff, Mr. Percy Davis Roe. In 1921 Mr. Roe served a notice to quit on Mr. Jamieson, who thereupon became a statutory tenant of the premises. In November, 1925, Mr. Jamieson sublet to the defendant, Mr. William Russell, an omnibus inspector, the rooms which were the subject of the present proceedings. In July, 1926, Mr. Roe obtained an order for possession of the whole of the premises against Mr. Jamieson on the ground of non-payment of rent, and Mr. Jamieson left the premises in May, 1927, leaving the defendant in possession of the rooms which had been sublet to him. Mr. Jamieson had never agreed that a term should be added to his tenancy prohibiting him from subletting.

The defendant was requested by the plaintiff to vacate those rooms, but he refused to do so. The plaintiff accordingly took proceedings in the Brentford County Court for the ejectment of the defendant from the rooms which he occupied. The county court Judge (his Honour Judge Hargreaves) decided in the plaintiff's favour, holding that Jamieson had no right to sublet part of the premises to a sub-tenant, and that the defendant was, therefore, a trespasser.

By section 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 :

"A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act. . . ."

The Divisional Court held, following the reasoning in *Keeves v. Dean* (40 *The Times* L.R., 211 ; [1924] 1 K.B., 685), that a statutory tenant possessed no interest which entitled him to sublet, and they affirmed the decision of the county court Judge.

The defendant appealed.

Mr. Doughty, K.C., and Mr. Schultess-Young appeared for the appellant ; Mr. Sidney Isaacs for the respondent.

MR. DOUGHTY, in opening the appeal, said that the case raised one of the most important questions under the Rent Restriction Acts—namely, the power of a statutory tenant to sublet in whole or in part the premises of which he had possession under the Rent Restriction Acts. Counsel referred to the county court proceedings, and said that the appellant had throughout been treated as a trespasser. The judgments in the Divisional Court depended very largely on the reasoning of Lord Justice Bankes in *Keeves v. Dean* (*supra*), where he said that the statutory tenant had no estate or title out of which he could

* Reported by E. J. M. CHAPLIN and T. W. MORGAN, Esqrs., Barristers-at-Law.

carve any estate. He (counsel) quarrelled with that statement.

Practically all tenants were now statutory tenants, because they had received notices to increase their rent. Section 5 of the Act of 1920 had been incorporated in an altered form in section 4 of the Act of 1923, which came into force on July 31, 1923, but had not been referred to in *Keeves v. Dean* (*supra*). Subsection (*h*) of that section provided that :—

"No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless [certain other conditions were fulfilled or] the tenant without the consent of the landlord has at any time after July 31, 1923, assigned or sublet the whole of the dwelling-house or sublet part of the dwelling-house, the remainder being already sublet."

Counsel also referred to the judgments of Lord Justice Scrutton and Mr. Justice Lush in *Keeves v. Dean* (*supra*), and said that the scheme of the Act was to put statutory tenants in the same position as any ordinary tenant, with this exception, that they were entitled not to receive a further notice to quit. In *Parkinson v. Noel* ([1923] 1 K.B., 117) Mr. Justice Greer had treated the matter as settled that a statutory tenant could sublet part of the premises. It was true that that statement was *obiter*. Counsel also referred to *Reynolds v. Bannerman* (38 *The Times* L.R., 509 ; [1922] 1 K.B., 719). Subletting was also referred to in sections 2 and 7 of the Act of 1923. That Act contemplated a lawful subletting after notice to increase had been given, and of the 10 per cent. increase allowed half was to go to the landlord.

The practice of subletting had grown considerably, with the result that a large part of the time of the county courts had been occupied in apportioning the rents of sub-tenants.

Counsel submitted that, as yet, no reasonable explanation had been given of the meaning of the words "lawfully sublet" in section 7 of the Rent Act of 1923. With regard to the position of an under-tenant to whom premises had been let in breach of covenant not to underlet he referred to *Dick and Another v. Jacques and Another* (36 *The Times* L.R., 773).

On the question of subletting part of the premises, counsel referred to *Campbell v. Lill* (42 *The Times* L.R., 397), a decision of Lord Justice Bankes and Lord Justice Warrington, sitting as a Divisional Court of the King's Bench Division, where it was held that the tenant, who was a statutory tenant and had sublet a portion of the house to a sub-tenant, was, in the circumstances of that case, within the protection of the statute. It was held in *Reeves v. Davies* (37 *The Times* L.R., 431 ; [1921] 2 K.B., 486) that the interest in his dwelling-house of a statutory tenant who had been adjudged bankrupt vested in his trustee in bankruptcy, and that he (the tenant) could not claim the protection of the Act. He submitted that section 15 of the Act of 1920 was the foundation of his position here and that the tenant, which expression by the definition clause included the subtenant, was entitled to sublet either as an incident or as a condition of the tenancy.

Mr. SCHULTESS-YOUNG followed on the same side. The provision in section 15 of the Act of 1920 as to retaining possession did not mean actual occupancy. The statutory tenant became landlord of the subtenant and was responsible for keeping him in order, and if the tenant was evicted the superior landlord became landlord of the subtenant.

Mr. ISAACS, on behalf of the respondent, submitted that the decisions in both the Courts below were right, and that a statutory tenant was not entitled to sublet the whole or part of the premises of which he was tenant. In support of that contention he relied on *Wheeler v. Smith,* decided on May 14, 1926, and reported in the *Estates Gazette* ; *Aston v. Smith* (40 *The Times* L.R., 576 ; [1924] 2 K.B., 143) ; and *Gidden v. Mills* ([1925] 2 K.B., 713). He said that the Act of 1920, which consolidated previous Acts, was designed to protect the tenant. A reaction then set in, and the Act of 1923 was designed to cut down the rights of tenants by introducing the principle of decontrol.

He took his stand on the judgments in *Keeves v. Dean* (*supra*), where the principle laid down was that the right of the statutory tenant was merely a personal right not to be disturbed by his landlord. On that point he also referred to *Remon v. City of London Real Property Company* (36 *The Times* L.R., 869 ; [1921] 1 K.B., 49). He submitted that the statutory tenant was in the position of a licensee at common law. As soon as he parted with any portion of his right he lost the protection given to him in law. As to the position of a licensee, he referred to *Coleman v. Foster* (1 H. and N., 37). Another useful analogy was the case of a person holding a lien. In his submission it followed from the decision in *Keeves v. Dean* (*supra*) that if a person could not assign he could not sublet ; an assignee could not be distinguished from a sublessee.

The expression "terms and conditions" in section 15 of the Act of 1920 must be construed strictly, and a right to assign or to sublet was not a term of tenancy, but merely an incident of it. On the distinction between an incident and a condition see *Brewer v. Jacobs* ([1923] 1 K.B., 528).

Under section 15 a right to sublet, even if it was a term or condition of the tenancy, was inconsistent with the provisions of the Act in the same way as an assignment was. Further, the expression, "so long as he retains possession," contradicted the right to assign or sublet. The whole policy of the Act was to protect persons in occupation (see *Hicks v. Scarsdale Brewery Company* ([1924] W.N., 189)), and the distinction between a contractual tenant and a statutory tenant was a real one. Subletting was mentioned in the Acts both with and without the qualification "lawfully." He submitted that the subletting in each case must be lawful in the sense that the tenant had a contractual right under his covenant with the landlord, or, in the absence of such a covenant, under an implied power, to do so, and that the word "subletting" referred only to a letting by a contractual tenant. There might also be a contractual tenancy which was outside the scope of the Rent Restriction Acts, and the tenant might sublet at a rental which brought the subtenancy within the Acts. As to the distinction between a contractual and a statutory tenant, he referred, in addition to the cases already cited, to *Cottell v. Baker and others* (36 *The Times* L.R., 208) ; *Ward v. Larkins* ([1923] W.N., 189) ; *Standingford v. Bruce* (42 *The Times* L.R., 122 ; [1926] 1 K.B., 466) ; *Fumasoli v. Comyn* (132 L.T. Rep., 490).

If a statutory tenant lost the protection of the Acts the sub-tenant acquired no rights (see *Prout v. Hunter* (40 *The Times* L.R., 868 ; [1924] 2 K.B., 736); *Leslie and Co., Limited v. Cumming and others* (42 *The Times* L.R., 504 ; [1926] 2 K.B., 417)). Under section 5 (1) (*d*) of the Act of 1920, a landlord might, on providing alternative accommodation, obtain possession of the premises. That must make a

statutory tenant's position a precarious one, and it was difficult to see how he could have, in these circumstances, an estate or interest in land. Further, if there were power to sublet and various sublettings took place, a burden might be imposed on a landlord to find alternative accommodation for all the subtenants, and this would lead to unreasonable results.

Mr. DOUGHTY replied.

The following considered judgments were delivered :—

LORD JUSTICE SCRUTTON.—This appeal raises a question of great importance to a number of persons in occupation of a few rooms in houses of low rental and rateable value. The question is whether, when their title to be in those rooms depends on a subletting by a person who himself had only a tenancy under the Rent Restrictions Acts—when a man is not in by the consent of his landlord, but because his landlord can only turn him out under conditions limited by those Acts—they have a good title. In other words, can a statutory tenant sublet part of the premises of which he is a statutory tenant ? The phrase "statutory tenant" comes from the marginal note to section 15 of the Act of 1920, "conditions of statutory tenancy," which is not part of the Act, but applies to the person who, in section 15, is described as a person "who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies." The Courts have interpreted this as referring to the provisions of section 5 of the Act of 1920, and section 4 of the Act of 1923, which prevent a landlord from getting rid of a tenant whose contractual tenancy has expired, except under the provisions of those sections. He stays in, not by the will of the landlord, who may desire to get rid of him, but by the provisions of the statute (*See Remon v. City of London Real Property Company*, 36 *The Times* L.R., 869 ; [1921] 1 K.B., 49). But, as I said in that case, Parliament originally "omitted expressly to provide what sort of a legal interest the person who stayed in by permission of Parliament, and against the will of the landlord," should have. The definition in section 15 of the Act of 1920, that so long as he retains possession he shall observe and be entitled to all the terms and conditions of his original contract of tenancy, so far as the same are consistent with the provisions of the Act, did not help very much when one came to the practical facts of life, and I think citizens are entitled to complain that their legislators did not address their minds to the probable events that might happen in cases of statutory tenancy, and consider how the legal interest which they were granting was affected by those probable events. For instance : (1) Can a statutory tenant dispose of his statutory tenancy by will ? (2) What happens to his statutory tenancy if he dies intestate ? (3) What happens to his statutory tenancy if the tenant becomes bankrupt, and his trustee (*a*) does not disclaim, (*b*) disclaims ? (4) Can a statutory tenant assign all his interest (*a*) for value, (*b*) without consideration, but under seal ? (5) Can he sublet (*a*) all his interest by several subtenancies ? (*b*) part of his interest by a sub-tenancy of part of the premises ? (6) Can he, retaining possession and control of the premises, and living in them, let unfurnished rooms to lodgers ?

I think it is pretty evident that the Legislature never considered as a whole the effect on the statutory tenancy of such ordinary incidents as death, bankruptcy, voluntary assignment, either *inter vivos* or by will, a total or partial subletting, but from time to time put into one of the series of Acts a provision as to one of those incidents without considering how it fitted in with the general nature of the tenancy which those incidents might affect. For instance, intestacy : Parliament, in 1915, section 2 (1) (*d*) of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, defined "tenant" as including "any person from time to time deriving title under the . . . tenant." This appears to show that in some instances, at all events, the statutory tenant might pass on his statutory interest to others. Whether or not they thought of persons entitled under the Statute of Distributions does not appear ; but in 1920, by section 12 (1) (*g*), they brought in, in addition to persons deriving title under the tenant, "the widow of a tenant dying intestate who was residing with him at the time of his death, or, where a tenant dying intestate leaves no widow, or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the County Court." What would happen if those entitled under the Statute of Distributions, say a child not resident in the house, disputes with the widow, or a child resident in the house ; or who are to agree, whether all those entitled under the Statute, or all members of the family resident in the house, is left in obscurity. In *Mellows v. Low* (39 *The Times* L.R., 190 ; [1923] 1 K.B., 523), where there was intestacy but no notice to quit had been given to the tenant, and no member of the family resided in the house, and the administratrix did not reside in the house, the latter was treated as having title against the landlord, she being a person deriving title from the tenant. But the Legislature does apparently there recognize that the tenant may have an interest which passes to someone else on his death, and is not only personal to him living. Take a will : The statutes say nothing about this, except the definition of tenant as including persons deriving title under him, and, as curiously enough no statutory tenant seems to have left a will under which a question has come into Court, the Courts have said nothing. In *Collis v. Flower* ([1921] 1 K.B., 409), where a non-resident executor was treated as a tenant the death occurred during the contractual tenancy, and before notice to quit had been given. The question of statutory tenancy did not, therefore, arise. It would seem that since, as appears hereafter, the statutory tenant cannot assign *inter vivos* his interest, it is very improbable that he can assign by will, but it does not seem that the Legislature considered the matter at all.

Take next involuntary assignment to a trustee by bankruptcy. Again, except that "tenant" includes persons deriving title through a tenant, there is no indication that the Legislature thought about the matter. The Courts have had to deal with the question. In *Reeves v. Davies* (37 *The Times* L.R., 431 ; [1921] 2 K.B., 486), during the currency of a contractual tenancy the tenant became bankrupt, the trustee disclaimed, and the landlord claimed possession. The Court of Appeal held that he was entitled to it by reason of the trustee's disclaimer. They held that the bankrupt did not become a statutory tenant when the person to whom his interest had passed under the wide definition of property in the Bankruptcy Act disclaimed the lease. But this and the next case show that in certain circumstances the interest of the original tenant may pass to another by operation of law, and is not, therefore, merely personal to him ; for in *Parkinson v. Noel* ([1923] 1 K.B., 117) the bankruptcy of the tenant occurred while he was a statutory tenant, the trustee disclaimed, the landlord claimed possession from the

statutory tenant, and the Courts gave the landlord possession. Again the statutory tenant is treated as having an interest which may pass to another.

Take next the case of a voluntary assignment during life. The statutes until 1923 only gave help in two respects. There was the definition that "tenant" included those deriving title from him; and section 15 (2) of the Act of 1920 provides that a tenant retaining possession should not, as a condition of giving it up, receive any consideration from any person other than the landlord. In *Keeves v. Dean* and *Nunn v. Pellegrini* (40 *The Times* L.R., 211; [1924] 1 K.B., 685) two assignments for value by statutory tenants to third parties came before the Court of Appeal. All three members of the Court held them bad as contrary to the Act in that the assignor received value from the assignee. But two members of the Court also held the assignments ineffective on a different ground. They said that a statutory tenant under section 15 (1) of the Act of 1920 was entitled to all the terms and conditions of the original contract of tenancy, but that the right to assign the original tenancy was not a term or condition of the original contract of tenancy, but an incident of the tenancy created by the original contract, which, therefore, did not pass to the statutory tenant, who had only a personal right which he could not assign to anyone else. I did not agree with this, as I thought it was too narrow a construction of the phrase "terms and conditions of the original contract of tenancy," which I thought included rights resulting from the grant in the contract, and I did not see how it fitted in with the previous decisions that the interest of the statutory tenant passed on bankruptcy to the trustee, or, as I thought, with the express provisions as to intestacy.

But it is to be noted that the facts on which the decision in *Keeves v. Dean* (*supra*) was based arose, and the action was commenced, before the Act of 1923 came into operation, and section 4 (1) (*h*) of that Act was not applicable or cited to the Court. That subsection made any assignment after July 31, 1923, without leave of the landlord, a ground on which the Court might eject the tenant, and it now seems clear, therefore, that whether an assignment is for value, or without consideration, but under seal, it may be used for ejecting the tenant, presumably because in the opinion of the Legislature his interest as statutory tenant was not one that he could assign, in that by assigning he would cease to retain possession within the meaning of the statute of 1920, section 15 (1).

This brings one, after a too lengthy preamble, the justification for which is the obscurity of the Acts, to the question in this case. Can the statutory tenant, while in possession, sublet part of the premises that he holds under his tenancy, remaining in possession of the rest of the premises? I can quite understand and sympathize with the Divisional Court, which approached this question on the lines of the reasoning of two of the Judges in *Keeves v. Dean* (*supra*). They would say that the right to sublet part of a contractual tenancy, in cases where there is no express provision to the contrary in the contract, is not a "term or condition of the contract," but only an incident of the tenancy thereby created, and it does not, therefore, pass to the statutory tenant who has only a personal right to occupy so long as he observes the terms and conditions, which does not give him a right to exercise other incidents of the grant than that of occupying the demised premises. Consequently two Divisional Courts said that the statutory tenant cannot sublet even part of the demised premises; this is the view of Mr. Justice Shearman and Mr. Justice Finlay in the judgment appealed from, where a subtenancy of part was created by the statutory tenant, who has himself now been ejected from the rest of the premises. It is also the view of Mr. Justice Salter and Mr. Justice Talbot in *Wheeler v. Smith* (1926), reported in the Estates Gazette Digest of Cases, a report which was certified by counsel engaged in it as being a correct report. It was also the view of Mr. Justice Swift, *obiter*, in *Aston v. Smith* (40 *The Times* L.R., 576; [1924] 2 K.B., 143, at p. 146). On the other hand, Mr. Justice Greer, before the decision in *Keeves v. Dean* (*supra*), had in *Parkinson v. Noel* (*supra*) stated, also *obiter*, that a statutory tenant could sublet.

But certain matters have to be considered: First, the two Lords Justices who expressed their opinion as to the personal right on the ground that incidents of tenancy or estate did not pass, expressly reserved the question as to subletting the whole or part of the premises. Lord Justice Bankes in *Keeves v. Dean* (*supra*, at p. 693) said:—

"I say nothing about subletting, because it may be that a statutory tenant who has sublet part only of the premises which he claims the right to retain and which he occupies is still entitled to the protection of the statute. What the position would be if he were to sublet the whole of the premises, and whether under those circumstances any distinction could be drawn between subletting and assignment, it is not necessary here to determine, and I do not decide it."

Mr. Justice Lush puts the difficulty in the assignor's giving up possession on an assignment, which he does not do in partial subletting.

Secondly, the provisions of the Act of 1923, section 4 (1) (*h*), apply to this case, and did not apply to *Keeves v. Dean* (*supra*), and were therefore not considered by the Court; and that subsection only makes as a ground of ejectment the subletting of part of the dwelling-house, the remainder being already sublet. That is to say, it does not treat as a ground of ejectment the subletting of part of the premises, the statutory tenant living in the house, part of which he sublets, but only a series of sublettings which between them account for the whole of the house and leave the statutory tenant out of possession of the premises. Some explanation of the presence of this provision may be found in the fact that the decisions of the Court of Appeal and House of Lords in 1922 and 1923 in *Terrell v Chatterton* (39 *The Times* L.R., 589; [1923] A.C., 578) had just brought to attention the effect of a tenant, who could not sublet the whole of his premises, making two partial sublettings which in effect sublet the whole demised premises. It is very difficult after this clause (*h*) to say that the statutory tenant cannot sublet part of the premises, when the landlord is not given power to eject him for doing so. It is true that this provision has very odd results. A, the statutory tenant of a house of nine rooms, sublets three to B, and three more to C; these sublettings, apparently, will not be grounds for his ejection by the landlord. He then sublets the last three rooms to D, and this apparently will justify the landlord in ejecting him from the whole of the premises. Will the sub-tenants be able to say, under the Act of 1920, section 5 (5), that the premises have been lawfully sublet; or will B and C be able to say it, but not D; though the ground of ejectment of A is the sublettings to B, C, and D, and not any one subletting. The same point will arise under the Act of 1920, section 15 (3), which for some reason which I cannot

understand has been added to section 5 (5) of the Act of 1920.

Thirdly, a case where the provision of section 4 (1) (*h*) of the Act of 1923 was applicable came before Lord Justice Bankes and Lord Justice Warrington, sitting as a Divisional Court in *Campbell v. Lill* (42 *The Times* L.R., 397) in March, 1926. There the statutory tenant sublet part of the premises, remaining in possession of the rest, and the landlord endeavoured to eject him. Lord Justice Warrington said that he agreed with the opinions of Lord Justice Bankes and Mr. Justice Lush in *Keeves v. Dean* (*supra*). Lord Justice Bankes then had to decide the question which he had reserved in *Keeves v. Dean* (*supra*), whether a statutory tenant who sublets part is entitled to or has lost the protection of the statute. He and Lord Justice Warrington did not say that subletting of part is an incident of estate but not a term or condition of the tenancy, and therefore the power to sublet part did not pass to the statutory tenant under section 15 (1) of the Act of 1920, but he has only a personal right. On the contrary, they took the view that the statutory tenant was protected by the omission in section 4 (1) (*h*) of any mention of subletting only part of the premises. I personally find it very difficult to see how the statutory tenant could be protected from any consequences of subletting part, and yet his sub-tenant of part could be expelled. If the statutory tenant could not, by reason of his statutory tenancy, sublet part, he had by subletting part violated a condition of tenancy under the Act, and so become liable to ejectment under section 5 (1) (*a*) of the Act of 1920 and section 4 (1) (*a*) of the Act of 1923, but he was held not liable to ejectment. Under these circumstances I find it impossible to hold the decision of the majority as to assignment under section 15 (1) of the Act of 1920 binding on a question of partial subletting under section 4 (1) (*h*) of the Act of 1923.

But further, in my view, the continual references throughout the Acts to partial subletting and sub-tenancies must be treated as a recognition that in the opinion of Parliament a statutory tenant remaining in possession might sublet part of his demised premises. The references are sometimes to sub-tenants ; sometimes to tenants to whom the premises are lawfully let. I find it impossible to explain them by limiting them to sub-tenants created by a contractual and not by a statutory tenant. It is impossible to ignore the fact that there are a very large number of the latter class, for every landlord who has raised his rent by virtue of the Acts, and every tenant who has done the same to a sub-tenant, has only done so because of statutory tenancy. Section 7 of the Act of 1923 empowers the tenant to increase the rent of his sub-tenant by a certain percentage, and section 3 (1) of the Act of 1920 shows that this increase cannot apply to a contractual tenancy lawfully made by the tenant. It would seem to follow that section 7 of the Act of 1923 must relate to and recognize sub-tenancies created by statutory tenants.

Again, why should section 4 (1) (*h*) of the Act of 1923 make no mention of partial subletting by a tenant unless a statutory tenant had, in the view of the Legislature, a right to sublet part of his holding. Section 1 (1) (*b*) of the Increase of Rent, &c. (Amendment), Act, 1919, when it speaks of the tenant's not being ejected unless, amongst other things, by subletting the house or any part thereof or by taking in lodgers he is making an unreasonable profit, must have been dealing with statutory tenants amongst others, though, as to subletting the whole house, it is now extended by the Act of 1923, section 4 (1) (*h*), already referred to.

From these and other provisions I have come to the conclusion that the Rent Restrictions Acts contemplate that the statutory tenant remaining in possession might sublet part of his premises, subject to apportionment of the standard rent of the tenant's premises, so as to prevent the sub-tenant from paying an extortionate rent. He cannot, however, assign his tenancy of the whole of the premises, whether for value or not. Nor can he by a series of sublettings part with the whole of the premises which he holds as statutory tenant, though if he does so I desire to reserve the question of the position of the sub-tenants. I also would point out that the question whether persons occupying part of the house in which their landlord resides, though described as sub-tenants, are not really lodgers, and the effect of their being lodgers, were not raised in the Court below and were therefore not considered in this Court.

For these reasons I am of opinion that an order for ejectment should not have been made against the sub-tenant in this case, and his appeal must, therefore, be allowed and judgment entered for him, with costs here and below. I regret that I cannot order the costs to be paid by the draftsmen of the Rent Restrictions Acts and the members of the Legislature who passed them and are responsible for the obscurity of the Acts and their failure clearly to provide for such obvious incidents of tenancy as death with or without a will, bankruptcy, power to assign, and power to sublet in whole or in part demised premises.

Lord Justice Sargant.—I am of the same opinion. In considering the decision of the Divisional Court here it is of great importance to see what was the argument which was presented to them on the part of the sub-tenant Russell and which their judgment negatived. Put shortly it was this. Jamieson, the tenant of the whole, was not prohibited by his original contract of tenancy from subletting part ; this ability to sublet was one of the terms and conditions of his original contract, which, under section 15, subsection 1, of the Act of 1920 became applicable to his subsequent statutory tenancy ; and therefore the sub-tenancy created by him in favour of the defendant Russell was a lawful subletting, and is preserved against the landlord by subsection 3 of section 15, notwithstanding the determination of the statutory tenancy of Jamieson. Now this argument is directly in conflict with the reasoning of the majority of the Court of Appeal in *Keeves v. Dean* (40 *The Times* L.R., 211 ; [1924] 1 K.B., 685) which probably binds us and with which, moreover, I agree. For when the conclusion is reached that the statutory tenant has no estate or property as tenant at all, but has a purely personal right to retain possession of the property, it is difficult to apply to him, as part of the terms and conditions of his former tenancy, rights essentially incidental and due to the possession of property. It was to this argument, and this argument alone, that the decision of the Divisional Court was, as I read it, directed. Mr. Justice Shearman, for instance, put it thus : "I cannot understand how the right to sublet can be considered to be one of the 'terms and conditions of the original contract of tenancy' when the right to assign is not," and Mr. Justice Finlay, after quoting the view of Mr. Justice Lush as to the purely personal character of the statutory tenant's rights, says : "It seems to me to follow that the statutory tenant . . . cannot sublet for precisely the same reason, namely, that he has no estate out of which the subletting can be carved." And it would

seem that the decision of another Divisional Court, consisting of Mr. Justice Salter and Mr. Justice Talbot, in a case of *Wheeler v. Smith* reported, and as we are told through counsel accurately reported, in the Estates Gazette Digest of Cases, was founded on reasoning similar to that of Mr. Justice Shearman and Mr. Justice Finlay in the present case. In rejecting the foregoing line of argument on behalf of the sub-tenant the Divisional Courts appear to have been right. And it may be further noted that, even if the statutory tenant had the same estate as he previously had as a contractual tenant, that alone would not avail the sub-tenant ; for a contractual tenant, though entitled under his contract to sublet part, obviously cannot give his sub-tenant an estate exceeding in duration his own estate.

Before this Court, however, the argument for the appellant sub-tenant has taken a much wider range and has been of a much more cogent character. Mr. Doughty has founded himself mainly on the proposition that the statutory tenant is the creation of statute, and has such rights as the various Acts have given him either expressly or impliedly ; and that an examination of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and of the Rent and Mortgage Interest Restrictions Act, 1923 (which two Acts are hereinafter referred to briefly as the Act of 1920 and the Act of 1923 respectively), shows that the Legislature has recognized the power of statutory tenants to create sub-tenancies, and has provided protection for the sub-tenants, independently of the continuance of the statutory tenancy of the statutory tenant. To appreciate this argument it is necessary to consider the general position of tenants of small properties at the time when the Acts of 1920 and 1923 were passed.

There can, I think, be no doubt that Mr. Doughty was right in his view that at both of these dates, and particularly at the time of the operation of the latter Act (July 31, 1923), the vast majority of the tenancies of the properties to which the Acts applied had ceased to be contractual tenancies and had become statutory tenancies. For landlords had naturally taken advantage of the intermediate legislation enabling them to make the statutorily authorized increases in the rents payable to them, and had for the most part (at any rate in England) adopted the method strictly necessary for that purpose of giving notices to determine existing contractual tenancies and subsequently giving notices of the appropriate permitted increases. And even in those cases (most common in Scotland) where landlords had adopted the method, subsequently held to be ineffective—see *Kerr v. Bryde* (39 *The Times* L.R., 61 ; [1923] A.C., 16)—of giving merely a notice of increase of rent, the error had been cured retrospectively by the Rent Restrictions (Notices of Increase) Act, 1923, which came into operation on June 7, 1923.

There can also be no doubt that both contractual tenants, while their tenancies remained contractual, and statutory tenants, whether originally contractual or not, had in innumerable cases, particularly having regard to the notorious deficiency of housing accommodation, and whether they were strictly entitled to do so or not, let or affected to let portions of their premises to sub-tenants ; and, so far as the position and rights of these sub-tenants were concerned, the cases appear to be divisible, at the time of the passing of the Acts of 1920 and 1923, into four classes—namely, (1) sub-tenants holding under tenants who still held on contractual tenancies, which did not prohibit the subletting of part ; (2) sub-tenants holding under tenants who still held on contractual tenancies which prohibited the subletting of part ; (3) sub-tenants holding under statutory tenants who had previously held on contractual tenancies which had prohibited the subletting of part ; (4) sub-tenants holding under statutory tenants who had not previously held on contractual tenancies which had prohibited the subletting of part. And since, as already stated, the number of statutory tenants was very much greater than the number of tenants still holding on contractual tenancies, the number of sub-tenants in classes (3) and (4), that is, holding from statutory tenants, was, at the dates of operation of the two Acts of 1920 and 1923, and particularly at the latter date, enormously in excess of the sub-tenants in classes (1) and (2), namely, those holding from tenants whose tenancies were still contractual.

Further, it is necessary to bear in mind the great practical difference between the assignment or parting with the possession of the whole of the premises held by a tenant on the one hand and the subletting of a portion of these premises on the other hand. In the first case the direct personal relationship between the landlord and the tenant, as such, is completely put an end to. But in the second case that direct personal relationship still remains, although, as regards a portion of the premises, and as between the tenant and the sub-tenant themselves, a new contractual relationship is created with which the landlord is not directly concerned, apart from any breach of contract in cases where the tenant was expressly prohibited from subletting part. It may well be that a non-prohibited sub-tenancy of this kind may not have all the legal characteristics of a full legal tenancy, such as the existence of a reversion in the sub-landlord to which rent is incident and which would involve full powers of assignment of the interest of either the sub-landlord or the sub-tenant. But it may still create a personal contractual relationship between the sub-landlord and sub-tenant which will subsist during the existence of the superior tenancy of the sub-landlord in respect of the whole premises. It is to be remembered that at common law a lease merely created personal contractual rights and gave nothing of the nature of indestructible estate to the lessee. It was only by the Statute of Marlebridge that the lessee was first protected against having his position destroyed—see Challis on Real Property, 3rd Edition, at page 426. And it was not till the reign of Henry VIII. that the full assignability of the relationship of the lessee to the lessor, and *vice versa*, was completely established.

Indeed in practice, where an individual is placed, as the statutory tenant undoubtedly was, in the position of having an exclusive personal possession of his premises, he is necessarily in a position in which he can place a third person in actual possession of a part of the premises, while retaining possession of the remainder, and that wholly irrespectively of whether his own right to exclusive undisturbed possession is purely personal or amounts to something in the nature of an estate or interest in the premises. And from this point of view it is of interest to refer to the comparatively recent case of *Grove v. Portal* (18 *The Times* L.R., 319 ; [1902] 1 Ch., 727), where a mere exclusive licensee of fishing rights, restrained in terms from underletting (that is from underletting the whole rights), was nevertheless held entitled to grant a sub-licence to two "rods" to participate in the fishing rights with him. The landlords of statutory tenants were not, in view of the exclusive possession of the tenants, able to discriminate between those whom the tenants took as lodgers and those

whom they affected to take as sub-tenants. And these last-named persons were in a position which, during the retention by the statutory tenants of their relationship towards their landlords, was practically indistinguishable from that of sub-tenants holding under ordinary sub-tenancies from contractual tenants.

Bearing these considerations in mind, then what is the true interpretation to be put upon the Act of 1920 and the Act of 1923, and, I may add, on section 1 (1) (*b*) of the Increase of Rent, &c. (Amendment) Act, 1919, where they refer to and obviously recognize the creation and existence of sub-tenancies? Mr. Isaacs, in his careful and able argument for the respondent landlord, insisted, and indeed was bound to insist, that the sub-tenancies referred to throughout were merely those in the first of the four classes to which I have referred above—namely, sub-tenancies from tenants who still held on contractual tenancies not prohibiting subletting. But to confine these references to this very minute class of sub-tenancies is, in my judgment, to place altogether too narrow an interpretation on this legislation, and indeed, in some cases, to come into conflict with the fairly obvious meaning of the passages in question. For instance, section 1 of the Increase of Rent, &c. (Amendment) Act, 1919, is a section which must, I think, be referring to and protecting statutory tenants, and if this is so, subsection (1) (*b*) of that section refers to and recognizes sub-tenancies existing under statutory tenants, and indeed treats them, for the purposes of that subsection, as standing in very much the same position as lodgers of the statutory tenants. Again, section 8 of the Act of 1920 would seem to apply quite clearly to statutory tenants; and if this is so there is great difficulty in limiting the sub-tenancies referred to in that section to sub-tenancies created by tenants who still held by virtue of contractual bargains only. And in section 12 (1) (*g*) of that Act the extension of the meaning of "tenant and tenancy" to include sub-tenant and sub-tenancy, and the extension of the meaning of "let" to include sublet, seem to me incompatible with a limitation of these expressions to the very limited class of sub-tenancies to which Mr. Isaacs sought to restrict the operation of the Act of 1920. Even more clearly inconsistent with that restricted meaning is the language of section 4 of the Act of 1923, substituting a new section for section 5 of the Act of 1920. That new section is obviously applicable to statutory tenants generally; and, this being so, subsection (1) (*b*) of that section must be read as recognizing sub-tenants of statutory tenants, and classing them for the purposes of the subsection with persons "residing or lodging" with them. And subsection (1) (*h*) of that section, while making an assignment by the statutory tenant or a subletting or sublettings by him of the whole of his dwelling-house an event on which a judgment of ejectment may be given, obviously treats a mere subletting of part as an event which does not involve a liability to forfeiture. Section 4, subsection (1) (*h*), of the Act of 1923 was not relied on, or even referred to, in *Keeves v. Dean* (*supra*), probably because the material facts in that case had occurred before the Act of 1923 had come into operation. But it was referred to and formed the main ground of the decision in the subsequent case of *Campbell v. Lill* (42 *The Times* L.R., 397), decided by a Divisional Court consisting of Lord Justice Bankes and Lord Justice Warrington. The latter Judge pointed out that on all sound canons of interpretation the word "tenant" should be given the same meaning in every part of the section. This is a strong authority in favour of the view that the section is not limited to contractual tenancies, but comprises statutory tenancies, and therefore recognizes sub-tenancies of parts of the premises included in statutory tenancies. Mr. Isaacs laid some stress on the circumstance that in some parts of the legislation in question, such as section 5, subsection 5, and section 15, subsection 3, of the Act of 1920, and section 2, subsection 2, section 4, subsection 5, and section 7, subsection 1, of the Act of 1923, reference is made to "lawful subletting"; and he argued that this was but the mere formal expression of what are referred to merely as "subletting" or "sub-tenancies" in other sections of the two Acts, and that this confirmed his suggestion that under either form of expression all that was being dealt with was the first of the four classes of cases which have been set out above—namely, sublettings effected by tenants still holding under contractual tenancies that did not prohibit the subletting of part of the premises. But I can see no reason for thinking that this phrase has so narrow a meaning. It will be remembered that under the scheme of the Acts, where a contractual tenancy prohibited the subletting of part of the premises, the resulting statutory tenancy being "on the same terms and conditions" would also prohibit the subletting of part. And I think that the phrase "lawfully sublet" is amply and properly satisfied by being held to refer either to this first class of sub-tenancies or to the fourth class of sub-tenancies above referred to, that is, to sub-tenancies under statutory tenants who had not previously held on contractual tenancies which had prohibited the subletting of part of the premises.

A further argument for the respondent was that the Legislature could hardly have intended to subject landlords, not only to the creation of an irremovable class of tenants, but also to the possible and indeed almost inevitable creation of a number of sub-tenants of portions of the demised premises. But in my judgment this argument was effectively countered by Mr. Doughty, who pointed out that even on the respondent's view this was the result with regard to all premises comprised in tenancies which still remained contractual and were not subject to a prohibition as to partial subletting; and that, if once it were thought expedient to subject any landlords to such an increased burden, there seemed to be no reason why this burden should be cast on those landlords only whose premises were still held by tenants on contractual and not statutory tenancies. The whole legislation on this subject, and there have been some ten Acts dealing with these questions, though it has only been necessary to refer specifically to three, bears marks of having been passed in some haste and in view of successive emergencies that arose during and after the war through the lamentable shortage of housing accommodation. It is patchwork legislation, has not been framed with any scientific accuracy of language, and presents great difficulties of interpretation to the Courts that have to give practical effect to it. But these considerations, in my judgment, tend in favour of the appellant rather than the respondent in this case. It is the respondent who has to rely on legal niceties, such as fine-drawn distinctions between the comparatively minute class of tenants whose tenancies still remain contractual and the vast class of those who are known as statutory tenants. Apart from such fine distinctions, the appellant can point to the clear recognition by section 4, subsection 1 (*h*), of the Act of 1923 of the right of statutory tenants to sublet part of their premises without incurring forfeiture, and can also point to the words of section 4, subsection 5, of the Act of 1923 which prevent the recovery of possession against

a tenant being operative against a sub-tenant. It is no doubt true that this last subsection contains the phrase "lawfully sublet." But the argument for the respondent admits that the word "lawfully" at least includes a condition that there shall have been no express contractual prohibition against the subletting of part of the premises; and there seems to be no sufficient reason for construing the word "lawfully" as implying any further condition which would limit the section to contractual tenancies not subject to this prohibition and exclude statutory tenancies not subject to a like prohibition. I agree, therefore, that the appeal should be allowed with costs.

MR. JUSTICE EVE.—This appeal raises the important question whether the holder of a statutory tenancy under section 15, subsection 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, in whose contract of tenancy no prohibition against subletting was contained has power to sublet part of the controlled premises and thereby confer on any sub-tenant, to whom such part was sublet before any proceedings for possession or ejectment were commenced against the statutory tenant, the protective provisions of section 5, subsection 5, and section 15, subsection 3. In other words, has the part of the premises so sublet been "lawfully" sublet within the meaning of the Act as amended by the Act of 1923?

It has already been decided in this Court that a statutory tenant cannot assign his interest (*Keeves v. Dean*, 40 *The Times* L.R., 211; [1924] 1 K.B., 685), but in the same case the question of his right to sublet was expressly reserved. The decision involved a difference of opinion between the members of the Court upon one important point of construction as to whether the right to assign was or was not a "term or condition" of the original contract of tenancy within the meaning of section 15, subsection 1, of the Act of 1920. The majority of the Court held the right to be incident to the tenant's estate, and not properly or indeed accurately described as a term or condition of the tenancy agreement, and this interpretation which I accept as binding upon us, has been applied in the present and at least one other case by the Divisional Court to negative any right of the statutory tenant to sublet. But it is to be observed that the decision in *Keeves v. Dean* (*supra*) did not rest upon this point alone. The Court examined the other relevant sections of the Act, and in particular section 15, subsection 2, and came to the conclusion that the statute was not intended to confer upon the statutory tenant a right to transfer his legal position under the Act to another person by assignment, and this conclusion is fortified by section 4, subsection 1 (*h*), of the Act of 1923 which excepts from the benefit of the restrictions on the right to recover possession any tenant who without the consent of the landlord has at any time after the coming into force of the Act of 1923 assigned or sublet the whole of the dwelling-house or sublet part of the dwelling-house, the remainder being already sublet.

On behalf of the sub-tenant it has been argued that the very terms of that subsection clearly show that the Legislature is drawing a distinction between an assignment and a subletting of the whole on the one hand, and a subletting of a part on the other, and we have been taken through the Acts, section by section, and invited to determine that not only is there nothing in the Act to negative the right to sublet a part, but many indications that such sublettings are contemplated.

By the definition section, section 12, subsection 1 (*f*) and (*g*), except where the context otherwise requires, the expression "tenant" includes any person from time to time deriving title under the original tenant, the expressions "tenant and tenancy" include "sub-tenant and sub-tenancy" and the expression "let" includes "sublet."

In examining the context in which these various expressions are to be found, we are certainly entitled, if not bound, to take into account the circumstances in which the Acts came to be passed, the nature of the tenements to which they apply, and the primary object of the whole legislation. The abnormal shortage of available dwellings for persons compelled by their means and avocations to reside in dwellings of very moderate rental value, and the apprehension that an excessive demand for accommodation of this class would inevitably raise rents to an insufferable extent, were no doubt the main factors in promoting the passing of the Acts, and from the very first, and still more forcibly as the competition for habitations increased, it must have been appreciated that premises of the nature intended to be protected by the Acts were rarely occupied by one family alone, but were frequently sublet in floors, and even single rooms, to several. Indeed, unless such had been the case, it is difficult to believe that the Acts would have accomplished what they have done. Moreover, it must not be lost sight of that no one can fail to have foreseen that the tenants holding under contracts would by degrees become statutory tenants in part by the determination or expiry of their tenancy agreements, and in part also by the service of notices of intention to increase rents.

Bearing these matters in mind, I agree with the other members of the Court that examination of the Acts, and in particular of those provisions to which counsel for the appellant directed our attention—section 5 (as amended by the Act of 1923), subsection 1 (*b*) and (*h*) and subsection 5, section 8 and section 15, subsection 3, and in the Act of 1923, section 7—leads to the conclusion that the right of subletting is not restricted to subletting during the currency of the tenancy agreement, but is contemplated and intended to be exercisable by the statutory tenant.

Reliance was naturally placed by the respondent on the expression "lawfully sublet" which occurs in both Acts, but the presence of the qualifying word is, I think, explained by this, that there are at least two forms of subletting which are not lawful under the Acts: one, a subletting which sublets the whole of the dwelling-house, or sublets a part, the remainder being already sublet; and the other a subletting made after the commencement of proceedings for recovery of possession, or ejectment. I agree in thinking that the appeal should be allowed.

[Solicitors—Mr. H. B. I. Schultess-Young; Messrs. Abbott and Hudson.]

Court of Appeal.
(Scrutton and Atkin, L.JJ., and Eve, J.)
1928. Jan. 31.

ELLERMAN LINES, LIMITED v. READ AND OTHERS.*

Ship — Salvage—Contract—Breach—Damages—Foreign judgment—Obtention by fraud—Injunction against enforcement.

The plaintiffs' steamer stranded in the Black Sea, and the defendant L., who was a British

* Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.

subject, agreed to try to salve her on the terms (*inter alia*) that security for payment of his remuneration should be arranged in London and that he would not arrest the ship unless there was an attempt to remove her before the security had been given. Security was given in London in accordance with the salvage contract, and the ship was refloated and taken to Constantinople for temporary repairs. Before she was ready to leave, the defendant L. brought an action against the master in the Turkish Court on the ground that the ship was about to be removed without security having been given. By order of the Turkish Court the ship was arrested, and, as the master had no evidence of what had been done in London and L. took an oath that security had not been given, the Turkish Court awarded L. £23,890. L. then disposed of the ship, and the plaintiffs brought this action, (1) for damages for breach of contract, (2) for a declaration that the Turkish judgment was invalid, and (3) for an injunction to prevent the Turkish judgment from being enforced.

Held, that the plaintiffs were entitled to damages including the value of the ship, and were not liable to be sued in England on the Turkish judgment ; and that as the judgment had been obtained by a British subject by fraud there must be an injunction restraining the enforcement of it in any part of the world.

Judgment of MacKinnon, J. (44 *The Times* L.R., 7), varied.

This was an appeal by the plaintiffs against the decision of Mr. Justice MacKinnon (44 *The Times* L.R., 7).

The plaintiffs, Ellerman Lines, Limited, brought an action against three defendants, Count Z. Landi, Grech, and Read, for damages for breach of contract, for a declaration, and for an injunction.

In November, 1924, a steamer, the Falernian, belonging to the plaintiffs, stranded in the Black Sea. A salvage steamer, the Semper Paratus, of which, the plaintiffs said, the three defendants were joint owners, and of which the defendant Landi was master, came up. After negotiations the master of the Falernian entered into a salvage agreement with Landi on the terms of "no cure no pay." The agreement was in the usual form approved by Lloyd's and contained, *inter alia,* provisions that the remuneration for the salvage services should, in default of agreement, be fixed by arbitration in London ; that security for payment of that remuneration should be arranged in London ; and that the salvor would not arrest the ship except in the case of an attempt to remove her before security had been given.

The Falernian was refloated and taken to Constantinople, and was there placed in dry dock for temporary repairs to enable her to be towed to Marseilles for permanent repairs. The plaintiffs sent out a Dutch tug to tow her to Marseilles, and on July 6, 1925, she was ready to start. Meanwhile, Landi had taken steps to prevent her leaving Constantinople, and by order of the Turkish Court she was arrested on July 1. Landi had begun an action in that Court against the master of the Falernian on the ground that the ship was about to be removed without security having been given. The Court decided that the onus of showing that security had been given was on the master, and as he had no evidence at Constantinople of what had been done in London he could not discharge the onus. Landi took an oath that security had not been given, the master took no further part in the proceedings, and the Court gave judgment against him by default.

It appeared that in default of appearance by a defendant the Turkish Court did not go into the merits of the dispute, but gave judgment for the amount claimed by the plaintiff. They accordingly awarded Landi a sum amounting in English money to £23,890. Later, Landi allowed his brother to obtain judgment against him for an alleged debt of £2,500, and the brother took over the Falernian in satisfaction. He then sold her, and in the result she had passed irrevocably out of the hands of the plaintiffs.

Security had, in fact, been given in London in March, 1925, in accordance with the salvage contract, and by swearing that security had not been given Landi obtained the judgment of the Turkish Court by fraud.

In September, 1925, while the Falernian was still lying at Constantinople, the plaintiffs began this action in the English Courts. In the course of the proceedings they had obtained an interim injunction, restraining the defendants from enforcing their Turkish judgment. In the action the plaintiffs claimed, first, damages for breach of contract ; secondly, a declaration that the Turkish judgment had been obtained in circumstances which rendered it invalid ; and, thirdly, an injunction to prevent the defendants from enforcing the Turkish judgment. The defendants counterclaimed to enforce their judgment for the £23,890.

Mr. Justice MacKinnon held (1) that as the plaintiffs were not parties to the Turkish proceedings the doctrine of *res judicata* could not apply to the question of breach of contract and the plaintiffs were entitled to damages, but that those damages did not include the loss of the ship, since that was not a necessary consequence of the breach ; (2) that the Court had power to make the declaration asked for, and there would be a declaration that the plaintiffs were not liable to be sued in England on the Turkish judgment ; but (3) that the Court could not grant an injunction restraining the enforcement of the Turkish judgment in any part of the world.

The plaintiffs appealed. There was a cross-appeal by the defendants as to costs, which was dismissed.

Mr. Raeburn, K.C., and Mr. David Davies appeared for the plaintiffs ; Mr. Wilfrid Lewis and Mr. G. K. Rose for the defendants other than Grech, who was not represented.

Lord Justice Scrutton, in giving judgment, said that this was a curious and, fortunately for English commerce, an unusual case. After stating in detail the facts leading up to the injunction, his Lordship said that Mr. Justice MacKinnon had, for some reason, declined to grant an injunction to take effect outside the jurisdiction. He (the Lord Justice) was unable to share the Judge's doubts on the matter. This was a case of an English contract broken by Count Landi, a naturalized British subject. Considerable portions of the contract were to be performed here. It was proved that Landi had broken the contract and had, by fraud, obtained a foreign judgment against the British shipowners. He was proceeding to enforce that foreign judgment against the property of the persons with whom he had con-

tracted. In such a case English Courts could always assert their power to stop a British subject who was before them from breaking his contract, and they would do it in this form. They did not grant an injunction to restrain the foreign Courts. They had no power to do so, but they did restrain the British subject from applying to those Courts to obtain the fruits of the judgment fraudulently obtained by him.

The law on this matter had been stated very clearly by Lord Brougham, L.C., in *Lord Portarlington v. Soulby* (3 Myl. & K., 104, at p. 107) thus :—

"In *Love v. Baker* (2 Freem., 125) it appears that one only of several parties who had begun proceedings in the Court of Leghorn was resident within the jurisdiction here, and the Court allowed the *subpœna* to be served on him, and that this should be good service on the rest. So far there seems to have been very little scruple in extending the jurisdiction. Lord Clarendon refused the injunction to restrain those proceedings at Leghorn, after advising with the other Judges ; but the report adds, '*sed quacre*, for all the Bar was of another opinion' ; and it is said that, when the argument against issuing it was used that this Court had no authority to bind a foreign Court, the answer was given that the injunction was not directed to the foreign Court, but to the party within the jurisdiction here. A very sound answer as it appears to me ; for the same argument might apply to a Court within this country, which no order of this Court ever affects to bind, our orders being only pointed at the parties to restrain them from proceeding."

He (the Lord Justice) had no doubt that the English Courts had jurisdiction to restrain persons from taking proceedings in a foreign Court to obtain the fruits of a judgment obtained by fraud. He could not conceive that where the English Courts found that a British subject had taken proceedings in a foreign Court based on fraud the English Courts could not interfere. He thought it was quite clear that there was jurisdiction in the present case to grant an injunction restraining Count Landi from acting upon the Turkish judgment and that such an order ought to have been granted. In his opinion an order should be made for an injunction in the terms asked for in the statement of claim against each of the three defendants.

The remaining question to be dealt with referred to the damages. He proposed to alter the Judge's order by saying that the wages and expenses of master and crew should be allowed for a reasonable time in view of all the circumstances ; and, further, he held that the plaintiffs were entitled to recover the value of the ship as at the date when they were first deprived of her use by arrest.

For those reasons the appeal must be allowed.

Lord Justice Atkin said that he agreed. He thought that the English Courts were not so bankrupt of resources as not to be able to deal with a case of this kind. The principle which they asserted was not that they were entitled to assume jurisdiction over the foreign Courts. They had nothing to do with the jurisdiction of those Courts. The principle upon which they acted had reference only to the personal relation of the defendants and to their violation of the rules of equity. In this case he thought that it was essential that an injunction should be granted restraining the defendants from taking advantage of the judgment obtained by them by gross fraud.

Mr. Justice Eve said that he concurred. In his opinion the foreign proceedings had been instituted in clear breach of contract and a judgment had been obtained by deliberate misrepresentation. In these circumstances the plaintiffs were entitled to all the protection that the Courts could extend to them and there ought to be an injunction against each of the three defendants.

[Solicitors—Messrs. Parker, Garrett and Co. ; Messrs. Amery Parkes and Co. ; Messrs. Leader, Plunkett and Leader.]

Judicial Committee of the Privy Council.
(Viscount Cave, L.C., Viscount Haldane, Lord Buckmaster, Lord Darling, and Lord Warrington of Clyffe.)

1928.
Feb. 2.

HIRSCH AND ANOTHER v. MONTREAL PROTESTANT SCHOOL COMMISSIONERS AND OTHERS.*

Canada — Quebec — Legislation — Validity —Education—Rights of Jews—British North America Act, 1867 (30 and 31 Vict., c. 3), s. 93—3 Edw. VII., c. 16 (Quebec statute), ss. 1, 6.

By s. 1 of the Quebec statute, 3 Edw. VII., c. 16, "Any provision to the contrary notwithstanding, in all the municipalities of the Province, whether governed, as regards schools, by the Education Act or by special laws, or by the Education Act and by special laws, persons professing the Jewish religion shall, for school purposes, be treated in the same manner as Protestants, and, for the said purposes, shall be subject to the same obligations and shall enjoy the same rights and privileges as the latter."

By s. 6, "After the coming into force of this Act, the children of persons professing the Jewish religion shall have the same right to be educated in the public schools of the Province as Protestant children, and shall be treated in the same manner as Protestants for all school purposes."

Held, that under s. 93 of the British North America Act, 1867, this statute is not *ultra vires* except so far as it would enable persons professing the Jewish religion to be appointed to the Protestant Board of School Commissioners in the City of Quebec or Montreal or to any Protestant Board of Examiners or to take part with Protestants in the establishment of a dissentient school outside those cities, and except so far as it would confer the right of attendance at dissentient schools outside the cities of Quebec and Montreal upon persons of religious faith different from that of the dissentient minority.

The Provincial Legislature can pass legislation to establish separate schools for persons who are neither Roman Catholics nor Protestants, provided that it does not interfere with the rights of the two Christian communities in their denominational schools.

* Reported by Sir W. J. Soulsby, Barrister-at-Law.

Decision of the Supreme Court of Canada ([1926] S.C.R., 246) varied.

Their LORDSHIPS affirmed, with certain variations, a judgment of the Supreme Court of Canada ([1926] S.C.R., 246) relating to the education of Jewish children in the Province of Quebec. The appellants were two of the Jewish members of a Commission appointed in 1924 by the Lieutenant-Governor.

On the hearing of the arguments in December Sir John Simon, K.C., Mr. St. Laurent, K.C. (of the Canadian Bar), Mr. M. Alexander (K.C., Canada), and Mr. F. Gahan appeared for the appellants; Mr. G. A. Campbell, K.C., Mr. J. J. Creelman, K.C. (both of the Canadian Bar), and Mr. D. N. Pritt, K.C., for the Protestant School Commissioners; Mr. A. Perrault, K.C. (of the Canadian Bar), for the Roman Catholic School Commissioners; Mr. Lanctot, K.C. (of the Canadian Bar), for the Attorney-General for Quebec; Mr. Horace Douglas for the respondent Schubert: and Mr. Lafleur, K.C. (of the Canadian Bar), and Mr. D. N. Pritt, K.C., for the interveners.

The LORD CHANCELLOR, in delivering their Lordships' judgment, said:—

This appeal, which raises questions of great importance in relation to public education in the Province of Quebec, had its first origin in the decision of the Superior Court of Quebec in 1903 in the case of *Pinsler v. Protestant Board of School Commissioners of Montreal* (23 Q.L.R., 365). In that case Mr. Justice Davidson held, on the construction of the Quebec Education Act of 1899, that a person professing the Jewish faith, not being the owner of real estate inscribed on the Protestant panel for the purposes of the city school tax, could not compel the Protestant School Commissioners to admit his son as of right to a school under their control. In consequence of this decision the Legislature of the Province passed in the year 1903 an Act (3 Edw. VII., c. 16) which provided as follows:—

"1. Any provision to the contrary notwithstanding, in all the municipalities of the Province, whether governed, as regards schools, by the Education Act or by special laws, or by the Eduction Act and by special laws, persons professing the Jewish religion shall, for school purposes, be treated in the same manner as Protestants, and, for the said purposes, shall be subject to the same obligations and shall enjoy the same rights and privileges as the latter. . . .

"6. After the coming into force of this Act, the children of persons professing the Jewish religion shall have the same right to be educated in the public schools of the Province as Protestant children, and shall be treated in the same manner as Protestants for all school purposes."

By the intervening sections (sections 2 to 5), provision was made for giving to the Protestant school authorities throughout the Province the benefit of school taxes and contributions paid by or in respect of persons professing the Jewish religion.

This statute was put in force for some years, but eventually—the number of Jewish children attending the Protestant schools in Montreal having greatly increased (it is said to have risen from 2,144 in 1903 to 11,974 in 1923)—it was found that the taxes and allowances received by the Protestant Board in respect of Jewish children were considerably less than the cost of educating those children, and a question was raised by the Board as to the validity of the Act of 1903. An Act passed by the Quebec Legislature in 1922 for increasing the subvention out of the school fund to the Protestant Board (12 Geo. V., c. 44) failed to put an end to the dispute, and on July 21, 1924, the Lieutenant-Governor appointed a Commission, upon which Roman Catholics, Protestants, and Jews were equally represented, to inquire into (among other things) the question of the instruction of Jewish children in the Protestant or other schools. The Commission, being divided in opinion as to the validity of the statute of 1903 and other matters, recommended that the Governor of Quebec should submit to the Court of Appeal and (if necessary) to the Privy Council the question of law which had been raised; and, accordingly, on February 3, 1925, the Lieutenant-Governor in Council submitted to the Court of King's Bench (Appeal Side) the following questions:—

"1. Is the Statute of Quebec of 1903, 3 Edward VII., c. 16, *ultra vires*?

"2. Under the said statute—

"(*a*) can persons of Jewish religion be appointed to the Protestant Board of School Commissioners of the City of Montreal?

"(*b*) is the Protestant Board of School Commissioners of the City of Montreal obliged to appoint Jewish teachers in their schools should they be attended by children professing the Jewish religion?

"3. Can the Provincial Legislature pass legislation providing that persons professing the Jewish religion be appointed—

"(*a*) to the Protestant Board of School Commissioners of the City of Montreal; or

"(*b*) to the Protestant Committee of Public Instruction; or

"(*c*) as Advisory Members of these bodies?

"4. Can the Provincial Legislature pass legislation obliging the Board of School Commissioners of the City of Montreal to appoint teachers professing the Jewish religion in their schools should they be attended by children professing that religion?

"5. Can the Provincial Legislature pass legislation providing for the appointment of persons professing the Jewish religion on the proposed Metropolitan Financial Commission outlined in the project submitted by Messrs. Hirsch and Cohen?

"6. Can the Provincial Legislature pass legislation to establish separate schools for persons who are neither Catholics nor Protestants?

"7. Assuming the Act of 1903 to be unconstitutional, have the Protestants the right under the present state of the Quebec law to allow children professing the Jewish religion to attend the schools—

"(*a*) as a matter of grace;

"(*b*) as of right?

"(*c*) Can the Province force the Protestants to accept children professing the Jewish religion under such conditions?"

An Act passed by the Quebec Legislature on April 3, 1925 (15 Geo. V., c. 19), authorized an appeal as to the matters so submitted from the Court of King's Bench to the Supreme Court of Canada, and from that Court (subject to leave being obtained) to his Majesty in Council.

The Court of King's Bench (Appeal Side), subject to certain reservations and dissents, which it is not necessary to set out in detail, answered the above questions numbered 1, 2 (*a*), and 7 (*a*) and (*b*) in the affirmative, and the remaining questions in the negative; but on appeal by the present appellants (being two of the Jewish members of the Commission above referred to) to the Supreme Court of Canada, that Court (consisting of Chief Justice Anglin, and Mr. Justice Mignault, Mr. Justice Newcombe, Mr.

Justice Rinfret, and Mr. Justice McLean) agreed upon the following answers :—

"QUESTION NO. 1.—*Answer.* No, except in so far as it would confer the right of attendance at dissentient schools upon persons of a religious faith different from that of the dissentient minority.

"QUESTION NO. 2.—*Answers.* To part (*a*), No. To part (*b*), No.

"QUESTION NO. 3.—*Answers.* To part (*a*), No. To part (*b*). This Committee is the creature of post-union legislation, and, therefore, its *personnel* is subject to provincial legislative control ; but, as it is presently constituted, only Protestants are eligible for appointment to it. To part (*c*). This question can be answered only when the powers and duties of such advisory members shall have been defined.

"QUESTION NO. 4.—*Answer.* No.

"QUESTION NO. 5.—*Answer.* No.

"QUESTION NO. 6.—*Answer.* Yes. Such legislation would not necessarily interfere prejudicially with rights and privileges enjoyed either by Roman Catholics or Protestants as a class at the Union. Such interference, of course, could not be allowed.

"QUESTION NO. 7.—*Answer.* It is impossible to answer this question categorically and difficult to answer it intelligently. We deal with it as follows :—

"We assume that the question is to be answered having regard to the law of the Province of Quebec bearing on educational matters, in so far as such law is valid, exclusive of the Act of 1903, and that 'Protestants' in the question means the Protestant Board of School Commissioners of the City of Montreal and the Trustees of the Protestant dissentient schools in rural municipalities.

"To part (*a*) the answer is : Yes.

"To part (*b*). Further, assuming that the inquiry intended is whether Jewish children have the right to attend Protestant schools, with a correlative obligation on the part of the Boards of Protestant School Commissioners and Trustees to admit children professing the Jewish religion to the schools respectively under their control and to provide therein for their education, the answer is :—

In the City of Montreal : Yes.
In the rural municipalities : No.

"To part (*c*). The words 'Under such conditions' are quite unintelligible. It is impossible to discern what conditions are meant to be imported. Eliminating them from the question, the answer is :—

In the City of Montreal : Yes.
In the rural municipalities : No."

The appellants have obtained special leave to appeal from this decision to his Majesty in Council.

The solution of the main question to be determined on this appeal, namely, the question whether the Quebec statute of 1903 above referred to is or is not *ultra vires*, depends upon the effect to be given to section 93 of the British North America Act of 1867, which provides as follows :—

"In and for each province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions :—

"(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union ;

"(2) All the powers, privileges, and duties at the union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec. . . ."

The succeeding two paragraphs of the section provide for an appeal to the Governor-General in Council from any act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the King's subjects in relation to education ; but it was not contended before this Board that these provisions—which were the subject of discussion in a Manitoba case (*Brophy v. Attorney-General for Manitoba*, 11 *The Times* L.R., 198 ; [1895] A.C., 202)—had the effect of ousting the jurisdiction of the Courts, and it is unnecessary to refer to them again.

In order to determine whether the restrictions imposed by section 93 of the Act of 1867 are infringed by the Quebec statute of 1903, it is necessary to consider, first, whether any and which of the schools referred to in that statute were denominational schools in which any class of persons had by law any right or privilege at the union, and, secondly, whether and to what extent that statute prejudicially affects any such right or privilege. For the purpose of this inquiry it is not necessary to recite the earlier statutes of Lower Canada dealing with public education, which are effectively summarized in the judgment of Mr. Justice Flynn in this case, and it will be sufficient to state shortly the provisions of the consolidating statute of 1861 (21 Vict., c. 15), which was in force at the date of the union.

The effect of the statute of 1861 was to establish two somewhat different educational systems, namely, one system for Lower Canada outside the cities of Quebec and Montreal (which may be referred to as the "rural area") and another system for those two cities.

In the rural area there were set up two classes of schools for the elementary instruction of youth, that is to say, (*a*) in each municipality, one or more common schools managed by School Commissioners elected by all the landholders and householders of the municipality other than the dissentient inhabitants to be hereafter referred to, and (*b*) in any municipality in which any number of inhabitants professing a religious faith different from that of the majority had signified such dissent, one or more schools managed by Trustees appointed by the dissentients. These schools were maintained partly by monthly school fees, partly by allowances out of the common school fund, and partly by a school rate levied by the School Commissioners, or, in the case of dissentients, by their Trustees. The teachers at each school were appointed by the Commissioners or Trustees in charge of the school, having first been examined by a Board of Examiners for the county, which might (if the Governor in Council so ordained) be organized in two divisions, one Roman Catholic and the other Protestant. The course of study to be followed in each school was regulated by the Commissioners or Trustees (as the case might be), but it was provided (by section 65 of the Act) that "the curé, priest, or officiating minister shall have the exclusive right of selecting the books having reference to religion and morals for the use of the schools for children of his own religious faith." The schools in each municipality were to be visited periodically by Visitors consisting of the resident clergy and other official persons ; but no priest, minister, or ecclesiastic was to visit a school belonging to inhabitants not of his own persuasion except with the consent of the Commissioners or Trustees of the school (section 121). Children from five to 16 years of age residing in any school district were to have a right to attend "the school thereof" upon payment of the monthly fees (section 66) ; but

this provision does not appear to have applied to the dissentient schools, which were reserved (except as a matter of favour) for children of the dissentient faith residing in the district and (if there was room) for children from other school districts "of the same faith as the dissentients for whom the school was established" (section 56). This reservation, though not clearly stated in the Act, appears to be deducible from its terms; and if there be any doubt upon the point, it is removed by paragraph 2 of section 93 of the British North America Act, 1867, which extends to dissentient schools in Quebec all the powers and privileges by law conferred on the Roman Catholic schools of Upper Canada, including the provisions of the Upper Canada Act of 1863 (26 Vict., c. 5).

It is convenient at this stage to deal, as regards these schools in the rural area, with the first of the two questions above formulated, namely, whether any and which of them were denominational schools in which any class of persons had by law any right or privilege at the union. That the dissentient schools in the rural area fall within that category can hardly be doubted. Where a school is founded by a body of Protestants and is maintained by their contributions and managed by Trustees appointed by them, where its teachers are chosen by those Trustees after examination by a Protestant Board of Examiners, where its religious books are selected by the Protestant minister and admission to the school is confined (except by favour) to the children of Protestant parents, it would be affectation to call that school anything but a denominational school; and the same is equally true of a like dissentient school under Roman Catholic control. It is plain also that the dissentient supporters of such a school, who are bound together by a common religious faith, form a "class of persons" having special rights and privileges with respect to the school, including the right to appoint the managing Trustees and through those Trustees to select the teachers at the school, to control the course of study and to exclude children of another faith. But the same cannot (their Lordships think) be said of a common school in the rural area not being a separate or dissentient school. Such a school, if in a single school district, is under the management of Commissioners appointed by the whole body of landholders and householders in the district without regard to their religious faith; and even in a district where a minority has established its own separate school, the electors who remain need not be all of the same religious persuasion. No doubt it is true, as stated by the Canadian Courts, that in most of the school districts in the rural area the majority of the landholders and householders are Roman Catholics, and, accordingly, that the common schools in those districts (other than the dissentient schools) are in fact controlled by members of that religious community; but, if so, the result is due to the circumstances of the particular school districts, and it is not a right or privilege to which any class of persons are "by law" entitled. In a New Brunswick case (*Maher v. Town Council of Portland*, 1874, reported in Wheeler's Confederation Law of Canada, page 338 note, at page 367), Lord Justice James, who delivered the judgment of this Board, dealt with a similar contention as follows:—

"It has been contended on the part of the appellant that *de facto* they became denominational schools in this way—that is to say, that whereas the whole machinery was left local, that the ratepayers had the power of appointing the master, the ratepayers had the power of appointing the trustees of the schools, but where the whole inhabitants of a district, or the great majority of a district, belonged to the Roman Catholic faith, or belonged to a Protestant sect, there they could so work the school practically as to give it a denominational character or a denominational hue; that is to say, if all the children were Roman Catholics, Roman Catholic teaching would be found in that school; but the fact that that might be the accidental result of the mode of working the Act under the old system is not to give a legal right to that denomination, which was the right alone which was intended to be protected by the Federation Act of the Dominion of Canada. It is an accident which might have happened to-day, and might have been reversed to-morrow by a change of the inhabitants of the district, or a change in their views; and that is not a thing to which it is possible to give the colour of a legal right."

It appears to their Lordships that this reasoning, although relating to a different statute, applies to the common schools (other than dissentient schools) in the rural area, and accordingly that as regards that area the separate or dissentient schools alone come within the protection of section 93 (1) of the Act of 1867.

Turning now to the cities of Quebec and Montreal, it appears that, while the public educational system established in those cities by the Act of 1867 was similar in many of its features to that of the rural area, there were important differences. It may be (as suggested by Mr. Justice Rivard) that it appeared to the Legislature that in these centres, where there was already a dense population and a mixture of religious beliefs, it was unnecessary to require a minority to declare its dissent, and that two kinds of school should at once be set up. But, however that may be, the statute, so far as it applied to the two cities, did not divide the schools into majority and minority schools, but into Roman Catholic and Protestant schools. Each city was to be considered for the purposes of the Act as one municipality, and each school was to be considered a school district. In each city the schools were to be managed by twelve School Commissioners appointed by the Corporation, of whom six were to be Roman Catholic and six Protestant; and such Commissioners were to "form two separate and distinct corporations, the one for Roman Catholics and the other for Protestants" (section 130). No special school rate was to be levied, but payments were to be made by the City Treasurer to the respective Boards of Commissioners "in proportion to the population of the religious persuasion represented by such Boards respectively" (section 131). Each Board was to manage its own schools and appoint the teachers; but such teachers were to be previously examined by a Board of Examiners appointed by the Governor in Council through the Superintendent of Education, one-half of such Board being Roman Catholics and the other half Protestants, and each of such halves acting separately from the other (section 103). The provisions of section 65 as to the choice of books having reference to religion and morals apparently applied to the City schools, so that the religious books for Roman Catholic schools would be chosen by the Roman Catholic curé or priest and the religious books for the Protestant schools by the Protestant priest or minister. Any school managed by either Board could be attended by any child in the city of the specified age (sections 66, 128, and 129).

Then, were the common schools in the cities of Montreal and Quebec denominational schools in which any class of persons had by law a right or privilege at the union? In their Lordships' opinion they were. Every common school in either city was under the

management and control of a Board of Commissioners chosen from persons of a particular religious faith, and each of these Boards is referred to (in section 131) as "representing" a religious persuasion. The school fund contributed by the corporation was to be apportioned between the two Boards in proportion to the religious persuasions which they respectively represented, and therefore roughly (although not precisely) according to the religious faiths of those who contributed to the fund. The examination of teachers, the selection of religious books, and the right to visit the schools were based on a like separation of faiths. It is true that in the two cities a school belonging to either Board might before the date of Confederation be attended by children of a faith different from that represented by the Board: but it appears to their Lordships that the provisions for the management and control of the schools by persons of a particular religious persuasion set upon them a denominational stamp which could not be effaced by the attendance of a certain number of children of a divergent faith. The Roman Catholics in Montreal or Quebec formed a class of persons who had the right and privilege of having their schools controlled and managed by Commissioners of that religious persuasion and their teachers examined by examiners of the same persuasion; and like privileges belonged to the Protestants of each city with regard to the schools controlled by the Protestant Board of Commissioners. This view is confirmed, not only by expressions contained in the judgments of this Board in the Manitoba cases, (*City of Winnipeg v. Barrett*, 8 *The Times* L.R., 745; [1892] A.C., 445, at pp. 453 to 456, *Brophy v. Attorney-General for Manitoba, supra*), and in the Ottawa case (*Ottawa Roman Catholic Separate School Trustees v. Mackell*, 33 *The Times* L.R., 37; [1917] A.C., 62, at p. 69), but also by the emphatic statements of the experienced Judges who dealt with this matter in the Canadian Courts. Chief Justice Anglin, in delivering the unanimous judgment of the Supreme Court of Canada, said that "under the Act of 1861 there were no dissentient schools either in Montreal or Quebec, although no doubt the schools in those cities were denominational schools," and, again, that "nobody doubted that the Roman Catholic and Protestant separate schools of Quebec and Montreal were denominational schools or that the Protestants were a class of persons whose rights and interests were protected"; and similar expressions may be found in the judgments delivered in the Court of King's Bench. Their Lordships cannot but assent to the views so expressed.

It may be added that, in their Lordships' opinion, the contention, put forward by counsel for the appellants, that the word "Protestant" in the statutes must be construed as meaning non-Catholic and so as including Jews, is quite untenable; and also that the Protestant community, although divided for some purposes into different denominations, is itself a denomination and capable of being regarded as a "class of persons" within the meaning of section 93 of the Act of 1867.

It appears that the boundaries of the cities of Montreal and Quebec have since the union been extended, and that the Roman Catholic and Protestant Boards of Commissioners have carried their operations into the added areas. The Supreme Court refrained from pronouncing an opinion as to the effect of any such annexation on school rights in the annexed territories, and their Lordships accordingly do not deal with that question; but it is clear that no post-union annexation of territory could deprive any class of persons of the protection afforded to them by section 93 of the Act of 1867.

It is now possible to deal with the second of the questions formulated above, namely, whether and to what extent the Quebec statute of 1903 prejudicially affects any right or privilege to which any class of persons was by law entitled at the union. Section 1 of the Act provides that "any provision to the contrary notwithstanding, in all the municipalities of the Province . . . persons professing the Jewish religion shall for school purposes be treated in the same manner as Protestants and for the said purposes shall be subject to the same obligations and shall enjoy the same rights and privileges as the latter." This is very wide and comprehensive language, and, notwithstanding the forcible reasoning of Chief Justice Anglin to the contrary, their Lordships incline to the view that it would authorize the appointment of professing Jews to the Protestant Boards of Commissioners and Examiners in Montreal or Quebec, and might even justify a claim on the part of Jewish inhabitants in the rural area to join with Protestants in forming a dissentient school and appointing its Trustees. If so, the section plainly infringes the rights and privileges of Protestants in the Protestant schools in the city areas and in the dissentient schools elsewhere. Further, section 6 of the Act, so far as it purports to enable a professing Jew to send his children as of right to a Protestant dissentient school in the rural area, is an infringement of the rights belonging to Protestants at the union and so goes beyond the legislative authority of the provincial Legislature. With regard to sections 2 to 5 of the Act, while they may no doubt require consideration by the Quebec Legislature in view of the decision of the present case, their Lordships agree with the view taken by the Supreme Court that they are not in themselves void as infringing section 93 of the Act of 1867.

For the above reasons their Lordships are of opinion that the answers to questions 1 and 2 (*a*) should be varied so as to run as follows:—

"QUESTION NO. 1.—No, except so far as it would enable persons professing the Jewish religion to be appointed to the Protestant Board of School Commissioners in the City of Quebec or Montreal or to any Protestant Board of Examiners or to take part with Protestants in the establishment of a dissentient school outside those cities, and except so far as it would confer the right of attendance at dissentient schools outside the cities of Quebec and Montreal upon persons of religious faith different from that of the dissentient minority.

"QUESTION NO. 2 (*a*).—On the construction of the statute, yes."

The above observations enable their Lordships to deal shortly with the questions numbered 2 (*b*), 3, 4, 5, and 7; and it is sufficient to say that they agree with the answers to those questions given by the Supreme Court.

There remains for consideration the sixth question, which asks whether the provincial Legislature can pass legislation to establish separate schools for persons who are neither Catholics nor Protestants. This question is framed in very general terms, and their Lordships have from time to time expressed their reluctance to give an opinion upon abstract and hypothetical questions which have not yet arisen in a concrete form; but the question now under consideration bears so close a relation to those which have been already dealt with that it would be difficult to arrive at a conclusion as to those other questions without forming an opinion upon the sub-

ject matter of the sixth question, and their Lordships think it right to say that upon this question also they are in accord with the opinion expressed by the Supreme Court of Canada. While section 93 of the Act of 1867 protects every right or privilege with respect to the denominational schools which any class of persons may have had by law at the union, it does not purport to stereotype the educational system of the Province as then existing. On the contrary, it expressly authorizes the provincial Legislature to make laws in regard to education subject only to the provisions of the section; and it is difficult to see how the Legislature can effectively exercise the power so entrusted to it unless it is to have a large measure of freedom to meet new circumstances and needs as they arise. The statute protects the rights which at the union belonged to the Roman Catholic population as a class, as well as those belonging to the Protestant population as a class; but to treat members of both denominations, who substantially made up the whole population of the Province at the time of the union, as forming together a "class of persons" with a right to object to the establishment of any school not under Christian control, would be to give a meaning to the statute which its words will not bear. It appears to their Lordships that it would be possible to frame legislation for establishing separate schools for non-Christians without infringing the rights of the two Christian communities in their denominational schools; and they agree with the Supreme Court that legislation confined within those lines would be valid. It is hardly necessary to add that this Board, like the Supreme Court, have dealt with all the questions as questions of law and have in no way concerned themselves with any question of policy.

For the above reasons their Lordships are of the opinion that the decision of the Supreme Court of Canada should be affirmed with the variations above set out, and they will humbly advise his Majesty accordingly. The appellants should pay the costs of the respondent Boards of School Commissioners and of the respondent Joseph Schubert of this appeal. The Protestant Committee of the Council of Public Instruction for Quebec, who obtained special leave to intervene before this Board, and the Attorney-General for Quebec should bear their own costs; but the sum of £150 deposited by the Protestant Committee should be returned to them.

[Solicitors—Messrs. Blake and Redden; Messrs. Lawrence Jones and Co.]

K.B. Div. (Finlay, J.) } 1928. Jan. 26.

KERR v. MARINE PRODUCTS, LIMITED.*

Companies—Director—Remuneration fixed by Board—Not confirmed by company—Validity of agreement—Companies (Consolidation) Act, 1908 (8 Edw. VII., c. 69), Table A, Art. 69.

The plaintiff was a director of the defendant company (which had adopted Table A with some modifications), and at a meeting of the board a service agreement was approved, signed, and sealed appointing the plaintiff "overseas director" at a salary of £1,800 a year. The plaintiff proceeded overseas and performed his duties under the agreement till differences arose and he resigned. In an action by the plaintiff for salary due under the agreement,

Held, that the agreement was *ultra vires* the board, and since the plaintiff's remuneration had never been determined by the company in general meeting, as required by Art. 69 of Table A, he could not recover, but must repay to the company on their counterclaim the money paid to him under the agreement.

This was an action tried by Mr. Justice Finlay. The facts appear from the judgment.

Mr. J. B. Melville, K.C., and Mr. Robert Fortune appeared for the plaintiff; Mr. Merriman, K.C., and Mr. F. W. Wallace for the defendants.

MR. JUSTICE FINLAY read the following judgment:—This action is brought to recover a sum of £1,470 15s. in respect of salary alleged to be due to the plaintiff by the defendants, under an agreement dated September 16, 1926. The defendants, Marine Products, Limited, were incorporated as a private company on July 28, 1926, the main object of the company being to exploit certain inventions and patents of Dr. Ehrenreich with reference to shark fisheries. The plaintiff, who is a retired naval commander, was one of the first directors of the defendant company.

The question which I have to determine is as to the validity of an agreement whereby the plaintiff, who was a director of the defendant company, was employed as "overseas director" of that company at a salary of £1,800 per annum.

There is a minute of a meeting, on August 23, 1926, of the directors of the defendant company at which there were present the plaintiff, who was chairman, Dr. Ehrenreich, Mr. Thynne, and Mr. Seale, showing that until the company was in a revenue-earning condition it was resolved that the drawings of directors on account of salaries be limited as therein defined and be payable as from July 1, 1926, that is, from a date some weeks prior to the formation of the company. The drawings of the plaintiff were by that resolution limited to £30 per month, while the drawings of Dr. Ehrenreich were limited to £125 per month. On September 7, 1926, was held the statutory meeting of the shareholders of the defendant company, and at that meeting the directors' fees were fixed at the rate of £180 per annum for the chairman, that is, the present plaintiff, and £150 per annum for the other directors. It is, of course, perfectly obvious that the drawings authorized on August 23 were not drawings in respect only of the salaries fixed on September 7, but that the directors had in their minds that they were to receive other remuneration. At a meeting of the directors held on September 16 service agreements were approved, signed, and sealed with Mr. Thynne as joint managing director, with Dr. Ehrenreich as joint managing director, with the plaintiff as overseas director, and with Mr. Seale as commercial director. These four gentlemen were the four directors of the company, they were present at the meeting, and there is no doubt that they all voted in favour of the approval of each and all of these agreements. I was informed that the total remuneration agreed to be paid under these four agreements to the four directors was £7,000 per annum. In this action I am directly concerned only with the agreement with the plaintiff.

There is no doubt at all that it was necessary for the proper management of the company's business that there should be in Australia one or more representatives of the company. Much of the business

* Reported by J. W. HALL, Esq., Barrister-at-Law.

had to be transacted in Australia, and, as I have said, it was no doubt essential either to send out some person from England authorized to carry on the company's business in Australia, or else to appoint some agent in Australia to carry on that business. There was at the same time issued to the plaintiff a letter of instructions of September 17, which shows what duties he was required to perform. He went to Australia, and I have no doubt that he there performed to the utmost of his ability the various duties entrusted to him. At a later date Dr. Ehrenreich also went to Australia, and it appears from the evidence before me that differences then developed first between Dr. Ehrenreich and some members of the staff in Australia, and later between Dr. Ehrenreich and the plaintiff.

By resolutions of the shareholders of December 22, 1926, confirmed on January 6, 1927, the capital of the defendant company was greatly increased, and it was turned into a public company. It should be mentioned, although it is not directly relevant to the issue before me, that in the statement in lieu of prospectus issued on that occasion no reference was made to these service agreements. The plaintiff said —and I accept his evidence—that he knew nothing about this until long after the event had happened.

On the plaintiff's return from Australia further differences seem to have developed, and finally, at a meeting of October 13, 1927, the plaintiff's resignation, which had been tendered before, was finally accepted.

The whole question is whether the agreement is enforceable. No question of *quantum meruit* arises. The defendants say that the agreement is unenforceable, and their main ground is that, whatever might have been done by the company itself, this agreement was not one which could validly be entered into by the directors. This matter, of course, depends upon the general law applicable to companies, and upon the Articles of Association of this particular company.

As to the law, my attention was called to several cases, and I may refer to two—*Benson v. Heathorn* (1 Y. and Coll. C.C., 326) and *In re George Newman and Co.* (11 *The Times* L.R., 292 ; [1895] 1 Ch., 674). The law appears to me to be stated in a single sentence in the judgment of the Court of Appeal delivered by Lord Justice Lindley in *In re George Newman and Co.* (*supra*), where at page 686 he says this : "Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of the company's assets, unless authorized so to do by the instrument which regulates the company or by the shareholders at a properly convened meeting." It was not suggested before me that there was any authority by the shareholders, and the whole question is whether the directors were authorized to enter into this agreement by the instrument which regulates the company. Table A is, with some exclusions not material to the present purpose, applied to the company, and the point before me appears to depend upon Article 69 of Table A, and Articles 14, 15, and 17 of the articles of the company.

Article 69 of Table A provides : "The remuneration of the directors shall from time to time be determined by the company in general meeting."

Article 14 of the company's articles provided : "The directors from time to time, and at any time may provide, through local boards, attorneys, or agencies for the management of the affairs of the company abroad, and may appoint any persons to be members of such local boards or as attorneys or agents, and may fix their remuneration. . . ."

Article 15 : "The directors from time to time, and at any time may delegate to any managing director, local board head manager, manager, attorney or agent any of the powers, authorities, and discretions for the time being vested in the directors. . . ."

Article 17 : "A director shall be capable of contracting and participating in the profits of the company in the same manner as if he were not a director, subject, nevertheless, to the following restrictions, namely : (1) Before the contract is entered into, or so soon thereafter as he becomes interested therein, he shall disclose in writing to the board his interest in the contract, and (2) after he has become interested he shall not vote as a director in respect of the contract or any matter arising thereout, and if he do so vote his vote shall not be counted. . . ."

It was contended on behalf of the plaintiff that the effect of Articles 14, 15, and 17 read together was that the directors could appoint local boards, attorneys, and agencies, and appoint any persons to be members of such local boards or as attorneys or agents, and could fix their remuneration. It was further contended that even if Article 14 (and the same observation in my opinion applies to Article 15) would not in itself be sufficient to justify the appointment of a director as an agent and the fixing of his remuneration by the directors, Article 17 shows that Article 14 ought to be construed as applying to directors. I am unable to accept this argument. The meaning of Articles 14 and 15 is, in my opinion, that the directors may appoint local boards or agencies, such local boards or agencies being of course subject to the directions of the board of directors, and it is in my view impossible to suppose that it was contemplated that the directors should appoint themselves to remunerative positions of this character and should vote themselves salaries for performing this work. This view seems to me to be inconsistent with principle and with the authorities as to the duties of directors. I may on this point refer to the judgment of the Vice-Chancellor in *Benson v. Heathorn* (*supra*). There appears to me to be a close analogy between the appointment of the director in that case to be ship's husband and the appointment of the director in this case to be overseas director. I cannot see that any assistance is to be derived from Article 17. That article enables a director, subject to certain restrictions and qualifications, to contract and participate in the profits of a contract with the company. One of the restrictions is that a director after he has become interested shall not vote in respect of the contract or in any matter arising thereout. It appears to me that this restriction is applicable in the present case. See on this *Foster v. Foster* ([1916] 1 Ch., 532), and particularly the observations of Mr. Justice Peterson at page 547. It does not seem to me that there is in that article anything which would authorize what was done by the directors here.

With regard to Article 69 I will only say this : It refers, I think, to the remuneration of directors in respect of their work as directors, but it appears to me to confirm the view which I have taken. It would be a remarkable result if the remuneration of the directors for their work as directors was to be determined by the company in general meeting, but the directors had power to vote themselves unlimited salaries in respect of work done or proposed to be done by them outside their work as directors of the company. When the figures in the present case of the remuneration voted by the company to the

directors for their services as directors are compared with the remuneration voted by the directors in respect of these special services this comparison may be thought to afford a striking commentary.

I cannot hold that the directors had authority by virtue of the articles, or in any other way, to approve these service agreements whereby they and each of them were voted large salaries in respect of services as overseas director or commercial director or otherwise. I ought perhaps to add that I was satisfied upon the evidence that there were at the date when this agreement was entered into and approved a substantial number of shareholders of the company who were not in any way consulted upon the subject. The case may seem a hard one from the point of view of the plaintiff, who has, I am sure, done his very best for what he conceived to be the interests of the company, but I am, of course, compelled to decide the question in accordance with what I believe to be the law, and I must hold that this agreement is one which cannot be enforced against the company.

The defendant company counterclaim for £800, being moneys paid to the plaintiff under the agreement which I have held to be unenforceable. In the circumstances I see no answer to this counterclaim if the view which I have formed on the main question is correct. It therefore follows that I must give judgment for the defendant company on the claim and also for the defendant company for £800 on the counterclaim. The plaintiff must pay the costs.

[Solicitors—Messrs. Simon, Haynes, Barlas, and Ireland ; Messrs. Nicholson, Graham, and Jones.]

K.B. Div. (Shearman, J.) } 1928. Feb. 9.

BRITT v. GALMOYE AND NEVILL.*

Master and Servant—Servant's negligence—Journey not on master's business—No liability on master.

The first defendant, who had the second defendant in his employment as a van-driver, lent him his private motor-car, after the day's work was finished, to take friends to a theatre. The second defendant by his negligent driving injured the plaintiff.

Held, that as the journey was not on the master's business and the master was not in control he was not liable for his servant's act.

His Lordship, after hearing legal argument, gave judgment for the defendant Galmoye in this action, which raised a new point on the liability of the owner of a motor-car for injuries caused to a third person by the negligent driving of a servant to whom the owner had lent the motor-car for the servant's own purposes.

The plaintiff, Mr. Harold Britt, was a painter employed by the Southern Railway Company. On December 23, 1926, he was standing at night on a trestle under a bridge at Lewisham in order to paint the under-side of the bridge. The trestle was protected from traffic by a barrier with red lamps. A motor-car belonging to the defendant, Mr. Lawrence Henry Galmoye, of 62, Barrington-road, Brixton, and driven by the other defendant, Mr. Horace Nevill, of Finchley-road, Kennington, collided with the trestle and injured the plaintiff. The jury found that the defendant Nevill was negligent and assessed the damages at £300.

Mr. Galmoye was a contractor employing a number of vanmen. Nevill, who was one of them, was a trusted servant, and, as Mr. Galmoye said, a friend as well as a servant. In addition to the vans, Mr. Galmoye had a Morris Cowley motor-car for his personal use, and had on a previous occasion lent it to Nevill at his request. On the day of the accident Nevill asked for the loan of the motor-car to take two women to the theatre, and Mr. Galmoye gave him the key of his garage and told him that he might take the motor-car. It was while Nevill was driving his friends home that the accident occurred.

Mr. E. F. Lever appeared for the plaintiff ; Mr. E. Duke for the defendants.

Mr. Lever contended that inasmuch as Nevill was in the general employment of Mr. Galmoye for the purpose of driving motor-cars, and was driving his motor-car with his authority, the liability of Mr. Galmoye was not affected because the journey was for Nevill's own benefit.

Mr. Duke, while arguing to the contrary, was stopped.

Mr. Justice Shearman, in giving judgment, stated the facts and said that he was asked to say that Mr. Galmoye was responsible. The principle of law as to the liability of a principal had been expressed in many ways. The Latin maxim : *Qui facit per alium facit per se* did not help him, for the question was : "Is this Mr. Galmoye's act ?" The principle was better expressed in the shorter maxim, *Respondeat superior*, because the gist of it was that the agent was doing something for his principal. The cases like *Storey v. Ashton* (L.R., 4 Q.B., 476) on diverted journeys did not help him here, because in those cases the servant began on his master's business and continued on his own. But here the servant, though admittedly in general employment as a driver of vans, was authorized to drive women who were not friends of the master. The journey was not on the master's business. The master was for the nonce a stranger.

Nor was much assistance to be got from the cases in which it had been held that where the master or his driver was present while the authorized person drove they retained sufficient control to make the master liable. He could find no remnant of control in the present case ; for control meant that the journey was the journey of the principal. The whole law of the liability of employers was considered in *Lloyd v. Grace, Smith and Co.* (27 *The Times* L.R., 409 ; [1911] 2 K.B., 489 ; 28 *The Times* L.R., 547 ; [1912] A.C., 716).

In *Dyer v. Munday* (11 *The Times* L.R., 282 ; [1895] 1 Q.B., 742) and in *Lloyd v. Grace, Smith and Co.* (*supra*), it was said in the Court of Appeal that the principal was responsible if the servant was employed to do the class of act in which the tort was committed. The servant here was not employed to do this class of act ; he was in the position of a stranger after his work was finished. In the result there must be judgment for Mr. Galmoye, with costs. The plaintiff was, of course, entitled, if he chose, to ask for judgment against Nevill for what it was worth, but to do so now might prejudice his position in the event of an appeal as to Mr. Galmoye.

[Solicitors—Messrs. W. B. Blackwell and Co. ; Mr. R. H. Hargreaves.]

* Reported by J. W. Hall, Esq., Barrister-at-Law.

Chan. Div. (Russell, J.) 1928. Feb. 9.

IN RE ANDERSON—PUBLIC TRUSTEE v. BIELBY.*

Will—Construction—"All my stock or shares in the Great Eastern Railway Company"—Railway amalgamation—*Falsa demonstratio*—Purchase of stock in new company.

By his will, dated March 9, 1922, Mr. Joseph Anderson, of 60, Carnarvon-road, Stratford, bequeathed to Mr. Percy George Bielby all his stocks or shares of whatsoever kind in the Great Eastern Railway. In November, 1922, the testator owned £3,000 Ordinary stock in that company. In January, 1923, the amalgamation scheme of the North-Eastern, Eastern, and East Scottish group came into operation, and, in return for his holdings of Great Eastern stock, the testator received £1,050 Five per Cent. Ordinary stock and £1,350 Deferred Ordinary in the London and North-Eastern Railway.

Between August, 1923, and March, 1925, after the amalgamation, the testator bought £3,800 Deferred Ordinary stock in the London and North-Eastern Railway.

The testator died on December 5, 1926. The question was whether, under the terms of the bequest in the will of all his stock in the Great Eastern Railway, the £1,050 Ordinary stock and the £5,150 Deferred Ordinary in the London and North-Eastern Railway passed to Mr. Percy Bielby. Mr. Justice Russell held that the £3,800 Deferred did not.

Mr. R. H. Hodge appeared for the plaintiff: Mr. Greenland for the specific legatee, Mr. Bielby; and Mr. W. M. Hunt for the residuary legatees.

MR. JUSTICE RUSSELL, in giving judgment, said that the testator, having made a codicil to his will dated May 12, 1926, died leaving a testamentary disposition of his property of that date. At that date the testator had £1,050 Five per Cent. Ordinary stock and £5,150 Deferred Ordinary stock of the London and North-Eastern Railway, of which £3,800 had been acquired after the amalgamation of the companies. The only way to construe the bequest of "all my stock or shares in the Great Eastern Railway Company" was to treat it as *falsa demonstratio* and a bequest of stock owned by him which had formerly been Great Eastern Railway stock. Clause 16 of the amalgamation scheme which was authorized under the Railways Act, 1921, made no difference. That clause ran:—

"Stock of the company substituted by virtue of this scheme for stock of the six companies shall be held upon and subject to the same trusts liens charges powers and other legal or equitable rights privileges and restrictions as affected the stock for which by virtue of the scheme the same is substituted and any reference in any Act of Parliament deed will codicil book document instrument or writing to stock of the six companies shall be deemed to be a reference to the stock of the company substituted therefor by virtue of this scheme."

But the £3,800 new stock was not substituted for any stock of the six companies. The £3,800 fell into residue, and Mr. Bielby took under the will only the £1,050 Five per Cent. Ordinary stock and £1,350 Deferred Ordinary.

[Solicitors—Messrs. Hillearys.]

* Reported by J. B. B. MACMAHON, Esq., Barrister-at-Law.

K.B. Div. (Finlay, J.) 1928. Feb. 8.

HANDS v. SIMPSON FAWCETT AND CO., LIMITED.*

Contract—Commercial traveller—Use of motor-car — Motoring offence — Suspension of licence — Dismissal — Claim for damages—Non-disclosure of motoring offence before the agreement.

The plaintiff, who was a commercial traveller, was employed by the defendants under an agreement which provided that the plaintiff was to use a motor-car for the carriage of samples. The plaintiff was convicted of driving the car to the common danger and was fined £10 and his driving licence was suspended for three months. The defendants thereupon terminated the plaintiff's employment on the ground that these facts constituted misconduct justifying dismissal.

In an action for wrongful dismissal the defendants also pleaded that before the agreement was made the plaintiff ought to have informed them that he had previously been convicted of being drunk when in charge of a motor-car and been sentenced to imprisonment for driving it in a manner dangerous to the public.

Held, that in the case of such an agreement as the plaintiff had with the defendants there was no obligation on him to disclose his previous conviction for a motoring offence, and that the conviction during the currency of the agreement, even although the plaintiff's licence was suspended, was not a ground for terminating the agreement, as the plaintiff could have got someone to drive the car. The plaintiff was therefore held entitled to damages.

In this action Mr. Harry Arthur Hands, a commercial traveller, of Sussex-square, Brighton, sought to recover damages from Messrs. Simpson Fawcett and Co., Limited, perambulator and toy manufacturers, of Blackbull-street, Hunslet, Leeds, for alleged breach of a written agreement entered into between the parties on December 1, 1926. The plaintiff also claimed damages for alleged wrongful dismissal and a declaration that he was entitled to commission at the rate of 2½ per cent. on the net value of all goods sold to persons introduced by him during a period of three years from December 1, 1926.

The point raised in the case was whether there was a duty on the part of a man, when applying for the position of commercial traveller, to inform his prospective employers that he had been convicted of motoring offences.

The defendants said that they were justified in putting an end to the contract because of the concealment of the motoring offences by the plaintiff, which, they said, was concealment of material facts.

Sir Walter Schwabe, K.C., and Mr. Eric Sachs appeared for the plaintiff; Mr. J. A. Greene, K.C., and Mr. Wynn Werninck for the defendants.

SIR WALTER SCHWABE, in opening the case, said that the plaintiff was employed by the defendants

* Reported by W. E. HURT and CHARLES CLAYTON, Esqs., Barristers-at-Law.

as a commercial traveller under the agreement in question which provided for a commission with a guaranteed minimum. His ground covered practically the whole of the South of England, including London. Under the agreement he was to be employed for seven months certain at 6 per cent. commission. He was then to have an option to continue on a yearly agreement on the same terms. If the defendants terminated the agreement the plaintiff was entitled to 2½ per cent. for three years on the orders from customers whom he introduced.

In January, 1927, a month after the contract was made, the plaintiff became involved in a collision in Sussex when driving a motor-car at night, and upon being summoned before the Haywards Heath magistrates his answer was that he had been dazzled by the bright headlights of the other car. The Bench found that he was driving on the wrong side of the road when the accident occurred and he was convicted of driving to the common danger and fined £10, his licence being endorsed and suspended for three months. That, said counsel, was pleaded as misconduct which entitled the defendants to terminate the plaintiff's employment.

The other defence was that before entering into the agreement the plaintiff had been convicted at Bow-street of having been drunk when in charge of a motor-car on Constitution Hill on Derby Day, 1925. He was fined £10, his licence was suspended for seven months, and he was sentenced to a month's imprisonment in the second division for driving in a manner dangerous to the public. In regard to that matter, said counsel, the plaintiff had a strong view that he was wrongly convicted.

The defendants said that they ought to have been informed of that conviction and that if they had known of it they would not have entered into the agreement with the plaintiff. They also set out another motoring offence, when the plaintiff was fined £3 for exceeding the speed limit. The question was whether the defendants were entitled to dismiss the plaintiff in January, 1927, because he had been convicted. He (counsel) submitted that it was no excuse for getting out of an agreement which the defendants did not like. He contended that the plaintiff was not bound to inform the defendants that he had been previously convicted of a motoring offence.

His LORDSHIP.—It would be otherwise if he were applying for a post as chauffeur.

SIR WALTER SCHWABE.—Very different indeed.

Counsel submitted, on the point of misconduct justifying dismissal, that it was a question of the extent of the misconduct, and that, in the circumstances, this case fell on the right side of the line in favour of the plaintiff. He cited *Fletcher v. Krell* (28 L.T., 105), where the defendant pleaded concealment by the plaintiff, a governess, of the fact that she was a divorced woman as justification for her dismissal, and it was held on demurrer that the plea was bad.

The plaintiff, giving evidence, said that in his career as an agent he had effected a turnover of £100,000 in one year. He had motored for 28 years. He was told by the defendants that a turnover of £200,000 could reasonably be anticipated in the South of England district. For the purpose of his business he mainly used the railway. He calculated that in the first year he would easily have procured a turnover of £20,000. He had about 1,000 customers on his agency book and probably 300 or 400 of them would have been buyers of the goods he was selling for the defendants. He had done business with Harrods, Whiteleys, and other big firms, and had done £36,000 in one year for Selfridges. A new man on his ground would have had a hopeless chance for a few years.

In cross-examination by Mr. GREENE, the plaintiff said that before his agreement with the defendants he had not done business in perambulators, but had been engaged in the cycle and allied trades. He told the defendants that he had a good connexion and knew the district very well. They told him that they had not done business in the South of England for 20 years and that they wanted to compete with a rival firm which had the trade principally in their hands. The motor-car in which he was travelling when the collision took place on January 6, 1927, was one which he had purchased from the defendants. When the police were called he gave the name and address of the defendants as the people for whom he was driving, because theirs was the only card he had with him at the time.

The plaintiff said that the motor-car was sold to him and he treated it as his property. He used it for business which he did for other firms. When his licence was endorsed he employed a man to drive for him.

Mr. GREENE, for the defendants, said that the issues in the case were of fact and not of law. If the contract could not be fulfilled on one side, the question for determination was whether the breach was small or whether it went to the root of the contract. It all became a question of degree. Under the contract the plaintiff was to do active work to sell the defendants' goods, and an essential part of the agreement was that a motor-car supplied to the plaintiff by the defendants under the contract on certain terms should be used to carry samples, for which purpose a special platform had been erected. The motor-car and the way in which the plaintiff used it were part of the objects of the agreement. If he had refused to drive the motor-car at all, that clearly would have been a breach of the contract; so, if he put himself into the position by his own conduct that he could not use the motor-car on account of the suspension of his licence, that in law was the same thing. Was the plaintiff in the position to say on January 27 that what he had done did not prevent him from carrying out his work? It might well be that the non-disclosure of convictions of motoring offences before his appointment did not of itself entitle the defendants to say that it put an end to the contract, but it was a very different thing when in fact there were actual motoring offences during the period of the agreement.

MR. JUSTICE FINLAY.—You cannot say that a motoring offence and a fine of £10 entitled you to break the contract; you have to show that it was the three months' suspension. Isn't it perfectly obvious that he could have continued his duties by employing a chauffeur?

Mr. GREENE.—The expense of employing a chauffeur would have been too great. If the plaintiff's financial position at that time was that he could not fulfill the contract, were not the defendants entitled to put an end to it, since his suspension prevented him from driving himself?

Mr. Walter B. Dow, manager and secretary of the defendant company, said that the company's trade was largely in the North. The total turnover for 1926 was £83,523. Referring to interviews with the plaintiff, he said that he was told nothing of his motoring troubles, and said that he would not have employed him if he had known of them.

MR. JUSTICE FINLAY, after stating the facts, said that it was suggested that the non-disclosure by the plaintiff of certain motoring offences justified the

defendants in repudiating the agreement. The authority on the subject was *Fletcher v. Krell* (28 L.T., 105). In his opinion there was no such obligation in the present case as existed in contracts of insurance to state all the material facts.

Dealing with the prosecution, conviction, and consequent suspension for three months of the plaintiff's motoring licence for dangerous driving while on a journey from London to Brighton in the defendants' interests, his LORDSHIP said that, in order to see if that formed a justification for the defendants' repudiation of the agreement, it was necessary to look at the contract itself. He thought that it was reasonably clear that the conviction of the plaintiff of a motoring offence of that kind was not a ground for terminating the agreement. The defendants were influenced by the suspension of the plaintiff's licence for three months, but it was impossible to say that the plaintiff could not have got someone to drive the motor-car during that time.

In some cases it might be of the essence of the contract that the man himself had to drive the motor-car, but there was nothing in this case to show that the plaintiff had put it out of his power to perform his duties. There must be judgment for the plaintiff. He assessed the damages at £400.

Judgment was accordingly entered for the plaintiff for £400, with costs.

[Solicitors—Mr. H. Burford Judge; Messrs. McIntyre, Emsley, and Co., for Messrs. Emsley and Son, Leeds.]

Court of Appeal.
(Scrutton and Sankey, L.JJ., and Astbury, J.)

1928.
Feb. 10.

COMPAGNIE CONTINENTALE D'IMPORTATION v. HANDELSVERTRETUNG DER UNION DER S.S.R. IN DEUTSCHLAND.*

Contract—Sale of goods — Conditions — Notice of appropriation — Date of bill of lading to be stated—Notice to be given within seven days from such date—Provisional invoice—Whether a good notice of appropriation—Whether despatch within the seven days sufficient.

The respondents in Rotterdam contracted to buy from the appellants in Hamburg 6,000 tons of South Russian wheat, the conditions of the contract providing that notice of appropriation with ship's name and date of bill of lading should be given by the shippers to the buyers within seven days from date of bill of lading, and that provisional invoice with ship's name and date of bill of lading should be sent by the shippers' London house to the buyers within three days from the arrival of the documents in London. The sellers shipped the wheat at Novorossisk, and within the seven days the sellers sent to the buyers a telegram and confirming letter, which the sellers alleged to be a notice of appropriation, but neither document stated the date of the bill of lading. On the same day the sellers posted to the buyers a provisional invoice which gave the date of the bill of lading, but the provisional invoice was not received by the buyers until after the expiry of the seven days. The buyers contended that there had been no tender in conformity with the contract, and it was found by the Appeal Committee in an arbitration that there had been no good notice of appropriation in the telegram and confirming letter and that the provisional invoice was not intended as a notice of appropriation, and that it was a recognized custom that notice of appropriation and provisional invoice should be separate documents, and that therefore the buyers were under no liability to the sellers.

Held, on a case stated, that even if the provisional invoice constituted a notice of appropriation, yet, as it was not received by the buyers within the contract time, the sellers had not satisfied the contract, since despatch within that time was not a compliance with the condition that the notice should be given to the buyers within that time.

Semble, the provisional invoice was not a notice of appropriation.

Decision of Wright, J. (44 *The Times* L.R., 10), affirmed.

This was an appeal by the sellers from a decision of Mr. Justice Wright (44 *The Times* L.R., 10) on an award stated in the form of a special case by the Appeal Committee of the London Corn Trade Association. The appeal raised a question of the construction of a condition printed on the back of a formal contract for the sale of grain.

On November 26, 1926, the sellers, the German representatives of the Russian Soviet Republics, carrying on business at Hamburg, entered into a contract with the buyers, a company carrying on business at Rotterdam, to sell to the buyers 6,000 tons of South Russian wheat. The contract was in the form of the London Corn Trade Association, Black Sea and Danubian Grain Contract, and was subject to a number of conditions printed on the back thereof. The sellers shipped the wheat on a steamer at Novorossisk, and the bills of lading were dated December 30, 1926. It was agreed that the period of seven days from the date of the bills of lading included January 6, 1927. On January 4, 1927, the sellers telegraphed, and confirmed the telegram by letter:—

"Contract twenty-sixth November tender 6099 .737 ke wheat no. K.O.5 S.S. Marigo L Novorossisk Gibraltar for order."

On January 6 the buyers wrote in reply that they could not accept that as a notice of appropriation because the date of the bill of lading was not stated. On the same day the sellers posted to the buyers a provisional invoice (which did give, *inter alia,* the date of the bill of lading), which the buyers received on January 7. On receipt of it the buyers returned it on the ground that no tender had been made in conformity with the contract.

The dispute was then referred to arbitration, and the arbitrators decided that the sellers had given a proper and sufficient notice of appropriation. The buyers appealed from that decision to the Appeal Committee of the London Corn Trade Association, and the Appeal Committee awarded, subject to the opinion of the Court on a special case, that the buyers had not received a proper and sufficient notice of

* Reported by T. W. MORGAN and E. J. M. CHAPLIN, Esqrs., Barristers-at-Law.

appropriation within the meaning of condition 1 of the contract, and were, therefore, under no liability to the sellers, and that the award of the arbitrators should be set aside.

Condition 1 on the back of the contract was as follows :—

"Notice of appropriation with ship's name, date of bill or bills of lading, and approximate quantity loaded shall be given by the shipper of the grain tendered under this contract direct or through his house or representative or agent in London to his buyer within seven days from date of bill of lading and by each other seller within the seven days, or in due course if received by him after that time ; . . . Provisional invoice based on bill of lading weight with ship's name and date of bill or bills of lading shall be sent by shipper's house or representative in London to his buyer within three business days after arrival of documents in London . . ."

The Appeal Committee found as facts that the letter of the sellers confirming their telegram on January 4 was intended to be a notice of appropriation, but that it was not a good notice of appropriation because it did not state the date of the bills of lading, and was properly rejected by the buyers. They also found that the provisional invoice of January 6 was not intended as a notice of appropriation, and that it was a well-recognized custom that notice of appropriation and provisional invoice were separate and distinct documents.

Mr. Justice Wright held that, even if the provisional invoice constituted a notice of appropriation, yet, as it was not received by the buyers within the contract time, the sellers had not satisfied the contract, and that, as the custom was not unreasonable and was not inconsistent with the contract, the provisional invoice was not a notice of appropriation, and the award of the Appeal Committee must be upheld.

The sellers appealed.

Mr. Somervell appeared for the appellants ; Mr. Le Quesne, K.C., and Mr. C. W. Lilley for the respondents.

LORD JUSTICE SCRUTTON, in giving judgment, said that the point raised was quite a short one. The sellers in Hamburg sold to buyers at Rotterdam 6,000 tons of South Russian wheat. The contract, which was in the form of the London Corn Trade Association, Black Sea and Danubian Grain Contract, was subject to a number of conditions printed on the back. Condition 1 on the back of the contract provided that notice of appropriation "shall be given by the shipper of the grain . . . to his buyer within seven days from date of bill of lading."

The date of the bill of lading was December 30, 1926, and it was common ground that the buyers had not received a valid notice of appropriation within seven days from that date. By January 7, 1927, no valid notice of appropriation had been given by the sellers to the buyers in accordance with the condition, unless Mr. Somervell's contention was a good one.

Mr. Somervell contended that a notice was given by the shipper when a communication was sent off to the buyer, and that it was immaterial that it did not reach the buyer within the seven days if it had been despatched by the seller within that period.

But when the contract said that a notice should be given by the seller to the buyer within a certain time, it meant that the notice should be given to the buyer within the time specified and not merely to the Post Office, or to a messenger who might lose it on the way. The notice must reach the buyer within the time specified. He agreed with Mr. Justice Wright, and he was gratified to find himself in agreement with the commercial gentlemen who formed the Appeal Committee of the London Corn Trade Association.

It was unnecessary to deal with a second point raised by Mr. Somervell, but without giving a final opinion on it, as the point had not been argued, he (Lord Justice Scrutton) would have thought that it was quite clear that a notice of appropriation and an invoice were two different things. However, the first point was sufficient to dispose of the appeal, which must be dismissed.

LORD JUSTICE SANKEY agreed. The Court was asked to construe a short sentence in the contract. The contract provided that notice of appropriation should be given by the sellers to the buyers within seven days. Mr. Somervell contended that the word "given" was susceptible of two meanings : (1) That the sellers should cause the notice of appropriation to be despatched within seven days ; or (2) should cause it to be received by the buyers within seven days. Counsel contended that the first alternative was the correct interpretation. But in his (his Lordship's) view, the second of the two alternatives was right. The word "given" meant given to the buyers, so that the buyers should receive it within the seven days. That was the plain and proper meaning of the word and it was the one which Mr. Justice Wright had put on it.

If there had been any doubt with regard to the construction of the word, they were entitled to look at the other conditions of the contract, and these other conditions of the contract tended to support the same construction. The appeal must be dismissed.

MR. JUSTICE ASTBURY agreed for the same reasons.

[Solicitors—Messrs. Coward, Chance, and Co. ; Messrs. Thomas Cooper and Co.]

Chan. Div. (Eve, J.) } 1928. Feb. 14.

MEADE-KING v. USHER'S WILTSHIRE BREWERY, LIMITED.*

Companies—Debentures—Compromise of rights of holders—Power of majority to alter terms—Redemption at less than par—Redemption figure above market price — Validity of scheme.

This was an action which raised the question whether the defendant company, Usher's Wiltshire Brewery, Limited, could insist on a compromise of the rights of the plaintiff as a holder of debenture stock.

Mr. Swords appeared for the plaintiff ; Mr. Owen Thompson, K.C., and Mr. Greenland for the defendant company.

MR. SWORDS said that the plaintiff was the registered proprietor of £200 A debenture stock, part of an issue of £120,000 4½ per cent. debenture stock created by a resolution of the directors of May 23, 1902, and secured by a trust deed of March 13, 1903. The certificate provided, among other things, that interest should be paid half-yearly, and that repayment of the debenture stock could be made only at

* Reported by A. W. CHASTER, ESQ., Barrister-at-Law.

a premium of 5 per cent. and on six months' notice. By an extraordinary resolution of the holders of three-fourths in value the terms might be increased or reduced as they thought fit. In 1925 a circular was issued to the stockholders stating that it was proposed to consolidate the A, B, and C debenture stock and to issue £350,000 6 per cent. debenture stock, and that, as the stock then known as the A stock only paid 4½ per cent. and was only redeemable at the company's option, and as this affected its market price, it was proposed to redeem it at 80 per cent. The company at that time was not in any financial difficulties. A meeting of these stockholders was held in pursuance of this circular in January, 1926. At this meeting the plaintiff was not present, and this proposal to redeem at 80 per cent. was passed unanimously. Counsel submitted that that was mere confiscation of the plaintiff's rights. The point was raised in an unreported case before Mr. Justice P. O. Lawrence in October, 1923, but the decision was given on another ground.

Counsel cited *Mercantile Investment and General Trust Company v. International Company of Mexico* (7 *The Times* L.R., 616 ; [1893] 1 Ch., 484, *n*) and *In re Alabama, New Orleans, Texas and Pacific Junction Railway Company* (7 *The Times* L.R., 171 ; [1891] 1 Ch., 213), *per* Lord Justice Bowen at page 243.

Mr. THOMPSON, for the defendants, said that there was no confiscation. This stock was irredeemable while the company was a going concern except at the company's option, and as a result its market price at the time of the agreement was from £66 to £73. So the plaintiff was getting more than he would otherwise get. The conditions were of such a wide nature as to include compulsory repayment of the holding of a secured creditor at less than par. The effect of the agreement was to release the rights of the stockholders against the company. The *Mercantile Investment* case (*supra*) was distinguishable. This compromise was a reasonable compromise of rights. Under the Joint Stock Companies Arrangement Act, 1870, now repealed by the Companies (Consolidation) Act, 1908, debenture holders had been required to take shares in *In re Empire Mining Company* (44 Ch.D., 402). The carrying through of this agreement was a relief of the company from a Stock Exchange difficulty. There was of course no financial difficulty. He submitted that the defendants' case was clear.

Mr. SWORDS replied.

MR. JUSTICE EVE (after stating the facts) said that the proposal in the circular of 1925 was undoubtedly a modification of the rights of the debenture stockholders. At the meeting of the different classes of holders the proposal was approved by the necessary majorities. These powers which the company proposed to exercise were said by the plaintiff to amount to confiscation. The scheme was in fact a release of the rights of the holders under their conditions. It could not be said to be so unreasonable as to call for the intervention of the Court. It was in the nature of a business transaction, and having been agreed to by substantial majorities it was sufficient to bind the minorities. The plaintiff's claim therefore failed and the action must be dismissed with costs on the appropriate County Court scale, the proceeding having been begun in the County Court and transferred here.

[Solicitors—Messrs. Church, Adams, and Co., for Messrs. Meade-King and Co., Bristol ; Messrs. Le Brasseur and Oakley, for Messrs. Stone, King, and Wardle, Bath.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) } 1928. Feb. 6.

M. v. M.*

Divorce—Judicial separation—Wife's petition—Alimony *pendente lite* — Interlocutory proceeding delayed—Decree of judicial separation—Court's refusal to proceed with petition for alimony *pendente lite*—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49)—Matrimonial Causes Rules, 1924, Nos. 57-59 and 61.

After a wife has been granted a decree of judicial separation it is too late to proceed with her petition for alimony *pendente lite,* even though it may have been commenced before the decree was pronounced.

This was an appeal by a woman petitioner from the refusal of the registrar to make an order for alimony *pendente lite* after she had been given a decree of judicial separation. The petition for judicial separation was filed on March 26, 1927, and the petition for alimony *pendente lite* was filed soon afterwards. The respondent filed his answer to the latter petition on May 27, 1927, and after considerable delays filed an affidavit of documents on October 5, 1927. On November 27, 1927, the wife was granted a decree of judicial separation. The registrar made an appointment for the hearing of the petition for alimony *pendente lite* on January 28, 1928, but declined to proceed farther with that petition on the ground that it was contrary to the current practice.

Mr. T. BUCKNILL, for the petitioner, referred to the following passage in Mr. Clifford Mortimer's last edition of Rayden on Divorce at page 188 :—

"After decree absolute in suits for nullity or dissolution of marriage or after a decree in suits for judicial separation, it would seem to be too late to obtain an award of alimony *pendente lite,* even upon a petition presented before the final decree, for there is no suit pending. There seems to be no reported decision upon the point."

Counsel read the Matrimonial Causes Rules, 1924, which gave the wife a right of inquiry into her husband's means for the purposes of alimony *pendente lite,* and said that on the analogy of the practice in suits for restitution of conjugal rights he was still entitled to an order in this case. It was held in *Ver Mehr v. Ver Mehr* ([1921] P. 404) that the jurisdiction of the Court to provide alimony for a wife *pendente lite* extended until the proved disobedience of the husband to a decree for restitution, and that this right of the wife was not affected by the fact that the order was made after the restitution decree, but before the time for compliance therewith had expired. In this case, he submitted, the suit for judicial separation was not at an end, as the decree might be set aside if there were renewed cohabitation, and such decrees had been set aside on the ground of false evidence. Moreover there could be an appeal from a decree of judicial separation.

LORD MERRIVALE.—Means might have been taken to expedite the inquiry, or to defer the hearing till the wife secured the inquiry as to her husband's means. There is no precedent for what you are asking me to do, and that is an argument against it.

* Reported by WILLIAM LATEY, Esq., Barrister-at-Law.

Mr. BUCKNILL said that if his contention were wrong the sooner the law was altered the better. It was a monstrous thing if a woman who proceeded with due diligence against a husband of substantial means could be kept at arm's length in this way.

LORD MERRIVALE.—That assumes that the Court has no power to allow for the period before decree.

Mr. GRAZEBROOK, for the respondent, submitted that this petition was too late and could not be entertained after a decree of judicial separation, which was based on the old Ecclesiastical Courts' practice. He referred to *Brisco v. Brisco* (2 Hagg. Consist., 199) and pointed out that under the old practice the question of alimony *pendente lite* was disposed of at the earliest possible stage. There was no jurisdiction now to hear this petition.

LORD MERRIVALE.—Permanent alimony was substituted by the Matrimonial Causes Acts for the decree in the ecclesiastical courts which fixed the alimony.

LORD MERRIVALE delivered a considered judgment as follows :—

The applicant was petitioner and her husband respondent in a suit for judicial separation instituted in March, 1927. With due diligence after her petition was filed she sought an order for alimony *pendente lite,* apparently upon sufficient grounds, but there was delay in the interlocutory proceedings, not due to any default in her solicitor, and the suit came to trial in November, 1927, and a decree for judicial separation was made before the interlocutory application had been brought to a hearing. Ten weeks later it was brought on and the learned registrar made no order save that the respondent should pay the wife's costs of the application up to the date of the decree. The wife appeals and asks that directions shall be given for inquiry with a view to such an order as the facts may warrant for payment of alimony *pendente lite.* In support of the appeal reliance is placed upon the general terms in which the Matrimonial Causes Rules, 1924, Rules 57, 58, 59, and 61, direct proceedings in respect of alimony pending suit. It is contended that the suit was not at an end on January 11, inasmuch as the marriage is subsisting and the decree is subject by statute to be reviewed or rescinded in certain events, and it is argued that this case is governed by a decided case of *Ver Mehr v. Ver Mehr* ([1921] P., 404). Further, there is a suggestion that the right of a wife to maintenance, which is in question, is a substantive right, asserted by this petition for alimony and proper to be enforced irrespectively of the position of this suit. The case for the husband was that after the pronouncing of this decree, which is the final judgment of the Court in the suit, there is no longer any *lis pendens,* and therefore no such order as is sought can be made. This case of *Ver Mehr v. Ver Mehr* (*supra*) does not govern this dispute. That was a wife's suit for restitution of conjugal rights. The order for restitution had not been obeyed, and although no steps had been taken under the Matrimonial Causes Act, 1884, the husband was guilty of desertion and of disobedience to a subsisting order, and this decree had the effect of a like decree in the Ecclesiastical Courts, save in so far as the statute of 1884 otherwise provides. What was said was that inasmuch as in the Ecclesiastical Courts the husband cited in such a suit remained subject to the jurisdiction of the Court until there had been obedience to the decree or the decree was discharged the husband was liable. The existing practice of long standing was thus confirmed. The rules of practice which are in question must be construed with due regard to the subject matter and the law relating thereto. The powers of the Court were conferred by the Matrimonial Causes Act, 1857, in sections consolidated in the Supreme Court of Judicature (Consolidation) Act, 1925. The Court in all suits and proceedings, other than proceedings to dissolve a marriage, must proceed to act and give relief on principles and rules which in the opinion of the Court shall be, as nearly as may be, conformable to the principles and rules on which the Ecclesiastical Courts acted and gave relief. Under the practice of the Ecclesiastical Courts, as now, two distinct powers existed in respect of enforcement of the husband's duty to maintain his wife. Pending suit for judicial separation the coercive authority of the tribunal was available to secure to the wife means of subsistence and necessary money for costs while the parties were proceeding with the litigation. When the questions between them had been determined by decree the wife, if she were the successful party, might obtain on a new petition a decree to ensure her permanent maintenance according to her husband's means.

The interlocutory proceedings for alimony and costs were coercive means of securing, if need be, by monition and excommunication, that the wife should be heard in the cause. How purely transitory they were appears upon even a slight examination of the text books and the authorities. The older writers described the payments for maintenance as hebdomadal. In case of appeal new provision was obtainable in the Court of Arches. The current expression which described the means of securing money for costs was "taxation from day to day." In *Westmeath v. Westmeath* (2 Hagg. Ecc. Supp., 1, at p. 73) the answer made to an attempt to secure a taxation after a decree was that the costs were unpaid because of neglect to procure taxation *de die de diem* while the suit was in progress. While the position of the wife pending a suit for judicial separation remained, in principle, very much the same after 1857 as it was before, her rights, if she were successful in obtaining a decree, were strengthened by definite provisions of the Matrimonial Causes Act, 1857, which gave her, during separation, rights as a *feme sole,* as well as by statutory recognition of the practice under which she became entitled to a permanent provision for her maintenance.

Under the practice of the Ecclesiastical Courts and ever since, alimony upon judicial separation is ordered to be paid as from the date of the decree. To accept the suggestion that the suit for judicial separation is a pending suit after the decree, would involve the absurd consequence that alimony *pendente lite* and permanent alimony might be accruing at the same time and indeed a petition in respect of each might proceed simultaneously.

The practice of this Court as illustrated by the order made in the registry rests upon the fact that the process resorted to before decree is a privileged procedure limited by the necessities of the case, and not the exercise of a substantive right such as gives a cause of action.

The necessity which can be so dealt with ceases when the decree is granted. To give a direction now for inquiry as to the wife's maintenance from March to November, 1927, while the litigation proceeded, would be a new departure, and in view of the hardships which often arise where a husband is petitioner it would involve mischievous consequences. The application therefore is refused.

His Lordship made no order as to costs.

[Solicitors—Messrs. Sharpe, Pritchard and Co., for Messrs. Amphlett and Co., Colwyn Bay ; Messrs. Jaques and Co., for Messrs. Porter and Co., Conway.]

K.B. Div.
(Lord Hewart, C.J., Shearman and Branson, JJ.) } 1928. Feb. 10.

REX v. EDITOR OF THE *NEW STATESMAN*—EX PARTE DIRECTOR OF PUBLIC PROSECUTIONS.*

Contempt of Court—Distinction from criticism—Imputation of partiality.

Observations on the distinction between legitimate criticism of a Judge and such an imputation of unfairness and lack of impartiality as constitutes contempt of Court.

This was a rule *nisi* calling on Mr. Clifford Dyce Sharp, the editor of the *New Statesman*, to show cause why he should not be attached for contempt of Court in respect of the following paragraph published in the *New Statesman* on January 28, 1928, which, it was alleged, was calculated to lower the authority of Mr. Justice Avory and bring him into contempt.

"We cannot help regarding the verdict given this week in the libel action brought by the Editor of the *Morning Post* against Dr. Marie Stopes as a substantial miscarriage of justice. We are not at all in sympathy with Dr. Stopes' work or aims, but prejudice against those aims ought not to be allowed to influence a court of justice in the manner in which they appeared to influence Mr. Justice Avory in his summing-up. Dr. Stopes found one of her advertisements in the *Morning Post* suddenly stopped. Accordingly she wrote to the Duke of Northumberland suggesting that Roman Catholic influence was at work. The Duke passed the letter on to the Editor, who chose to regard it as a reflection upon his own honesty—which was patent nonsense—and brought an action. He was awarded £200 damages. The sum is not large, but the principle is important. We do not think the action ought to have been brought. Dr. Stopes' letter was foolish, partly because it is always foolish to write to a proprietor behind a trusted editor's back and partly because it is always foolish to talk of 'Catholic plots'—or of 'Bolshevik plots' for that matter. But Dr. Stopes obviously intended no reflection upon the Editor personally—did not even know who he was. And from what we ourselves know of newspaper practice there could be no injurious reflection upon him, first because he may never have heard of the censoring of the advertisement, and, second, because the suggestion that a man is influenced by Catholic ideas of right and wrong is surely not an 'injurious reflection.' That certain advertisers threaten to boycott any paper which accepts Dr. Stopes' advertisements is a fact for which we can vouch. Their exclusion may therefore be no more than a matter of commercial policy, implying no reflection at all upon an editor—since he may not even know what has happened. The serious point in this case, however, is that an individual owning to such views as those of Dr. Stopes cannot apparently hope for a fair hearing in a Court presided over by Mr. Justice Avory—and there are so many Avorys."

Mr. Jowitt, K.C., and Mr. St. John Hutchinson showed cause for Mr. Sharp; the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. Giveen supported the rule.

Mr. JOWITT said that there was recently tried before Mr. Justice Avory the case of *Gwynne v. Stopes*, a libel action in which the plaintiff was the editor of the *Morning Post*. The defendant was Dr. Marie Stopes, who was known as an advocate of birth control. It was unnecessary to discuss that subject beyond saying that on the one side it enlisted the sympathy of those who considered that the welfare of society was deeply bound up with those doctrines, and on the other side it aroused the antagonism of those who thought that those doctrines and the way in which they were inculcated were contrary to morality and even to decency.

He desired to say at once that if, on a fair reading of the paragraph, there was raised the inference, or if there might even be thought to be the inference, that Mr. Justice Avory had deliberately allowed his likes or dislikes to influence him, nothing of the sort was intended or had entered Mr. Sharp's mind. If the paragraph might be thought to bear that meaning he unreservedly apologized both to Mr. Justice Avory and to the Court. What it was intended to convey was that the subject was so controversial that no one who held strong views on one side or on the other could prevent his judgment from being unconsciously influenced by them. Judges were only human and, until we had a sort of "Robot" Judge, being human might be quite unconsciously influenced by their personal views.

MR. JUSTICE SHEARMAN.—These compliments are very interesting, but do they help us?

Mr. JOWITT said that there had been no case of this kind since *Reg. v. Gray* (16 *The Times* L.R., 305; [1900] 2 Q.B., 36), and what was there complained of was scurrilous abuse, which could not possibly be called criticism, and in a case in the previous year, *McLeod v. St. Aubyn* (*infra*), it had been said that this remedy was now obsolete. He was not there to justify the language of the article; it was infelicitous and far from seemly. But it appeared from the affidavit of Mr. Sharp that it was in fact the last piece of "copy" sent to the printer. It was written in great hurry, and had there been time for reconsideration he had not the slightest doubt that it would not have appeared in those terms at all. But the report of the verdict in *Gwynne v. Stopes* appeared in the newspapers on a Thursday morning, and the paper went to press on the same day.

It had been said, continued counsel, that when a case was over Judge and jury were given over to criticism, and Jeremy Bentham had said that the Judge presiding over the trial of a case was himself on trial. He repeated that he was not there to justify any allegation of partiality on the part of Mr. Justice Avory, if the Court thought the article bore such a meaning.

The LORD CHIEF JUSTICE.—How, if we should think that the only reasonable meaning is the meaning which you repudiate?

Mr. JOWITT.—Still more should I wish to apologize.

Mr. Sharp, in his affidavit, which counsel read, said that he had no personal knowledge of any individual concerned in the case, or in either of the opposing views of birth control, and wrote entirely from a sense of public duty. The affidavit stated:—

"In writing the said paragraph I meant to express the opinion that the feelings of those who believe in birth control on the one side, and those who oppose it on the other, are so strong that it is humanly impossible for anyone, adhering to the one side or the other, to take an entirely unbiased attitude or to express an entirely unbiased opinion, in a case in which these issues were involved. I never meant to suggest any intentional unfairness or bias on the part

* Reported by J. W. HALL, Esq., Barrister-at-Law.

of Mr. Justice Avory. I realize that the paragraph as it stands might appear to imply reflections upon the judicial integrity of Mr. Justice Avory. I wish unreservedly and completely to withdraw any such personal reflections and to express my deep regret to the Court and to Mr. Justice Avory that, owing to the exigencies of time, such reflections may appear to have been made in the said paragraph."

Mr. JOWITT, continuing, said that in *Dallas v. Ledger* (4 *The Times* L.R., 432) it was said that "there was an undoubted right to make comments upon the conduct of Judges or jurors," and a distinction was drawn between comments before trial which might require summary intervention, and comments after trial which, though improper, did not amount to contempt of Court. In the *Bahama Islands* case ([1893] A.C., 138) a violent attack had been made on the then Chief Justice of the Bahamas. It appeared that a successful litigant before him had sent him a present of pineapples, which he naturally refused. In the *Nassau Guardian* a letter signed "Colonist" appeared which said this, among other violent criticisms :—

"Search the annals of the bench of every country, of every age, and I defy creation to produce a more noble, more self-denying, and more virtuous exhibition of a tender conscience than was afforded by our Chief Justice in refusing to accept a gift of pineapples ! Some cynic has said : 'Every man has his price.' It is assuring to this community to know that the 'fount of justice' in this colony is above the price of even one dozen pineapples."

The editor refused to disclose the name of the writer of that letter, and the Chief Justice committed him to prison and imposed a fine. The Governor released him, and the Privy Council held that the letter, though it might have been made the subject of proceedings for libel, was not in the circumstances calculated to obstruct or interfere with the course of justice or the due administration of the law, and did not constitute a contempt of Court.

In *McLeod v. St. Aubyn* (15 *The Times* L.R., 487 : [1899] A.C., 549, at p. 561) it was said that the power to commit for contempt "is not to be used for the vindication of the Judge as a person," and "committals for contempt of Court by scandalizing the Court itself have become obsolete in this country." He suggested, not that that meant that the jurisdiction had gone, but that the conduct of the public in recent years and the position of the Bench in public esteem were such as to render its exercise unnecessary. In the last case of this kind, *Reg. v Gray* (*supra*), the matter was mere scurrilous abuse. In conclusion he repeated, on behalf of Mr. Sharp, his unreserved withdrawal and apology.

The ATTORNEY-GENERAL, supporting the rule, said that he did not desire to say much in reply. He did not suggest for a moment that a Judge should be exempt from the criticism which the subject had a right to direct at persons holding public offices, but there was a great difference between criticism and an attack on the fairness of the Judge as a Judge. That was restrained, not from tenderness to his feelings, but because it was of the utmost importance to the administration of justice that public confidence in the impartiality of the Bench should not be impaired. The *Bahama Islands* case (*supra*) was not much nearer to this than the Bahama Islands themselves. In Wilmot's "Opinions," at page 255, there was a clear, if rather archaic and stilted, statement of the principle :—

"The arraignment of the justice of the Judges is arraigning the King's justice ; it is an impeachment of his wisdom and goodness in the choice of his Judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations and indisposes their minds to obey them ; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and in my opinion calls out for a more rapid and immediate redress than any other obstruction whatsoever ; not for the sake of the Judges as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open, and uninterrupted current, which it has, for many ages, found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth."

It was worse, the Attorney-General submitted, to say that a Judge was so steeped in prejudice and bias that he could not try a case of a certain kind fairly than to say that on a particular occasion he had deliberately allowed his private views to influence him.

The LORD CHIEF JUSTICE, in delivering the judgment of the Court, said that in the opinion of the Court the meaning of the words complained of was quite free from ambiguity. They meant what they said, and said very plainly—namely, that a person who held certain views could not hope for a fair hearing in a Court presided over by the learned Judge who was named.

Mr. Jowitt, in his extremely able argument, had used from time to time phrases beginning with a conditional clause : "If on the fair meaning of the words they mean so and so" ; then he expressed regret and apology. In the Court's opinion there was no room for those conditional clauses. The words meant that in the opinion of the writer it was impossible for a person holding certain views to get a fair hearing before that Judge. If the expressions of regret had ended with those conditions it would have been necessary to take a very serious view of the matter, but before the end that which had been conditional and reserved became unconditional and unreserved, and, indeed, was in that form in Mr. Sharp's affidavit.

The principle which was applicable to those fortunately very rare cases was stated in *Reg. v. Gray* (16 *The Times* L.R., 305 ; [1900] 2 Q.B., 36), where, at page 40, Lord Russell, delivering the unanimous judgment of the Court, said :—

"It cannot be doubted . . . that the article does constitute a contempt of Court ; but, as these applications are, happily, of an unusual character, we have thought it right to explain a little more fully than is perhaps necessary what does constitute a contempt of Court, and what are the means which the law has placed at the disposal of the Judicature for checking and punishing contempt of Court. Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority, is a contempt of Court."

And a little later, after stating that the contempt there dealt with belonged to the class described by Lord Hardwicke as "scandalizing a Court or a Judge," Lord Russell said :—

"That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the

public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticize adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen."

Applying those canons, and all of them, to the present matter, the Court had no doubt that the article complained of did constitute a contempt. It imputed unfairness and lack of impartiality to a Judge in the discharge of his judicial duties. The gravamen of the offence was that by lowering his authority it interfered with the performance of his judicial duties.

If they had come to the conclusion that that was intended by the writer, who was also the editor, the only proper course would have been to commit him to prison for contempt. But it was right to look at the circumstances. [His Lordship referred to the haste with which the article was written as set out in Mr. Sharp's affidavit.] Although, therefore, the words that were in fact employed seemed to the Court to be free from ambiguity, the Court accepted the explanation and apology, and abstained from committing the respondent.

The COURT ordered and adjudged that he was guilty of contempt. Feeling as they did that if the true analysis of the case had exhibited its graver aspects it must have been punished by committal, in the circumstances they abstained from imposing a fine, but ordered Mr. Sharp to pay the whole costs of the proceedings as between solicitor and client.

[Solicitors—Mr. E. S. P. Haynes; the Director of Public Prosecutions.]

K.B. Div.
(Lord Hewart, C.J., Avory and Branson, JJ.)
1928. Feb. 10.

REX v. EDITOR OF THE *DAILY MAIL*—EX PARTE FACTOR.*

Contempt of Court — Pending proceeding — Publication prejudicing fair trial — Absence of intention — Proceeding not genuine — No attachment.

A publication made with the clear intention of prejudicing the fair trial of an issue pending before a Court is obviously a contempt of Court and will be punished as such. But where the Court is satisfied that there was no such intention and yet the publication might prejudice a pending trial, the Court will, in considering whether a writ of attachment should issue, take into account the circumstances of the case, and no attachment will be granted unless (*inter alia*) the Court is satisfied that the pending proceeding is a genuine proceeding, brought and intended to be prosecuted to effect its avowed purpose.

This was a rule *nisi* for a writ of attachment for alleged contempt of Court against Mr. Walter George Fish, the editor of the *Daily Mail*, in respect of an article which appeared in that newspaper on December 23, 1927.

The rule had been obtained on behalf of Mr. John Factor, of 91, Jermyn-street, W., who complained that on December 15 an article was published in the *Daily Mail* which was headed: "'Aristocrat' of the Underworld. 'Varsity Man's 50 Years' Frauds. Jacob Factor's Associate. To Prison Again." The first paragraph of the article of December 15 was as follows:—

"By sentencing a man who calls himself James Montgomery, a bogus solicitor, aged 77, to 12 months' hard labour at the Old Bailey yesterday, the Common Serjeant, Sir Henry Dickens, K.C., has rid society for a time of a leader of the gang of share-pushing pests who, in association with the notorious Jacob Factor, have for several years been defrauding people all over Great Britain."

On December 15 Mr. John Factor issued a writ against the Associated Newspapers, Limited, the proprietors of the *Daily Mail*, claiming damages for an alleged libel contained in the article in the *Daily Mail*, in which he had been referred to as "Jacob" Factor. The writ was duly served, and on December 23 the following article appeared in the *Daily Mail*:—

"JACOB FACTOR AND THE 'DAILY MAIL.'
"A WRIT FOR LIBEL.

"The British public will be surprised to learn that Jacob Factor, the notorious share-pusher, who found England too hot for him after the *Daily Mail* exposure, is once again back in London. Through his solicitors, Messrs. Zeffert and Heard, of 17, Coleman-street, London, E.C.2, he has issued a writ against the *Daily Mail* claiming damages for libel.

"We thought we had succeeded in chasing this arch-swindler back to his haunts in America for good, but it appears that he has managed to get into this country again and is living for the time being at 91, Jermyn-street, London.

"The writ is issued in the name of John Factor. His solicitors have informed Messrs. Lewis and Lewis, who act for the *Daily Mail* in these matters, that he is the Jacob Factor with whom we are familiar. His fraudulent share dealings have been repeatedly exposed in this newspaper and in our courageous contemporary *Truth*.

"If Jacob Factor imagines that the issuing of the writ will muzzle us while he is engaged on some new deal he is labouring under a misapprehension."

That article, counsel submitted when the rule was obtained, was calculated to interfere with the administration of justice. In his affidavit in support of the application for the rule Mr. Factor said that the contents of the article were false. He did not know Montgomery and had had no business transactions with him of any kind, and his alleged association with Montgomery and his gang was imaginary. The suggestion that the writ was issued to muzzle the *Daily Mail* was entirely untrue. Mr. Factor said that he intended to press the libel action to trial with the utmost expedition.

Mr. Jowitt, K.C., and Mr. H. M. Giveen appeared to show cause against the rule; Sir Henry Maddocks, K.C., and Sir George Jones supported it.

Mr. JOWITT, in showing cause, said that the case raised a question of some importance with regard to the rights of newspapers to publish articles, which were part of a series of articles, in spite of the fact that a writ had been isued in connexion with those articles, and whether the issue of such a writ effectually sealed the lips of the newspaper until the trial of the action.

* Reported by G. F. L. BRIDGMAN, Esq., Barrister-at-Law.

Unfortunately, there had been certain migrants to this country who had gone round from house to house seeking to induce credulous and ill-informed persons to buy shares in companies with fine-sounding names which were said to hold lands containing minerals or oil in vast quantities. One of the persons concerned in those activities was named John, or Jacob, Factor. From March, 1926, to the end of July, 1926, there had been published at frequent intervals in the *Daily Mail* a series of articles dealing with Factor and his activities and accusing him of the gravest frauds which it was possible to imagine. If one tithe of the statements made by the *Daily Mail* about Factor were true it was quite obvious that it was most undesirable that he should be at liberty. One of his methods was to ask a person in such a position as that of a country parson or schoolmaster to buy ten 4s. shares in one of his companies. Those shares were stated to confer on the buyer the privilege of subscribing at the same price for another 490 shares. After payment of the initial £2 good news was received by the company and was handed on to the shareholders; for example, that oil had been struck, and it was intimated that an additional £98 should be sent immediately to enable shareholders to share in the company's good fortune. In many cases the *Daily Mail* had shown that the telegrams stating that oil had been struck, or bearing other good news, were nothing more than wicked and fraudulent lies. During the *Daily Mail* campaign a committee set up by the Government recommended that "share-pushing" should be prevented. No one who had read the evidence could doubt that steps should be taken with that end in view. In spite of the terrible accusations made against Factor between March and July, 1926, he took no steps to clear his character and instituted no proceedings for libel. In July, 1926, this country became too unpleasant for him and he transferred his activities elsewhere.

In December, 1927, Montgomery was convicted at the Central Criminal Court. On December 15 the *Daily Mail* published the article on which Factor issued his writ. That article dealt with Montgomery, and Factor was mentioned only incidentally. In the statement of claim in Factor's action the innuendo had been drawn with the express object of keeping the action to the issue that Factor was not associated with Montgomery. Factor said in effect: "I will swallow all the camels you have said about me, but I strain at this gnat." The article published by the *Daily Mail* on December 23, 1927, appeared months before the action could come to trial and in no way referred to Factor's association with Montgomery. Perhaps Factor had thought that the *Daily Mail* would not be able to justify the allegation of his association with Montgomery, but he was wrong. The newspaper adhered to the statement that Factor was a man of very bad character, and they regretted that the libel action was not sufficiently wide in its issues to bring all the matters to which he (counsel) had referred within its scope.

There was good ground to suppose that Factor had issued his writ, not with a view to the action ever being brought on for trial—that was almost inconceivable—but in the hope that the *Daily Mail* would have to give him a free hand to do whatever he wanted.

Mr. JOWITT then read the affidavit of Mr. W. G. Fish. In it Mr. Fish said that the business of share-pushing had assumed serious proportions in this country. Shares generally worthless were peddled out in small parcels to credulous persons, often in a humble position of life, who were frequently induced to part with the savings that they had accumulated. Those persons were in many cases completely ignorant of the elementary principles of business caution and were persuaded into buying shares by the dazzling prospects often fraudulently held out to them. When in course of time those prospects were completely falsified, the investors were in many cases reluctant to come forward and make a complaint which would certainly result in an exposure of their own folly, but which would probably not result in a recovery of their money even though it might lead to a conviction.

In those circumstances Mr. Fish submitted that newspapers with a large circulation among all classes of people could perform a very useful public service in putting members of the public on their guard against the activities of share-pushers and in exposing their plans, and it was with that object in view that he pursued the course which he had taken.

He had known of the existence for upwards of two years of John Factor, who, to the best of his knowledge, information, and belief from information supplied to the *Daily Mail*, was throughout that period a thoroughly undesirable person. He (Factor) had been connected with a large number of companies the object of which had been the sale of plots of land in Arkansas and elsewhere in America and oil shares. At the end of 1925 and the beginning of 1926 the *Daily Mail* published a number of articles attacking by name certain of those companies and warning the public against investing money in them. Between March 29 and July 24, 1926, the *Daily Mail* published a large number of articles attacking John Factor under the name of Jacob Factor.

In spite of the gravity of the accusations made in those articles and the frequency with which they had been made in the *Daily Mail*, Factor had never dared to bring an action with reference to them until he issued a writ with reference to the article which appeared on December 15, 1927. In the statement of claim delivered by John Factor no reference was made to any of the earlier articles.

On March 31, 1926, an American adventurer, whose original name was Baum but who had changed it to Leon Britton—an associate of John Factor in his business of share-pushing—issued a writ against the Associated Newspapers, Limited, claiming damages for libel with reference to an article which appeared in the *Daily Mail* on March 30, 1926. The innuendo attributed by the statement of claim to the words complained of was

"that the plaintiff was a business associate and/or partner with a notorious rogue and swindler and fugitive from justice named Factor in many schemes to defraud the public."

On April 1, 1926, Leon Britton issued another writ against the Associated Newspapers, Limited, for libel contained in an article published in *The Evening News* on March 31, 1926. The innuendo attributed by the statement of claim to the words complained of was

"that the plaintiff was a business associate or partner with a notorious rogue and swindler named Factor, and had aided him in schemes to defraud the public."

On August 9, 1926, another American adventurer, Maurice Singer, who was also an associate of John Factor in his business of share-pushing, issued a writ against the Associated Newspapers, Limited, for a libel contained in articles which appeared in the *Daily Mail* on May 21 and July 24, 1926, and the *Continental Daily Mail* on July 24, 1926. The innuendo

attributed by the statement of claim to the words complained of was

"that the plaintiff had in the past and was still participating in and/or was and had been privy to or responsible for the sales and dealings with Jacob Factor and/or of the Westminister Finance Company, Limited, in the shares of the company and was still associating with Jacob Factor."

The articles complained of in those three actions were articles dealing with the activities of Factor and his associates. None of those three actions was ever brought to trial. In the case of the first two the defendants obtained an order dismissing the action for non-compliance with orders for security for costs. Singer never proceeded with his action after delivery of a defence pleading justification.

"In fact," continued Mr. Fish, "I am informed and believed that the plaintiffs issued the writs in the hope of muzzling the Press while they endeavoured to complete their fraudulent designs of swindling the public and that as soon as they had done this they left the country, and that it was in these circumstances that they refrained from proceeding with their actions. Having regard to the foregoing, I believe that the writ in this action has been issued in the hope of stopping the *Daily Mail* and other newspapers from commenting on the activities of Factor. I further believe that it is highly probable that Factor will pursue the same course as that adopted by his associates, Leon Britton and Maurice Singer, in their respective actions and leave this country before this action can be brought to trial, after bringing his activities *pendente lite* to a successful conclusion."

The statement of claim in the present case, Mr. Fish said, was delivered on January 17, 1928, and it must be many months before the action could be brought on for trial. He submitted that it would be contrary to the interests of justice and of the public that he should be restrained from commenting on Factor and his activities for that length of time. He was authorized by the defendants, the Associated Newspapers, Limited, to state that they intended to justify the allegations complained of, including in particular the allegation of the association between Montgomery and Factor. The writ had been issued not because of the libel which was alleged, but in the hope of sealing the mouths of the newspapers, and in those circumstances the Court ought not to interfere. If, by the issue of a writ, all publications with regard to the person who issued it must cease, it would be easy for fraudulent persons to issue writs to enable them to carry on their mischievous business unharmed by any comments in the Press.

He had not, since the issue of the writ in the action, in any way commented on the question of the association of Factor with Montgomery, which appeared to be the only point in issue in this action, nor did he intend so to do. He desired, however, if the Court thought it proper and expedient, to retain the liberty to expose the past and present activities of Factor if in the interests of the public it should seem desirable so to do. He was informed by the Montreal correspondent of the *Daily Mail* that Factor had left this country and was on January 23, 1928, in Montreal in connexion with his business activities. He was further informed by that correspondent that since the issue of the writ in the action Factor had granted an interview to the representative of the Quebec newspaper *Minier*, in which he dealt with he matters in issue in this action.

Factor, continued Mr. JOWITT, was a man of very bad character whose activities ought to be restrained. It was a most useful function of a newspaper to warn the sort of people who would be trapped by his lies. Had it not been for the timely exposure of Factor in the *Daily Mail*, he and his associates would have got away with a very large sum of money. If he came to England again and took the trouble to issue a writ it boded ill—if he were right in the present matter—for the innocent British public who were seeking new investments for their savings. It was highly desirable that the activities of such a man as Factor should be shown up. There might well be a limit to that doctrine, but, whatever line might be drawn, in the present case the *Daily Mail* had not committed any contempt of Court.

SIR HENRY MADDOCKS, in support of the rule, said that the *Daily Mail* had tried Factor in his absence, and had published to the world that he was guilty of all manner of offences. Because he had not chosen to issue a writ the Court was asked to assume that all that had been published about him was true. The fact that the Associated Newspapers, Limited, proposed to justify in their defence to Factor's action made no difference. The question was whether the fair trial of that action had been prejudiced.

The case involved the application of a very serious principle. That principle, which appeared from numerous cases to have existed from time immemorial, had been violated. The course adopted by the *Daily Mail* was an extreme one. He did not suggest any improper motive, but the *Daily Mail* had deliberately done what they had done to bring the matter before the Court. They expressed no regret and made no statement that the editor had been unaware of what he was doing. It was stated boldly that Mr. Factor had been attacked by the *Daily Mail* so often over a period of months that the newspaper was justified in what it had done. The editor's affidavit went further and contained an application to the Court to sanction the continuation of the attacks until the trial of the libel action.

The fact that the person attacked might well be assumed by anyone who had read the attacks on him to be a man of undesirable character, and the fact that the proprietors of the *Daily Mail* were going to plead justification in the libel action, only emphasized the violation of the principle that a man, whoever he might be and however bad his character might be, was entitled in this country to a trial by a jury who were not biased by anything said outside the Court by one of the parties.

The LORD CHIEF JUSTICE.—If you put the principle in that unqualified form, you are forced to say that there are not, nor can there ever be, any circumstances which can justify the continuance of criticisms if the person criticized has issued a writ.

SIR HENRY MADDOCKS.—I do not think that it goes quite to that extent, but the continued criticism must not be calculated to interfere with the trial of the action begun by the writ. There might be a statement which would not direct the minds of possible jurors to the fact that it was connected with the action. That might be unobjectionable.

Counsel added that in the defence which the proprietors of the *Daily Mail* had filed to Mr. Factor's action they pleaded that the words complained of were true in substance and in fact, but they had not yet condescended to deliver any particulars of justification. They had also denied that Mr. Factor had any credit or reputation and that he had been injured in either of them.

The discretion vested in the Court was very wide, but it must be exercised by applying the long-

established principle. Where that principle had been relaxed, as in *Reg. v. Payne* (12 *The Times* L.R., 321; [1896] 1 Q.B., 577, at p. 580), it was because the matter written was innocuous, or because the person responsible had not known of it.

The LORD CHIEF JUSTICE.—Is it your proposition that, no matter what the true facts may be, no matter what long-continued attempts have been made by a newspaper to exhibit those facts to the public, by the simple process of issuing a writ the person criticized, however guilty and however worthless, can be quite sure of putting an end to criticism?

SIR HENRY MADDOCKS.—I should not attempt to argue that for a moment; but is it to be assumed against the person referred to that he is guilty? The plea of justification has still to be tried and the onus to prove that plea is on the parties who have set it up. Whether the plea of justification is made out is a matter for the jury.

MR. JUSTICE BRANSON.—You say that it is all one whether there is a plea of justification or not.

SIR HENRY MADDOCKS.—Yes. That plea raises an issue which has to be tried by a jury.

Counsel submitted that it did not matter whether or not the alleged contempt of Court referred to the subject-matter of the action if it were calculated to prejudice its fair trial—*Higgins v. Richards* (28 *The Times* L.R., 202). If the rule was discharged in the present case it would mean that a newspaper need only plead justification to a libel action, and then it would be free to continue its adverse comments on the plaintiff.

The *Daily Mail* had referred to Mr. Factor as an arch-swindler, and that meant that he was a criminal.

MR. JUSTICE BRANSON.—He did not seem to mind very much.

The LORD CHIEF JUSTICE.—He was most patient.

SIR HENRY MADDOCKS replied that the value of criticism depended on the critic. Commendation by some persons was condemnation, and criticism in some quarters was advertisement. If every one who was criticized in the *Daily Mail* took action the Courts would require to be enlarged. The fact that Mr. Factor had taken no action with regard to the earlier articles did not amount to an admission by him that their contents were true. If the *Daily Mail* had taken seriously half of what they had said about Mr. Factor their proper course was to have informed the Director of Public Prosecutions. Neither the newspaper nor the Director had taken any action. The advisers of the *Daily Mail* knew quite well that a plea of justification was valueless unless it was supported by particulars.

The *Daily Mail* had thrown down a challenge to the Court regarding how far they could go with impunity. There was no evidence that Mr. Factor had been engaged in any fresh deals in this country, but they nevertheless associated him with Montgomery. Was he to be pursued for ever because he had once been engaged in share-dealing operations?

The LORD CHIEF JUSTICE, in delivering the considered judgment of the Court, said that the principle on which the Court acted in cases of this nature had been clearly stated in many cases. It was necessary to refer only to a few. In *Reg. v. Payne* (12 *The Times* L.R., 321; [1896] 1 Q.B., 577, at p. 580) Lord Russell said:—

"The applicant must show that something has been published which either is clearly intended, or at least is calculated, to prejudice a trial which is pending."

And again at page 581, quoting Lord Justice Cotton in *Hunt v. Clarke* (5 *The Times* L.R., 650; 58 L.J., Q.B., 490), he said:—

". . . there should be no such application made unless the thing done is of such a nature as to require the arbitrary and summary interference of the Court in order to enable justice to be duly and properly administered without any interruption or interference."

A publication made with the clear intention of prejudicing the fair trial of an issue pending before a Court was obviously a contempt of Court, and would be punished as such. But where the Court was satisfied that there was no such intention, and yet the publication was one which might conceivably prejudice a pending trial, the circumstances of the particular case must be taken into account. The nature of the proceedings which were pending, the conduct of the parties, the time, the manner, and the locality of the publication in relation to the time, the mode, and the locality of the trial had all to be considered, and the Court must be satisfied that a case for its "arbitrary and summary interference" had been made out.

Some of those considerations had been mentioned in the case of *Rex v. Blumenfeld—Ex parte Tupper* (28 *The Times* L.R., 308). There were others also. The Court must be satisfied that the pending proceeding, the trial of which it was alleged was being prejudiced, was a genuine proceeding, brought and intended to be prosecuted to effect its avowed purpose. Otherwise no attachment would be granted.

The editor of the *Daily Mail* had contended that the present case was one in which the writ for libel was not issued by Factor with the genuine intention of proceeding to trial and clearing his character of the aspersions cast on it by the article of December 15, 1927, but was issued to enable him to procure immunity from further attacks while the action was pending. It appeared from Mr. Fish's affidavit that, from March 29, 1926, to July 24, 1926, the *Daily Mail* published a series of articles attacking the applicant under the name of "Jacob" Factor. The language was unequivocal. It included such expressions as "smooth-tongued thief," "arch-swindler," "out-and-out-swindle," "fleecing the public," "career of fraud," "robbing the unwary," and "confidence dodge." Those attacks ceased only when Factor left the country.

Factor, however, took no proceedings on any of them, defamatory though all of them undoubtedly were. Nor had he, in the proceedings now pending, made any complaint of any of those charges made against him. On the contrary, in his statement of claim his complaint was most carefully confined to the allegation that he was carrying on his frauds in conjunction with Montgomery. In other words, his complaint was not that it was said of him that he was defrauding people all over Great Britain, but only that he was doing so in association with Montgomery. The Court found it impossible to believe that an action so framed could have been launched in order that a jury might vindicate Factor's character and award damages for the injury done to it—the avowed and legitimate object of an action for libel.

That view was emphasized by the fact that the article of December 23, 1927, was full of defamatory matter, and yet no writ for libel had been issued in respect of it. It was also emphasized by the language of Factor's affidavit in support of the rule, which again was carefully framed to deny specifically only so much of the allegations complained of in the

alleged libel as charged an association of Factor with Montgomery.

The Court was not satisfied that the article of December 23—coming as it did, after a long series of similar articles, being but a repetition of charges already often made against Factor and not complained of, and avoiding, as it did, any further mention of the alleged association of Factor with Montgomery—was calculated to prejudice the trial of the only issues which Factor had chosen to raise—namely, that of his association with Montgomery and of the damages which he should obtain if that issue were found in his favour.

In those circumstances the case was not one in which the Court would intervene. On the contrary, to adopt an expression employed by Mr. Justice Phillimore in *Rex v. Blumenfeld—Ex parte Tupper* (*supra*), if half of what the *Daily Mail* had said about Factor (which had not been complained of by him) were true, it was very much for the public benefit that his unmasking should not be delayed.

The rule would be discharged with costs. But the discharge of the rule was not to be taken as authorizing the *Daily Mail* to publish further and different charges against Factor up to the trial of the action, if it should be proceeded with.

[Solicitors—Messrs. Lewis and Lewis; Messrs. Zeffertt and Heard.]

House of Lords.
(Lord Buckmaster, Viscount Sumner, Lord Wrenbury, Lord Carson, and Lord Warrington of Clyffe.)

1928.
Feb. 14.

DUCKER v. REES ROTURBO DEVELOPMENT SYNDICATE, LIMITED.

INLAND REVENUE COMMISSIONERS v. SAME.*

Revenue—Income-tax—Excess profits duty—Profits of trade—Syndicate for development of patented invention — Agreement with foreign company for grant of licence and option of purchase—Exercise of option of purchase for sum in cash—Whether a profit of trade or the realization of a capital asset—Finding of Special Commissioners affirmed—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. D, Case I.

A syndicate formed to work and develop a group of English and foreign patents carried on business mainly by granting licences to manufacturers at royalties. Certain foreign manufacturers, however, refused to take licences, unless they were also given an option of purchase exercisable within a given period. The syndicate entered into a contract with an American company to grant it a licence to use and work the syndicate's American patents, with an option of purchase thereof. The company exercised its option of purchase and paid to the syndicate the sum of £15,898 for the purchase of the American patents out and out. The syndicate having been assessed to income-tax and excess profits duty upon this sum, the Special Commissioners found that the profits made on the sale of the patents were profits of the syndicate's trading.

Held, that as the Special Commissioners had not misdirected themselves in law and had in effect found the sum received for the patents to be a receipt of the syndicate's business in contrast to the realization of a capital asset, and as there was evidence to support this finding, their decision must be affirmed.

Decision of the Court of Appeal (43 *The Times* L.R., 796) reversed.

These were two appeals from orders of the Court of Appeal (43 *The Times* L.R., 796) reversing orders of Mr. Justice Rowlatt, who affirmed decisions of the Commissioners for the Special Purposes of the Income Tax Acts, to the effect that the respondent company was liable to pay income-tax and excess profits duty upon a sum of £15,898.

The question was substantially the same in each case, and was whether, for the purposes of the taxation of the profits of the respondents' trade or business, a sum received by the respondents for the disposal of certain foreign patent rights was to be taken into account as a receipt of their trade or business, or was to be treated as a realization of a capital asset and, consequently, not liable to tax.

The respondent company was formed in 1906, and proceeded to acquire, under an agreement of October 22, 1906, the British patent rights in respect of an invention relating to centrifugal turbine and similar pumps, of which one Edmund Scott Gustave Rees was the inventor, and which became known as the Rees Roturbo pumps; and also a two-thirds share of the foreign patents in respect of the invention, the inventor, Mr. Rees, retaining the other third share.

The respondent company was formed at the instance of the inventor, Mr. Rees, primarily for the purpose of taking over the existing patents and any future development patents based on the Roturbo principle, and for the purpose of providing additional working capital for the company which manufactured the pumps. The manufacturing company was at first Thomas Parker and Co., Limited, to whom the respondents granted an exclusive licence under the agreement of October 22, 1906. But in 1908 a new company, the Rees Roturbo Manufacturing Company, Limited, was formed, with the inventor, Mr. Rees, as managing director, to take over the business of Thomas Parker and Co., and that company had since that date carried on the whole manufacture of pumps in the United Kingdom, and the sale of pumps in the United Kingdom and elsewhere, except as regarded countries for which exclusive licences had been granted to other concerns, or where the foreign patents had been sold.

Throughout the respondent company's existence its assets had consisted entirely of the group of patents relating to the original invention or to the improvement or development of it, and of investments.

Foreign patents in regard to the invention were granted for many foreign countries. The development of the patents by the granting of manufacturing licences was always the main business of the respondent company, but the possibility of the sale of foreign patents or rights had always been contemplated by the company. The evidence showed that foreign manufacturers usually required to be given an option to purchase the patent rights as a condition of agreeing to take a licence.

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

By an agreement of March 15, 1912, the respondent company and Mr. Rees (who still owned a one-third interest in the foreign patent rights) granted to the Manistee Iron Works Company an exclusive licence to manufacture and sell the patented articles in the United States and Canada for the unexpired terms of the patents in consideration of a cash payment of £10,000 and royalties of 10 per cent. on the selling price, with a guaranteed minimum, coupled with an option, exercisable within fixed dates, to purchase the United States and Canadian patents for a lump sum.

The Manistee Company paid the £10,000 but not the minimum royalties, and ultimately, by a supplemental agreement of January 23, 1917, the Mainstee Company was excused royalties up to January 1, 1917, and its option was changed into one to purchase the United States patents only for a sum of £26,500. The Manistee Company exercised its option, and the respondent company received £15,898 as its share of the purchase price, which was written off the value of the patents. That was the sum in dispute in this case.

The Special Commissioners decided that the profits on the sale of patents arose in the course of the company's business and were chargeable to income-tax and excess profits duty.

Mr. Justice Rowlatt affirmed the decision of the Special Commissioners, but the Court of Appeal, by a majority (the Master of the Rolls and Lord Justice Sargant, Lord Justice Scrutton dissenting), reversed the decision of the Judge.

The Attorney-General (Sir Douglas Hogg, K.C.), the Solicitor-General (Sir Thomas Inskip, K.C.), and Mr. R. P. Hills appeared for the appellants; and Mr. Latter, K.C., Mr. J. H. Stamp, and Mr. J. H. Bowe for the respondents.

LORD BUCKMASTER, in giving judgment, said that the view of the Court of Appeal was that the sum in respect of which the respondents had been assessed was part of the capital assets of the company and ought not to be brought into the account for income-tax. The company was formed in 1906 for the general purpose of purchasing and acquiring patents and for the special purpose of acquiring particular patent rights from Mr. Rees, the inventor, who retained a one-third share in the foreign patents in respect of his invention. It was one of the purposes of the company to improve, manage, develop, or sell or otherwise deal with any part of the property and rights of the company. The company acquired several foreign patents in connexion with the Rees invention and, as regarded its patent rights in the United States, it granted the Manistee Company a licence to use the patented articles with an option to purchase, and that option was exercised.

Although the company preferred to grant licences and to retain the patents in its own hand it always contemplated the possibility of the sale of its foreign patent rights. The contention of the company was that the sale to the Manistee Company was a solitary disposition of part of its capital assets and that the purchase price was not a trade receipt.

He thought that it was undesirable in cases of that kind to attempt to repeat in different words a rule or principle which had already been found applicable and which had received judicial approval. In *Californian Copper Syndicate v. Harris* (5 Tax Cas., 159, at p. 166), the Lord Justice-Clerk, in considering that class of case, said that the question to be determined was :—

"Is the sum of gain that has been made a mere enhancement of value by realizing a security, or is it a gain made in an operation of business in carrying out a scheme for profit making ?"

That principle was approved by the Privy Council in *Commissioner of Taxes v. Melbourne Trust, Limited* (30 *The Times* L.R., 685; [1914] A.C., 1,001) and was, he thought, the right principle to apply. Two questions arose in this case : (1) Did the Special Commissioners in the exercise of their powers properly direct themselves in accordance with that test ? (2) Did they in fact find that this purchase money was a trade receipt ? It was suggested that the Special Commissioners, who had delayed their decision in this case until after Mr. Justice Rowlatt had given judgment in a somewhat similar case of *Collins v. Firth-Brearley Stainless Steel Syndicate* (9 Tax Cas., 520), had been misled by some language of Mr. Justice Rowlatt into applying the wrong test, and that subsequently his decision had been reversed by the Court of Appeal. But Mr. Justice Rowlatt in that case had upset the finding of the General Commissioners, which was in favour of the taxpayer, and the ground of the decision of the Court of Appeal was that the finding of the General Commissioners was a finding of fact and ought not to have been upset.

He thought that the Special Commissioners did mean to find that the sum received from the Manistee Company was a receipt of the company's business, as the Crown contended. It was impossible to say that the Special Commissioners had wrongly directed themselves, or that there was not ample evidence to support their finding.

The other noble and learned Lords concurred.

[Solicitors—The Solicitor of Inland Revenue ; Messrs. Sharpe, Pritchard, and Co., for Messrs. Underhill, Neve, Thorneycroft, Taylor, and Co., Wolverhampton.]

Chan. Div. (Russell, J.) 1928. Feb. 9.

REIGATE CORPORATION v. SURREY COUNTY COUNCIL.*

Highway—Main road through tunnel—Tunnel out of repair—Annual payment by Council towards cost of repair—Local Government Act, 1888 (51 and 52 Vict., c. 41), ss. 11 (2), 97.

The Reigate Corporation were liable for the repair of all the highways within their district repairable by the inhabitants at large. Tunnel-road was a main road running through a tunnel. It was necessary to repair the tunnel, and the question was whether the cost of the repair was part of the cost of the repair of the road towards which the Surrey County Council was bound to make an annual payment within s. 11 (2) of the Local Government Act, 1888.

Held, that the walls and roof of the tunnel were necessary to keep the road open, and might properly be said to be part of the road, and that even if the walls and roof were not part of the road yet their repair and maintenance were necessary to the repair and maintenance of the road, and the costs of such repair and

* Reported by J. B. B. MACMAHON, Esq., Barrister-at-Law.

maintenance were costs within the meaning of s. 11 (2) of the Local Government Act, 1888.

The question raised by this special case related to a road at Reigate called "Tunnel-road," which ran north and south from London-road into the Market-place, Reigate. The road was some 290 yards in length and for a distance of about 56 yards it ran through a tunnel. The tunnel walls and roof consisted of brick, the roof being arched. The soil above the crown of the arch was about 20 feet deep.

Tunnel-road was constructed in 1823 by Earl Somers on, through, and under his own lands—namely, Castle Hill. It was constructed as a private road and the tunnel, with its walls and roof, was constructed at the same time. At that time an ancient highway, a footway, ran along and across part of Castle Hill. This footway passed over the extreme southern end of the tunnel, having on its southern edge the south parapet wall of the tunnel. Tunnel-road continued to be a private road until 1858, in which year it would appear to have come under the control of the Turnpike Trustees as a result of a bargain with Earl Somers. According to the facts as alleged in paragraphs 11, 12, and 13 of the special case, Reigate on September 11, 1863, was created a municipal borough, and the Mayor, Aldermen, and Burgesses of that borough were incorporated by charter. On August 21, 1865, the Corporation resolved to adopt the Local Government Act, 1858. On June 4, 1866, the Corporation, by virtue of the powers conferred upon them by section 41 of the Local Government Act, 1858, entered into an agreement with the Turnpike Trustees whereby the Corporation undertook the maintenance and repair of the road, including the walls of the tunnel and banks, and the agreement contained a provision for its termination on 12 months' notice given by either party. No such notice was given, and the agreement continued in force until the expiration of the Turnpike Trust in 1881. After the Local Government Act, 1888, came into force until January 9, 1923, Tunnel-road was treated as a district assisted road, the Surrey County Council making voluntary contributions under section 11 (10) towards the cost of its maintenance and repair. No repairs were during this period made to the walls or roof of the tunnel. The Tunnel-road became a main road on January 9, 1923; and on October 15, 1923, the Reigate Corporation, in pursuance of section 11 (2) of the Act of 1888, claimed to retain the powers and duties of maintaining and repairing it. The Surrey County Council thereupon became liable to make to the Corporation an annual payment "towards the costs of the maintenance and repair, and reasonable improvement connected with the maintenance and repair of such road."

In 1924 it became necessary to carry out, at a cost of £317, certain repairs and works to the tunnel.

The substantial question for decision was whether the costs incurred by the Reigate Corporation in keeping the roof, walls, and parapets of the tunnel in repair were costs within the meaning of section 11 (2) of the Local Government Act, 1888.

Since February 16, 1922, the Corporation had been owners of all the land on each side of the road and over the tunnel, with the exception that they did not own the property on the eastern side of the road from the southern end of the tunnel to the Market-place. On the soil over the tunnel there was a cottage, erected about the year 1867, which was now the property of the Corporation. In the walls of the tunnel there were doors and gates leading into vaults, owned by the Corporation, which led out of the tunnel in and under the adjacent soil.

Mr. Maurice Fitzgerald appeared for the plaintiffs; Mr. R. A. Glen for the defendants.

Mr. Justice Russell delivered the following considered judgment:—

The Corporation contend that the walls and roof of the tunnel are part of the road, having been constructed simultaneously with the road and as part and parcel of it. Alternatively they say that if the walls and roof of the tunnel do not form part of the road they are works which it is necessary to maintain in order efficiently to maintain and repair the surface of the road, and the cost of such maintenance is properly part of the cost of the maintenance and repair of the road.

The Council, on the other hand, say that the walls and roof of the tunnel cannot be said to be and are not part of the road, nor are they works erected for the protection of the surface of the road, or for any other purpose than the support of the land above. They say that the case is simply one of a highway having been dedicated with an existing inconvenience attached thereto, and that the authorities establish the proposition that all repairs required to be done to such an existing inconvenience must be done by its owner, that is, by the Corporation as the owner of the adjacent land which it supports.

A subsidiary point was also urged—namely, that in no event could the Council be liable to repair the southerly portion of the tunnel which supports the ancient footpath.

I will first of all deal with the main point. There is no direct authority that I can find or that has been cited to me in relation to highways running through tunnels, and no doubt much must depend upon the facts in each case. Here the landowner made the road on his own land, in part running through it by means of a tunnel. Simultaneously he erected the brick walls and roof. These ensure that no part of the soil (which would otherwise form the walls and roof of the tunnel) can fall on to the surface of the road. The fall of large quantities of soil would choke up and obstruct the road; even the risk of the fall of smaller quantities would deter people from using the road.

There is authority for the view that a wall supporting a road made on the slope of a hill forms part of the roadway, *Reg. v. Inhabitants of Lordsmere* (2 *The Times* L.R., 623). On the same principle I can see no logical reason for holding that a wall whose purpose is to keep the soil on the higher levels of the slope from coming on to the road should not also be held to be part of the road. It is suggested that the case of *Attorney-General v. Staffordshire County Council* (21 *The Times* L.R., 139; [1905] 1 Ch., 336) is an authority to the contrary. I do not so read it. There the road was cut on the side of a hill and had walls on each side. The decision was simply that upon the evidence in the case neither the upper nor the lower walls were out of repair, and that the Court would not make any order as to what steps the road authority should take for the purpose of keeping their roads in repair. There being no authority which prevents me from so holding, I am prepared to hold and do hold that the walls and roof of the tunnel which were erected simultaneously with the making of the road, and which operate to keep and are necessary to keep the surface of the road free from that which would or might otherwise obstruct it, may properly be said to form part of the roadway.

If I am wrong in this, another view is open. If the walls and roof are not part of the road, yet they may constitute something, apart from the road, which it is necessary to maintain and repair for the purpose of maintaining and repairing the road ; something which if allowed to get into disrepair may bring about the obstruction and disrepair of the highway. In other words, the case is analogous to *Sandgate U.D.C. v. Kent County Council* (15 *The Times* L.R., 59), the repair and maintenance of the walls and roof of the tunnel corresponding to the repair and maintenance of the sea wall and groynes in that case. Here, in my opinion, the maintenance and repair of the tunnel walls and roof are necessary for the maintenance and repair of the road, even though the walls and roof form no part of the road ; and the costs of such maintenance and repair are costs within section 11, subsection (2), of the Local Government Act, 1888.

I can find no support in the authorities cited for Mr. Glen's proposition that the walls and roof of this tunnel must be regarded as an inconvenience subject to which the road was dedicated as a highway, and that the owner of the inconvenience must repair it. The cases cited by him seem to me to have no bearing upon, or relation to, a case like the present one. He cited several authorities in support of his contention, and the principal one and the real basis of his proposition appeared to be *Tarry v. Ashton* (1 Q.B.D., 314). All that was decided in that case was that the owner of a heavy lamp attached to his house and projecting over the highway was liable in damages to a passer-by upon whom, owing to its being out of repair, it fell ; and this was held upon the footing that it was his duty to keep in repair the lamp which for his own purpose he kept projecting over the highway. In *Fisher v. Prowse* (31 L.J., Q.B., 212) it was no doubt held that a highway may be dedicated subject to existing obstructions, such as cellar flaps and steps, and that the owner of the obstruction is not liable for damages caused by it, provided that he maintains it in its original condition as to repair and as to extent of obstruction. Nor, as was pointed out by Mr. Justice Denman in *Warner v. Wandsworth Board of Works* (53 J.P., 471), is the road authority bound to remove the obstruction. But nowhere in the authorities cited do I find any justification for the view that the walls and roof of this tunnel constitute an inconvenience or obstruction subject to which the highway was dedicated. As already indicated, I take the view upon the facts of this case that they either form part of the highway or are necessary for the maintenance of the highway.

There remains for consideration a subsidiary point raised on behalf of the Surrey County Council, in regard to that portion of the southern end of the tunnel over which the old footpath runs. That arises under section 97 of the Local Government Act, 1888, which runs thus : "Nothing in this Act with respect to main roads shall alter the liability of any person or body of persons, corporate or unincorporate, not being a highway authority, to maintain and repair any road or part of a road." The contention is that Earl Somers having in 1823 tunnelled under an existing highway, the old footpath, he thereupon became liable *ratione nocumenti* to repair that part of the tunnelled road which went under the old footpath, and that that liability is preserved by section 97 and rests with his successors in title to the soil—namely, the Corporation. The answer to this appears to me to be that section 97 does not preserve the liability *ratione nocumenti* in the present case, because the Corporation are not only successors in title to Lord Somers but are also a highway authority. Their liability to repair that portion of the tunnel does not arise *ratione nocumenti,* but arises in the same way as their liability in regard to the rest of the tunnel.

I accordingly declare that the defendants are liable to make an annual payment towards the costs incurred by the plaintiffs from time to time in keeping the roof, walls, and parapets of the said tunnel in repair, and I direct judgment to be entered for the plaintiffs for the sum of £317 without costs.

[Solicitors—Messrs. Westbury Preston and Stavridi, for Messrs. Grece and Patten, Redhill ; Messrs. Wyatt and Co., for Mr. T. W. Weeding, County Hall, Kingston-on-Thames.]

K.B. Div. (Finlay, J.) 1928. Feb. 9.

SIMEONS AND COMPANY, LIMITED v. SHARLES.*

Bankruptcy — Reputed ownership — Sale of goods by bankrupt before bankruptcy—Delivery not taken by purchaser up to date of receiving order—Claim by trustee of bankrupt's property—"Possession, order or disposition of bankrupt"—Bankruptcy Act, 1914 (4 and 5 Geo. V., c. 59), s. 38 (*c*).

A bankrupt, before the date of the receiving order, had sold goods and handed over delivery orders to the purchasers upon payment made. The purchasers did not attempt to take delivery of the goods, which were in store, until after the date of the receiving order, and delivery was then refused upon the instructions of the bankrupt's agent, by whom the delivery orders had been signed, and in whose name and to whose order the goods were held in store. The trustee in bankruptcy claimed that the goods were in the possession, order, or disposition of the bankrupt at the date of the receiving order, and formed part of the bankrupt's estate.

Held, on the facts, that the goods were not in the possession, order, or disposition of the bankrupt in such circumstances that he was the reputed owner thereof within the meaning of s. 38 (*c*) of the Bankruptcy Act, 1914, and did not form part of the bankrupt's estate.

In this action the plaintiffs, Messrs. C. Simeons and Co., Limited, claimed the delivery of 200 cases of vacuum flasks or payment of their value, and damages for their detention, in the following circumstances :—Between August 3 and September 7, 1927, the plaintiffs purchased the flasks from Messrs. C. Melin and Co. Upon payment being made for the goods Messrs. C. Melin and Co. handed to the plaintiffs delivery orders, signed by the defendant Mr. Leslie Smith, Messrs. C. Melin and Co.'s agent, and addressed to the superintendent of the Free Trade Wharf, London, in respect of the cases of flasks comprised in the purchase. On September 29, 1927, the plaintiffs applied to the Free Trade Wharf Company, Limited, for the 200 cases of vacuum flasks to be transferred to their name. This was refused by the

* Reported by CHARLES CLAYTON, Esq., Barrister-at-Law.

Wharf Company on the ground that they had written instructions from the defendant Mr. Smith not to accept or honour any delivery orders issued by him in respect of the 200 cases of flasks.

Mr. Smith had issued these instructions in consequence of a communication from Mr. Eugene Durand, who traded as Messrs. C. Melin and Co., that he had filed his petition in bankruptcy. The defendant pleaded that he claimed no interest in the cases of vacuum flasks other than the sum of £296 18s. 8d. for charges and costs incurred by him in respect of the Customs clearance, freight, and warehousing of the goods, and he alleged that the right to the flasks was claimed by the present claimant, Mr. Frederick C. Sharles, the trustee in the bankruptcy of Mr. Eugene Durand.

Mr. Frederick C. Sharles had been appointed trustee of the bankrupt's property on October 5, 1927. He claimed that the goods, the subject of the action, were in the possession, order, or disposition of the bankrupt at the date of the receiving order, September 24, 1927, and that as trustee of the bankrupt's estate, and subject to the discharge of any lien thereon to which the defendant might be legally entitled for charges for freight and warehousing, he could claim them as forming part of the bankrupt's estate.

An order was made by a Master directing that all further proceedings in the action against the defendant Mr. Smith should be stayed, and that an issue should be tried between the plaintiffs and the claimant to decide whether the cases of vacuum flasks were the property of the claimant as against the plaintiffs.

Mr. Tindale Davis and Mr. Harry Atkins appeared for the plaintiffs ; Mr. Edward Clayton, K.C., and Mr. Phineas Quass for the claimant.

MR. JUSTICE FINLAY delivered the following considered judgment :—

This case, which is an issue directed by a Master, raises a question under the Bankruptcy Act, 1914, section 38 (*c*), which relates to reputed ownership. By that section the property of a bankrupt is to comprise, among other things, "all goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof."

The facts, as to which there was little, if any, dispute, are as follows :—The bankrupt, Mr. Eugene Durand, had for many years carried on business as a merchant under the name of C. Melin and Co. On September 24, 1927, a receiving order was made against him on his own petition, and his bankruptcy accordingly dates from that date. He had for some time done a considerable business with the plaintiffs in vacuum flasks. These flasks were forwarded from Germany, 40 cases a week, and it was the practice of Mr. Durand to sell these cases to the plaintiffs, sometimes before and sometimes after their arrival in this country. The cases were shipped from Hamburg and the method of business was this : the bill of lading was made out to order and the charges were paid by Mr. Leslie Smith, the forwarding agent employed by Mr. Durand for the purpose of dealing with these goods. The goods on arrival were stored at the wharf in the name of and for the account of Mr. Smith, and when Mr. Durand had negotiated a sale to the plaintiffs he either in writing or by word of mouth asked Mr. Smith for a delivery order. He would then hand it over to the plaintiffs against payment for the goods. Payment was made in one or two instances by cheque, but more usually by acceptances at four months' date. It was the practice of the plaintiffs to leave the goods, sometimes for considerable periods, in store at the wharf, the charges for rent, for insurance, and for carriage on delivery being borne by the bankrupt. With regard to the five consignments of goods material to this case, the goods, duly identified, had been bought by the plaintiffs and payment had been made by acceptance or cheque before the date of the bankruptcy.

It was thus in the power of the plaintiffs at any time to obtain delivery of the goods to them by presenting the delivery orders, but, in fact, delivery orders had not been presented at the wharf in respect of these consignments at the date of the bankruptcy. The result was that the goods were still at the wharf to the order of Mr. Leslie Smith. After the bankruptcy the plaintiffs endeavoured to obtain the goods, but the wharfingers, acting on Mr. Smith's instructions, refused to part with them. It was admitted before me that the property in the cases had passed to the plaintiffs, with the result that section 38 (*a*) has no application, but it was contended that the trustee in bankruptcy was entitled to claim the cases by virtue of section 38 (*c*). A considerable number of authorities were cited to me upon the proper construction of this clause. I desire to quote only two passages. In *Ex parte Wingfield—In re Florence* (10 Ch.D., 591) Lord Justice James, at page 594, said : "The section must, however, be read, as the similar provision in the bankruptcy statutes from the time of James I. has always been read, with some attention to common sense. It has always been construed as meaning this : that if goods are in a man's possession, order, or disposition, under such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods who has permitted him to obtain that false credit is to suffer the penalty of losing his goods for the benefit of those who have given the credit. But, if no such credit has been given, then the maxim applies, *Cessante ratione cessat ipsa lex.*"

In *In re William Watson and Co.—Ex parte Atkin Brothers* (20 *The Times* L.R., 727 ; [1904] 2 K.B., 753) Lord Justice Vaughan Williams, delivering the judgment of the Court of Appeal, at page 757, said this : "The doctrine of reputed ownership was first embodied in the Bankruptcy Act, 21 Jac. I. It has been couched in various words in the successive bankruptcy statutes, but this principle has run through them all, and the statement of Lord Redesdale in *Joy v. Campbell* (1 Sch. & Lef., 328, at p. 336) (a case which has been approved and acted on again and again : see *Belcher v. Bellamy,* 2 Ex., 303, *Hamilton v. Bell,* 10 Ex., 545, and many other cases), that the true owner must have unconscientiously permitted the goods to remain in the order or disposition of the bankrupt, justifies this statement. This does not mean, as we understand it, that he must have intended that false credit should be obtained by the bankrupt's apparent possession of the goods, but it does at least mean that the true owner of the goods must have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must (observe, not might, or might not) arise : see *Hamilton v. Bell* (*supra*), *Gibson v. Bray* (8 Taunt., 76), *Ex parte Bright* 10 Ch.D., 566). The question for us then is, Did Messrs. Atkin consent to the possession by the bankrupts, Messrs. Watson, under such circumstances that customers were entitled to assume that Messrs. Watson were the owners of the goods in their trade or business ? "

These passages lay down the general principles applicable, and it is necessary, applying those principles, to decide upon the facts of each particular

case, as it arises, whether the reputed ownership section applies. In this case I have come to the conclusion that I ought not to hold that these goods of the plaintiffs were in the possession, order, or disposition of the bankrupt in such circumstances that he was the reputed owner thereof. I do not doubt that Mr. Leslie Smith must as between himself and the bankrupt be regarded as an agent of the bankrupt, nor do I doubt that, for the purposes of the matters which I have to consider, goods may be in the reputed ownership of a principal although physically in the possession of an agent, but the essential point seems to me to be this, whether the result of what has happened would be that persons having dealings with the parties must draw the inference that the goods were the property of the bankrupt, with the result that the bankrupt would be enabled by reason of such reputed ownership to obtain false credit.

Here the goods were physically in the possession of the wharfingers and were held by them to the order of Mr. Leslie Smith. The delivery order, which is of course a document of title, was in the hands of the plaintiffs. On these facts it would, I think, be wrong to hold that the plaintiffs have by their conduct in any way induced a belief that these goods were in the possession, order, or disposition of the bankrupt in such circumstances that he was the reputed owner thereof. Many variations in the facts may be put, and some were suggested in the course of the argument before me. My decision must necessarily be limited, as every decision on a question of this sort must be limited, to the facts of the case before me, and on those facts, applying the principles of law as I understand them, I decide in favour of the plaintiffs.

[Solicitors—Messrs. William A. Crump and Son ; Messrs. De La Chapelle, Thirlby and Co.]

K.B. Div. (Rowlatt, J.) } 1928. Feb. 21.

MERCHANTS' MARINE INSURANCE COMPANY, LIMITED v. LIVERPOOL MARINE AND GENERAL INSURANCE COMPANY, LIMITED.*

Insurance (Marine) — Total loss—"Immediate consequence"—Chain of causation.

The plaintiffs, having undertaken the reinsurance of a risk under a marine policy, reinsured their own risk with the defendants, the policies being subject to the following conditions :—"In the event of the vessel not being at the place of destination on the date of the expiration of the policy the insurance shall continue in force till the end of the day when the vessel arrives at her first place of destination.

"If the insured object is in a damaged condition at the time when the insurance expires . . . the risk shall continue for the immediate consequence of such damage until the object without unnecessary delay has been repaired or sold."

On the date of the expiration of the original policy the vessel was on a voyage and had not reached her first place of destination, and after that date and before reaching such place she grounded on a reef but got off and proceeded. When she reached her first place of destination, it was found that she was badly damaged and temporary repairs were effected. She then proceeded but began to leak badly and had to be run ashore to prevent sinking and was subsequently sold as a wreck. The original insurers paid as for a total loss, and the plaintiffs, having paid them, claimed against the defendants.

Held, that the loss was not an "immediate consequence" of the damage caused by the original stranding, as the chain of causation was broken when the vessel reached her first place of destination, which was a place of safety, and that therefore the action failed.

The plaintiffs in this case claimed under a policy of reinsurance, dated March 9, 1925, on a Norwegian steamer, the Maradal.

Mr. Raeburn, K.C., and Mr. Simey appeared for the plaintiffs ; and Mr. A. T. Miller, K.C., and Mr. H. Atkins appeared for the defendants.

Mr. RAEBURN, in opening, said that the steamer Maradal was insured against marine perils for a period from January 1 to December 31, 1925. The insurers reinsured their risk with the plaintiffs, and the plaintiffs reinsured their risk with the defendants. The policies were subject to conditions, of which two were here material :—

"In the event of the vessel not being at the place of destination on the date of the expiration of the policy the insurance shall continue in force till the end of the day when the vessel arrives at her first place of destination.

"If the insured object is in a damaged condition at the time when the insurance expires . . . the risk shall continue for the immediate consequences of such damage until the object without unnecessary delay has been repaired or sold."

At the beginning of January, 1926, the Maradal was on a voyage from the Baltic to South Africa with a cargo of timber. Her first place of destination was Luderitz. On the evening of January 9, before she reached her destination, she grounded on the Angra Reef during a fog. After a short time she got off and went into Luderitz. It was then found that she was badly damaged. There were no facilities for repair at Luderitz, and a diver was sent from Cape Town and temporary repairs were effected to enable the vessel to proceed to Cape Town. She started, but, though the weather was good, she began to leak badly again, and to prevent sinking she was run ashore on Possession Island. Subsequently she was sold as a wreck for £500. The original insurers paid as for a total loss, and the plaintiffs, as reinsurers, paid the original insurers and claimed over against their reinsurers, the defendants, who refused to pay. The plaintiffs accordingly brought this action.

Mr. RAEBURN submitted that in view of the first of the above conditions the policies continued in force until the Maradal reached Luderitz on January 10, and the vessel was therefore in a damaged condition at the time when the insurance expired. By the second condition the policies were still in force at the date of the loss. The risk was to continue for the immediate consequences of the original damage until the vessel was repaired, and the word

* Reported by W. B. THOMPSON, Esq., Barrister-at-Law.

"repaired" in that connexion must mean "completely repaired and made able to do her work again." As the original damage was the "proximate cause" of the final loss within the meaning of those words in *Reischer v. Borwick* (10 *The Times* L.R., 568 ; [1894] 2 Q.B., 548) and *Leyland Shipping Company, Limited v. Norwich Union Fire Insurance Society, Limited* (34 *The Times* L.R., 221 ; [1918] A.C., 350), the loss was an immediate consequence of the original damage, the insurances continued, and the claim was properly paid.

Mr. MILLER said that, though but for the original injury the loss might have never occurred, the vessel on entering Luderitz had reached a place of safety. By sending her out to sea again to make her way to Cape Town the insured exposed her to new perils which were not covered by the policy.

Evidence having been called, Mr. MILLER submitted that the defendants were not liable. The policy was an English one incorporating provisions of the Norwegian Insurance Plan, and should be interpreted in accordance with English law. The second of the clauses referred to had been construed by the Norwegian Supreme Court in a case in which a ship had been damaged and had put into a port of refuge and, while lying at that port after the expiration of the policy, had been wrecked by a storm. The Court held that the ultimate loss was not an immediate consequence of the original damage and that the underwriters were not liable. The question was not whether the loss was proximately caused by the original damage ; for the real cause was the fact that the vessel was lying at a point in the port of refuge where she was exposed to the subsequent storm.

The two clauses should not be read together. One dealt with place and the other with condition ; one spoke of the expiration of the policy and the other of the expiration of the insurance. The second clause merely declared the existing law.

On the facts of the case the ultimate loss here was not caused proximately by the original damage ; the vessel reached her destination safely, and could have stayed there in safety until thoroughly repaired. Someone there, however, decided to send her out again after temporary repairs, and the interposition of that act of volition distinguished this case from the *Leyland Shipping Company* case (*supra*) and *Reischer v. Borwick* (*supra*) relied on by the plaintiffs.

Mr. RAEBURN replied.

MR. JUSTICE ROWLATT, in giving judgment, said that the case turned on the terms of the original insurance. The vessel was at sea on the day on which the policy would have run out, and by the continuation clause the policy was continued and was still in force when the vessel stranded. She was got off, and went into harbour at Luderitz and there anchored. A diver was brought from Cape Town and he succeeded in locating various holes, which he patched. The result was that the vessel appeared watertight ; they tried her up and down, and as she seemed safe they concluded that she might go on to Cape Town. After she had been out some hours water began to come in, and it rapidly became worse, so that the position became desperate and the vessel had to be run ashore.

The question was whether on these facts the defendants were liable. The fact that the first insurers had considered themselves liable and had paid the claim did not affect the right of the defendants to dispute their liability. Mr. Miller's first point was that the vessel was not in a damaged condition at the time when the insurance expired—namely, on December 31. But when the policy was continued under the continuation clause, the insurance went on with all its incidents and he (his Lordship) thought the point a bad one.

The real point of the case was the allegation that, after leaving Luderitz, the vessel was lost as an immediate consequence of the damage which she had suffered by the original stranding. When she was in the harbour at Luderitz the water was under control and she was safe. The people there might have taken out all the cargo and inspected the tank cover and margins ; they might have secured further assistance and more elaborate salvage appliances. But as it was, she was no longer in danger of sinking in deep water as a consequence of the casualty which she had suffered.

He passed no judgment on the wisdom of what in fact was done, but the vessel had evidently suffered some injury to her structure which, in spite of the repairs which had been effected, developed further during the voyage from Luderitz. No doubt she was lost owing to weakness caused by the casualty, but in his view the loss was not an "immediate consequence" of that casualty. The cases which had been cited, *Reischer v. Borwick* (10 *The Times* L.R., 568 ; [1894] 2 Q.B., 548) and *Leyland Shipping Company, Limited v. Norwich Union Fire Insurance Society, Limited* (34 *The Times* L.R., 221 ; [1918] A.C., 350) were quite different, for in those cases the injured vessel never reached a place of safety. Here the vessel had reached a place of safety but was lost when on a new voyage which set going again the chain of causation which had stopped when she reached that place of safety. Judgment, therefore, must be given for the defendants.

A stay was granted on the usual terms.

[Solicitors—Messrs. Waltons and Co. ; Messrs. William A. Crump and Son.]

Prob., Divorce, and Adm. Div. (Hill, J.) } 1928. Feb. 14.

BLANCHARD v. BLANCHARD.*

Divorce—Judicial separation—Wife's petition—Husband's adultery—Powers of Court—Limited discretion to refuse decree—Matrimonial Causes Act, 1857 (20 and 21 Vict., c. 85), ss. 16, 31—Matrimonial Causes Act, 1923 (13 and 14 Geo. V., c. 19), s. 1—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), ss. 178, 185.

Where a wife petitions for judicial separation on the ground of adultery proved to have been committed by her husband since July, 1923, the Court has only a limited discretion to refuse a decree of judicial separation. Such a refusal must be based on some legal ground that constituted an absolute or discretionary bar according to the practice of the Ecclesiastical Courts, or upon the ground that the suit is not brought *bona fide* but merely for some collateral purpose. The Court's opinion that the relief to be granted should be dissolution of marriage and

* Reported by WILLIAM LATEY, Esq., Barrister-at-Law.

not judicial separation is not a legal ground for refusing the relief prayed for.

This was a petition for judicial separation by Mrs. Elizabeth Annie Blanchard, *née* Edwards, of Windmill-road, Brentford, who was married on May 24, 1909, to William Benjamin Blanchard, a lift engineer, at the Bristol Register Office, on the ground of his adultery with a Mrs. Hawkins since 1926 at an address at Twickenham and at other places. The petition also contained charges of cruelty which were abandoned. By his answer the respondent denied the charges of cruelty but admitted the allegations of adultery.

Mr. H. W. M. Potter (with him Mr. Walter Frampton) appeared for the petitioner; Mr. G. C. Tyndale and Mr. Wavell-Paxton for the respondent.

The petitioner in her evidence said that her husband was the co-respondent in a case in which Mrs. Hawkins was divorced by her husband on the ground of her adultery with Mr. Blanchard.

MR. JUSTICE HILL.—Have you any religious scruples against divorce?—No. I don't expect my husband will return to me, but I have no desire for a divorce.

Why do you prefer a judicial separation to a divorce?—The reason is that I am not going to let Mrs. Hawkins marry my husband. She has ruined my home.

Evidence was given that the respondent was now living with Mrs. Hawkins and they wished to marry each other.

Mr. TYNDALE said that in section 16 of the Matrimonial Causes Act, 1857, it was provided that "a sentence of judicial separation *may* be obtained" on certain grounds, but that in regard to divorce (section 31) "in case the Court shall be satisfied on the evidence that the case of the petitioner has been proved [saving connivance, condonation, or collusion] the Court *shall* pronounce a decree declaring such marriage to be dissolved." The same difference, "may" and "shall," was found in the re-enacting statute, the Supreme Court of Judicature (Consolidation) Act, 1925.

MR. JUSTICE HILL.—Could the Ecclesiastical Courts refuse a decree if adultery were proved and there was no absolute bar?

Mr. TYNDALE said that the *bona fides* of the petitioner could have been taken into account under the old procedure. The present case, he submitted, was an abuse of the process of the Court, and his Lordship had a discretionary power to refuse a decree of judicial separation, until the wife amended her petition to one for divorce. He referred to *Matthews v. Matthews* (3 Sw. & Tr., 161), in which it was held that in a suit for judicial separation, brought by the wife on the ground of cruelty, lapse of time, though not an absolute bar, yet taken in connexion with other circumstances, *e.g.*, a deed of separation, might show that the application was not made *bona fide* for the protection of the wife, but for some collateral purpose; and, if the Court was satisfied of this, the petition ought to be dismissed.

MR. JUSTICE HILL.—A judicial separation may be sought *bona fide* for the protection of the wife. Here she does not need any physical protection, and she would get better financial terms by dissolution.

Mr. TYNDALE.—Yes. Alimony under a judicial separation is only for joint lives. I know of no more pressing question of public policy than that of allowing people in these circumstances to right the wrong, as far as possible, by marrying.

MR. JUSTICE HILL.—Up to now I have always treated myself as having no discretion in this matter, and my impression is that I cannot refuse the relief asked for.

Mr. POTTER addressed the Court for the petitioner.

MR. JUSTICE HILL delivered a considered judgment as follows:—

In this case the petitioner wife seeks a decree of judicial separation on the ground of the respondent husband's adultery. The adultery proved was subsequent to 1923 and the petitioner is therefore entitled to a decree of dissolution, but she seeks only for judicial separation. There was no doubt about the adultery. The respondent left the petitioner and was found living with another woman. The husband of that woman petitioned for divorce, naming the present respondent as co-respondent; a jury found the adultery proved and a decree *nisi* was pronounced. The respondent and the other woman are still living together. The other woman wants to marry the respondent as soon as the decree against her is made absolute. The respondent, if he is able to do so, wants to marry the other woman. It is probable that they will continue to live together, whether they can marry or not. But the petitioner does not ask for dissolution and, as the law stands, dissolution cannot be decreed unless she asks for it. In cases such as this, I have thought it my duty to inquire why judicial separation and not dissolution is asked for. My reason for so doing is twofold: (1) that, according to law, judicial separation is not to be decreed when it is sought not for the protection of the wife, but for some wholly collateral purpose; and (2) that I am well aware of the evils likely to result when persons bound by the marriage tie are living apart with no real prospect of reconciliation.

In the words of Sir F. Jeune in *Johnson v. Johnson* ([1901] P., 193), "it is a terrible thing that people should be going about the world, neither married nor unmarried, possibly liable to contract fresh and illegal matrimony, and certainly exposed to temptation to commit adultery," and, as is said in the majority report of the Divorce Commission, and said with the high authority of Lord Gorell, "if a party sues, where there is ground for divorce, the remedy claimed is not one which concerns the party alone, but also the parties, the children, the State, and the interests of morality."

Inquiring the reason why judicial separation and not dissolution is sought, I have found sometimes that it is religious conviction, the belief that, whatever the law may say, marriage is indissoluble. Such a conviction, conscientiously held, I am bound to respect. That I do not share it is apparent from the fact that I administer a law based on the contrary view. Sometimes the reason is ignorance of the law, the mistaken idea that, if she divorces her husband, a wife cannot obtain maintenance from him, whereas, in fact, the powers of the Court in regard to maintenance are greater upon a decree of dissolution than upon a decree of judicial separation. Sometimes, the wife has the hope that some day her husband will return to her and thinks that there will be a better chance of this if the marriage is not dissolved. But sometimes the motive is much less worthy. It is the desire to punish the husband, by making it impossible, during the wife's lifetime, that he should marry anyone else, and to punish the other woman by making it impossible that she should marry the husband. With that desire, so wanting in charity and, it may be, so cruel in its effects, there can be no sympathy. Especially now, when a wife is entitled to relief on the ground of a single act of adultery, I think it shocking that it should

depend on her caprice to inflict upon the husband so severe a punishment.

Following my practice, I asked the petitioner why she sought judicial separation and not divorce. She was quite frank about it. She had no religious objection to divorce. She had no expectation or wish that her husband should return to her. Her reason was this : the other woman had ruined her home, and she did not want her husband to marry that woman. In these circumstances I greatly regret that the law gives me no power to decree dissolution. Parliament has not acted upon the recommendation of the Divorce Commission that the Court should have a discretion in these cases. But the petitioner has been grievously wronged by the respondent, and, though she needs no protection against interference by the respondent, yet she wants orders for permanent maintenance and for custody, and this Court has no power to make such orders, except upon a decree. Maintenance and custody are, at any rate, part of the purpose for which the suit is brought. It is not brought wholly for a collateral purpose, as in the case I was referred to, *Matthews v. Matthews* (3 Sw. & Tr., 161). As the point was argued, I ought to add that, upon the facts of this case and upon the law as it stands, the petitioner, in my opinion, has a right to a decree of judicial separation. The Court has a discretion, but not an unlimited discretion. The discretion must be exercised upon some legal ground. That in my view is the effect of section 185 (1) and (2) of the Supreme Court of Judicature (Consolidation) Act, 1925. It is true that the word used in section 185 is "may," whereas in section 178, which relates to dissolution, the word used is "shall." The same difference in wording is to be found in the repealed sections of the Act of 1857. The reason of the difference in 1857 was, I think, this : As regards judicial separation the Act merely conferred upon the Divorce Court, with certain additions, the jurisdiction formerly exercised by the Ecclesiastical Courts as regard divorce *a mensa et thoro* and directed the Divorce Court to act upon the principles on which the Ecclesiastical Courts had theretofore acted. But as regards dissolution, the Act created a new right and defined in detail the conditions to which it was subject—the absolute and discretionary bars to a decree. No such detailed definition of the right to judicial separation and its conditions was necessary. They were already regulated by the rules of the law which had prevailed in the Ecclesiastical Courts. The Supreme Court of Judicature (Consolidation) Act, 1925, deals with the two heads of relief in the same way. Section 178, as to dissolution, defines the absolute and discretionary bars and uses the word "shall"; section 185, as to judicial separation, uses the word "may," but, instead of setting out the absolute and discretionary bars, requires the Court to be satisfied that "there is no legal ground why the petition should not be granted." The legal grounds are to be found in the cases, and they include the absolute and the discretionary bars, and the ground that the suit is not brought *bona fide*, but only for some collateral purpose.

But it is not a legal ground that the Court thinks it would be better that the relief to be granted should be dissolution and not judicial separation. Before the Act of 1923, when the only marital offence of the husband was adultery, the wife could obtain no relief other than a decree of judicial separation. But, if there were no legal ground against it, she had a right to that decree. That right has not been taken from her because an alternative remedy was given to her by the Act of 1923.

His LORDSHIP pronounced a decree of judicial separation, with custody of the younger child of the marriage, and costs.

[Solicitors—Messrs. Firth and Co., for Mr. Wilfrid Firth, Brentford ; Messrs. Oswald Hanson and Smith.]

Prob., Divorce, and Adm. Div. (Hill, J.) } 1928. Feb. 7.

FLEMING AND ANOTHER v. HORNIMAN AND ANOTHER (FLEMING INTERVENING).*

Conflict of Laws—Domicile—Abandonment of domicile of choice—Revival of domicile of origin—Reacquisition of domicile of choice only by renewed residence with intention to settle—Domicile sole issue in contesting grant of probate—Costs.

If a man abandons his domicile of choice he can reacquire it only by fulfilment of the same conditions of intention and residence as those by which he previously acquired the same domicile of choice.

There is no authority for allowing costs out of the estate in a probate action to an unsuccessful party who merely seeks to prove, in the case of a will duly executed by a testator of sound disposing mind, that the testator had a domicile under the law of which that party would take a large part of the testator's estate in opposition to his wishes. The costs should follow the event in such a case.

This was a probate action concerning the estate, valued at £137,400, of the late Mr. James Albert Fleming (in this report called the testator), formerly of Estancias Flemington, Gualeguay, Argentina, and of St. James's-court, W., who died in London on July 28, 1926, a widower, in his seventieth year. By their statement of claim the plaintiffs, Mr. Juan Enrique Augustin Fleming and Mrs. Maria Carmen Hawtrey, claimed as the lawful children of the testator to be entitled to share in his estate. They said that he died intestate and domiciled in the Argentine Republic, and asked the Court to pronounce against an alleged will dated July 24, 1926, and to revoke probate thereof, granted in common form on September 16, 1926, to the defendants. They further said that the alleged will was not duly executed in accordance with the law of the testator's domicile, and was not a valid testamentary disposition according to Argentine law, by which they were entitled to four-fifths of the estate.

The defendants, Mr. John Eric Horniman, of 76, Sloane-street, W., and Mr. James Dey, of Carew-road, Northwood, as executors of the will of July, 1926, denied that the testator died intestate or domiciled in the Argentine, and claimed probate of the will in solemn form, together with a declaration that he died domiciled in England. The intervener, Mrs. Elizabeth Knox Fleming, widow of the testator's brother, the late Mr. Samuel Fleming, the London police magistrate, had adopted the defence, but she died on December 28, 1927, at her flat in St. James's-court.

* Reported by WILLIAM LATEY, Esq., Barrister-at-Law.

Mr. Ernest Charles, K.C., and Mr. T. Bucknill appeared for the plaintiffs ; Sir Ellis Hume-Williams, K.C., and Mr. H. W. Barnard for the defendants ; and Mr. Cotes-Preedy, K.C., and Mr. Noel Middleton for the intervener's executor.

The onus being on the defendants, Sir Ellis Hume-Williams opened.

The testator, who was the son of a Yorkshire miller who left £60,000 at his death, went to the Argentine in 1881, said counsel, and in the course of a 45 years' residence there amassed a large fortune. He married an Argentine lady and on her death in 1918 relations became strained between him and the plaintiffs, his children, owing to the partition of his property which followed, according to Argentine law. He wound up all his affairs in Argentina and left that country finally in April, 1926. At the time of his death in London in the following July he had disposed of all his property in South America except £250.

When it became necessary to submit himself to an operation in July, 1926, he made a will, which was duly executed, in which he declared himself of English nationality and that his children were well provided for. He left to certain members of the Fleming family £17,000, and among other bequests was one of £50,000 to his sister-in-law, Mrs. Elizabeth Knox Fleming, in trust for her life, with a reversion to her three daughters. He also left the residue to Mrs. Elizabeth Fleming, but she committed suicide towards the end of 1927. The operation took place two days after the will was executed, and he died on July 28.

Among the witnesses called was the Rev. Basil Phillips, who attested the signature of the will. He said that he often met the testator during the few months preceding his death, and the testator often said that he was going to leave the Argentine for good and settle down in England. Once he said : "I'm an Englishman, and intend to remain an Englishman to the end of my life."

Miss Suzanne Fleming, a niece of the testator, said that when he visited England in 1925 he declared his intention of disposing of his properties in South America and coming home for good. In 1926, after he had returned from the Argentine, he said that he wished to be buried at Angmering, Sussex, where, in fact, he was buried.

Other evidence was given on the subject of the testator's domicile at the time of his death.

Much of the evidence for the plaintiffs related to the alleged insane hatred entertained by the testator for his son and daughter from very early days, but Mr. Tweedie, the solicitor who took instructions for the testator's will in England, said that he saw no signs of delusions or insane hatred against anybody. The testator was a man of a kindly disposition. It was absolutely ridiculous to suggest, moreover, that he was not of sound mind. In his (the witness's) 50 years' experience he had never known a more capable and clearer-minded man than the testator.

Before the close of the case for the plaintiffs, Mr. Charles intimated that he would not rely on any of the pleas save domicile.

Mr. Justice Hill.—I should have held that there was no ground for suggesting that the testator was suffering from an insane obsession against his children. His accusation against them of robbing him might merely be the picturesque view of a man born and bred in England, whose dislike of the Argentine law affecting the property of married people might easily have been transferred to a hatred of the individuals who benefited by it.

Sir Ellis Hume-Williams read a letter of the testator to show that he had a tender and anxious affection for his children.

Mr. Douglas Fleming, a beneficiary under the disputed will, and a cousin of the plaintiff, of Lightcliffe, near Halifax, said that in June, 1926, the testator, when lying ill in bed, said to him, in reference to income-tax matters : "I am domiciled in the Argentine." The testator said that he was coming to England every year for as many months as his doctors would allow. He said that he had no desire to remain in England, because he did not want to be in a country where it was always raining.

Other essential parts of the evidence are contained in the judgment.

On the conclusion of the arguments, Sir Ellis Hume-Williams said that under the Wills Act, 1861 (24 and 25 Vict., c. 114), whether the testator's domicile was English or Argentine, the executors were entitled to have the will proved in common form, and the question of administration of the estate would come afterwards. He submitted that the question had only been brought before the Court on pleas which ought never to have been put on the record.

Mr. Justice Hill delivered a considered judgment as follows :—

The testator died on July 28, 1926, in London. He had executed his last will on July 24, 1926. It disposed of all his property. The defendants, the executors, proved that will in common form. This action was begun on January 5, 1927, by the two children of the testator, his son and daughter. Neither of the children takes any benefit under the will of July 24, 1926. By their allegations in the statement of claim the plaintiffs attacked the will as a whole. As to this part of the case the plaintiffs wholly failed. The due execution was proved, the testator's knowledge and approval were proved, and the case as to insane delusions wholly broke down and was very properly withdrawn by Mr. Charles. It follows that the will is entitled to probate in solemn form.

By the statement of claim the plaintiffs further allege that the testator died domiciled in the Argentine Republic. The importance of this in administration lies in the fact that by Argentine law the testator had no power to dispose of four-fifths of his estate except to the plaintiffs ; it must pass to them whatever the wishes of the testator. The defendants allege that the testator died domiciled in England. The plaintiffs claim a declaration of Argentine domicile. The defendants claim a declaration of English domicile.

The testator was born in 1856 near Halifax, Yorkshire, of English parents. His domicile of origin was therefore in England. In 1881 he went to the Argentine and lived there until early in 1926, except that he and his wife and children came to England for a visit in 1899 ; he himself came to England for a visit in 1923 and again in 1925. On March 3, 1926, the testator sailed from Buenos Aires, and, after breaking his journey at Madeira and Portugal, reached England on April 26, 1926. He remained in England till the day of his death. All his life he retained his British nationality.

Two questions are to be determined : (1) Did he acquire a domicile of choice in the Argentine ? The onus of this is on the plaintiffs. (2) If he did, did he abandon that domicile of choice before his death ? If he did, had he reverted to his domicile of origin ? The onus of proving abandonment is on the defendants.

On the first question the matter to be decided is this, as stated by Lord Justice Bowen in *In re Marrett*

(3 *The Times* L.R., 707; 36 Ch.D., 400, at p. 408): "When a man takes up his residence in a new country the problem which has to be solved is whether there has been such a fixed and settled intention permanently to reside in the new country as, concurring with the actual residence there, amounts to an adoption of a domicile of choice instead of the domicile of origin." The authorities speak of the change *animo et facto*. The *animus* is the fixed and settled intention permanently to reside. The *factum* is the actual residence.

On the second question the law is thus stated in Dicey under Rule 8: "A domicile of choice . . . is retained until both residence (*factum*) and intention to reside (*animus*) are in fact given up, but when once both of these conditions have ceased to exist it is abandoned as well in law as in fact." A mere intention is not enough so long as the person continues to remain within the territory of his domicile of choice. (See *In the Goods of Raffenel,* 32 L.J., P. and M., 203.) To leave that territory is not enough, so long as the person continues his intention to reside permanently in the country of his domicile of choice (*In re Steer,* 28 L.J., Ex., 22). But when the intention is formed and the residence is brought to an end, or the residence having been brought to an end the intention is formed, then there is a complete abandonment of the domicile of choice. The intention here meant is a formed intention to leave the country of the domicile of choice for good.

I would only add this. The authorities often speak of a person leaving the country of his domicile of choice *sine animo revertendi*. That, I take it, means without the intention of returning to it as his permanent home. If a man intends to give up his domicile of choice and in fact gives up his residence there, it is not inconsistent with an abandonment that he has it in mind that he may or will pay a temporary visit to that country at some future time.

For instance, a man with a domicile of origin in England acquires by residence and intention a domicile of choice in France. He then leaves France with the intention to give up permanent residence there but has it in mind that he will make his home in England but occasionally go to the French Riviera for a holiday. *Udny v. Udny* (L.R., 1 H.L. Sc., 441) settled the point that a domicile of choice may be abandoned though no intention has been formed to choose another domicile in any particular country. In such a case upon the abandonment there is an intended reversion to the domicile of origin. It follows, I think, that if a person leaves the country of his domicile of choice with the fixed and settled intention to give up residence there and thereupon reverts to his domicile of origin, and afterwards changes his mind and forms the intention of returning to that country as permanently residing there, he reacquires a domicile of choice there, only when, with that intention, he again resides there; or, in other words, a domicile of choice must be acquired over again by fulfilment of the same conditions as before.

In this case I have come to the conclusion upon the evidence (*a*) that the testator acquired a domicile of choice in the Argentine. And, I think he retained it until he left the Argentine on March 3, 1926. But, (*b*) in my judgment the evidence makes it quite clear that he abandoned it when he so left the Argentine. The intention was already fixed and settled, and with that intention he in fact ceased to reside. In my judgment when the ship on which he travelled set sail from Buenos Aires he reverted to his domicile of origin; and, thereafter, he acquired no new domicile in the Argentine or in any other country. Even if I am wrong in concluding that the intention was already fixed and settled when the testator sailed from Buenos Aires, it became fixed and settled between the time of his reaching England in April, 1926, and his death in July, 1926.

As to my first conclusion, domicile of choice: in 1893 the testator married an Argentine lady in Mendoza, where he was then residing. Between that date and the death of his wife in 1918 he had become the owner of three properties, La Choza, Las Acacias, in Rosario, and Flemington. All these places are in the Argentine. From 1905 he lived at Flemington, which he appears to have named after himself. By 1918 he had built up an important business and owned a great quantity of livestock. In 1918, during his wife's fatal illness, he bought a double grave in the British section of the cemetery at Buenos Aires. His wife was buried there, and as late as 1925 he expressed the wish that if he died in the Argentine he should be buried there.

In 1902, writing to his father, he hoped that he and his family would come home, that is to England. But in 1908 his father died. The testator was dissatisfied with the provisions of his father's will and became, or already was more or less, estranged from his brothers and sisters in England. No further visit was paid to England during his wife's lifetime, and in 1915 (page 35 of the correspondence), the testator is writing to his wife's sister: "I have abandoned my own family and have attached myself to yours." This lady in evidence said that the testator always said that his country was the Argentine Republic and that "we were his family"; her evidence shows that this was said before 1918. Similarly, Miss Carmen Villaneuva, speaking of the years 1917 and 1918, states that the testator said that the Argentine Republic was his adopted country and that he had formed his family circle there. This finds corroboration in the letters of the testator after 1918, in which he says that it had been his intention to found a family.

It further receives some corroboration from the fact that in formal documents as late as February, 1926, the testator described himself, or was described, as "domiciled" in the Argentine or in places in the Argentine. I refer to the certificate of revaccination in 1923 and the certificate of identity in 1925 and to the power-of-attorney executed by him on February 13, 1926. These documents are in Spanish. I refer also to his passport issued on February 25, 1926. I attach more weight to the passport which was issued by the British Consul than to the documents in Spanish, for the evidence of the Argentine lawyers makes it doubtful whether the word *domiciliado* is not used both to express legal domicile in the strict sense and also merely a fixed place of residence or business. The certificate of revaccination and the certificate of indentity at any rate speak of the testator as *domiciliado* not in the Argentine Republic, but in a particular place, Gualeguay in the first, and Buenos Aires in the second.

Putting all these things together, I think the proper conclusion is that before his wife's death in 1918 the testator, residing in the Argentine, had formed a fixed and settled intention of permanently residing there. Having so acquired an Argentine domicile of choice he rightly described himself in February, 1926, as of Argentine domicile, for up to that time he had not abandoned that domicile of choice.

I now pass to his abandonment of that domicile. Following upon the death of his wife the testator

became completely estranged from his children. By Argentine law they were entitled on their mother's death to half the property acquired during the marriage. The legal proceedings which ensued ended in a partition agreement under the sanction of the Court. The testator was profoundly dissatisfied both with the law which gave the children half of the property which his industry had acquired and with the conduct of the children in the proceedings and the working out of the partition. He thought he was unjustly treated. His undertakings were undoubtedly greatly hampered.

The result was that the testator, who had already lost his wife, was by the end of 1920 completely and finally estranged from both his children. Thereafter he frequently speaks of himself in his letters as leading a lonely, miserable life. In the partition the estate La Choza had passed to the son, after the testator had raised a large sum of money to clear it of a mortgage. The testator still retained the estates Las Acacias and Flemington, but both were subject to mortgage. By the end of 1921, as his letters indicate, he was trying to sell Las Acacias and forming the hope that he might ultimately realize all his property and then leave the country altogether. But there were at this time a commercial crisis and a heavy fall in prices, which made sale difficult; and for the time being he had to get his mortgage debt renewed for another three years at an increased rate of interest. So things continued during 1922.

In June, 1923, he sold Las Acacias with its stock. Part of the price of the land was left on mortgage until June, 1926. He then writes of his intention to run home (that is, to England) for a trip, and "on my return I shall then try and sell this property (that is Flemington) and close my connexion with the Argentine and intend spending the rest of my life seeing my relations and friends," &c. But in another letter he adds: "Much depends upon the impression I may receive at home."

He came to England in July, 1923, and there became on friendly terms with his English relatives. He returned to the Argentine in September. His letters in the autumn of 1923 and early 1924 show that he hoped to sell Flemington and return to England "definitely" in 1924 "in order to enjoy for the few years of life that remain to me the pleasure of seeing my brothers and sisters and the few old friends still remaining." But owing to the commercial crisis and political troubles it was still difficult to sell. He wrote in the same sense during 1924 and in the latter part of the year began to remit money to England for investment there. He was further advised by the doctor that he must not winter again in the Argentine. He ends the year 1924 by saying that if his property is sold he hopes "to leave definitely and come to England for the summer and pass the winter in some warmer climate."

He writes in the same sense in 1925. He again made a visit to England in that year and there became on the most friendly terms with some of his relatives, and especially with his brother Mr. Samuel Fleming and his family. Before he left the Argentine in the spring of 1925 he wrote: "If the sale comes off I shall leave the country for good." That was the sale of Flemington. He states his intentions very clearly on page 257 of the correspondence, April 2, 1925. He has "decided to chuck it and return to my ain folk. Am close on 70 years of age and ailing, so much to my regret I have to close down the page of my life in the Argentine." At the same time he contemplates that should his health improve he may pay his friends in the Argentine a surprise visit. Flemington was not sold that year in the spring, and in April, 1925, the testator left with a return ticket and came to England, and in September, 1925, was back again in the Argentine. He was accompanied by an English niece, Miss Halstead, now Mrs. Dumal. The letters in the autumn of 1925 show that he was still of the same mind—to realize his property in the Argentine and then leave the country for good. In December, 1925, he sold Flemington and the stock. The price (over £80,000) of the estate was paid in January, 1926, and transferred by the testator to London. For the stock a promissory note was given due May 4, 1926.

In December, 1925, he received news of the death of Mr. Samuel Fleming. It is said that the letters show that this altered all his plans and made him give up the idea of leaving the Argentine for good. I do not so read the letters. The death of Mr. Samuel Fleming merely determined him to leave early in 1926. He had been hesitating as to whether he ought not to be in the Argentine in June, 1926, for the final payment of the money secured by mortgage on Las Acacias. He now takes steps to leave sooner and to entrust to others the winding-up of the business still to be done in the Argentine. I refer to page 321 of the correspondence, December 24, 1925: "My camp is sold and in a short time expect to get all ready for my return to England definitely," and page 326, on January 5, 1926: "I am tied down to a business still unfinished but hoping to finish very soon. My last business transaction should conclude on June 24, so if I cannot come before then I am hoping to be with you about the end of July next to remain definitely at home." See also page 331. By the end of January, 1926, he had made up his mind not to stay on till June. On January 30, 1926, he writes: "I am arranging to leave authorization to people here to conduct my business for me as well as they can, and hope no difficulties will arise that will oblige me to return again to the Argentine." Accordingly, on February 13, 1926, he executed a power-of-attorney to his lawyer, Dr. Spangenberg, to execute a receipt for payment and discharge of the mortgage upon Las Acacias. This power-of-attorney recites that the testator executes the power-of-attorney "owing to the fact that he has to leave the country definitely to take up his residence in London." On February 28, 1926, he makes arrangements for the collection of the remaining money due to him in the Argentine, including that due on the promissory note and for the transfer to London of the balance less certain gifts to named persons.

Besides all this, he did other things which show his intention to sever his connexion with the Argentine. He had in December resigned his membership of the Foreign Residents' Club in Buenos Aires, and on leaving he wrote to resign his membership of a Lodge of Freemasons at Buenos Aires. He made a number of parting gifts, for instance, to the British Hospital at Buenos Aires. He arranged for gifts of money to several people, including his lawyers, and Mr. Haxell, a friend in Buenos Aires. He discharged his last outstanding account. Before he left he went through his papers and destroyed all except such as he took with him. He took with him his books. That is the evidence of the niece, Mrs. Dumal. In fact, after he left, his agents did collect the moneys still outstanding, and before his death all moneys had been transferred or were in course of transfer to London. He, with his niece, left Flemington on February 23, 1926, and sailed from Buenos Aires on March 3, 1926.

He thereupon gave up residence in the Argentine

in fact, and had carried out the intention so long entertained, "to realize all I have and leave the country altogether."

On February 13, 1926, being still in the Argentine, he executed a holograph will dealing only with the assets that he then had in the Argentine. He had made other holograph wills before. It is apparent that he thought the Argentine law of succession applied to his property in the Argentine, and he was anxious to dispose of the one-fifth which that law left him free to will away from his children. The execution of this will is in no way inconsistent with his intention to leave the Argentine for good in March; and it is significant that having deposited this will with Mr. Haxell, by his letter of February 25, 1926, he asks Mr. Haxell "to send him the will by post to London once all my business is finished in the Argentine."

A good deal of evidence was given by witnesses here and in the Argentine. It does not lead me to a conclusion as to the testator's intention other than that to be derived from the letters and documents. As to the Argentine evidence Mr. Patterson of the Buenos Aires branch of the testator's bankers, the London and South American Bank, confirms that conclusion, and so does Dr. Spangenberg, called for the plaintiffs, who said: "On his departure he said that he was leaving the country, but that if his health improved he would return on a visit."

Dr. Carraoza's evidence that on leaving he said, "Hasta pronto," which is, translated, "We shall soon meet again," and which I still think might also be translated: "To our meeting soon," is a slender fact on which to found any conclusion. It expressed a hope which might equally be fulfilled by Dr. Carraoza paying a second visit to England, or the testator paying a visit to Buenos Aires.

Miss Leonor Villaneuva said that on leaving the testator said: "He had to be back in Buenos Aires in June, and at the commencement of the winter in England he might possibly go to South Africa and from there go on to Buenos Aires." I think her recollection must be in fault as to June. He was told to avoid winter in the Argentine, and he was not going to arrive in England till the end of April. An intention to return in June is quite inconsistent with the letters of February and March. The letters before and after March show that he did not intend to spend winters in England and did contemplate a trip to South Africa. And the letters also show that he did contemplate that he might at some future date pay a visit to the Argentine.

The evidence called before me as to the testator's declarations of intention when in England in 1923 and 1925 to his niece, Miss Halstead, and her evidence as to the time she was with him in Buenos Aires in 1925 and 1926 support the conclusion to be drawn from the letters.

There remains the evidence as to statements made by the testator in England in 1926. They show that his intention was fixed and settled. I refer to the evidence of the Reverend Mr. Phillips and of Miss Halstead (Mrs. Dumal) and Miss Suzanne Fleming. They come to this, that he intended to stay in England to the end of his days but would have to make trips abroad because of the climate, and directed that he was to be buried in Angmering churchyard. He was making arrangements for a trip to South Africa, sailing in August.

Mr. Douglas Fleming said that he spoke of going from South Africa to Buenos Aires and returning to England *via* Madeira in the following spring. He may have done so, though Nurse Crawford who was to accompany him knew only of a trip to South Africa. But if he did contemplate going on to Buenos Aires, he contemplated no more than a short visit.

There remains only one other piece of evidence. Mr. Douglas Fleming said that in the summer of 1927 the testator told him that he did not pay income-tax, and said: "I am exempt because I am domiciled in the Argentine." In this connexion the plaintiffs further relied on letters of the testator written in 1926. In 1925 the income-tax authorities had been satisfied, and it was a fact, that the testator's place of residence was not in England but in the Argentine. The question seems to have been whether the dividends on colonial securities should be paid to him with or without deduction of tax. The question again arose in 1926. The income-tax authorities were, of course, not concerned with domicile, but with residence. Whether the testator, residing in England from April and intending to make a trip to South Africa in August and return to England in the following spring was, in respect of these dividends, subject to tax I do not know.

It may be that if those facts had been stated to the income-tax authorities they would have been satisfied. They inquired through the testator's brokers "the approximate date on which you expect to return to the Argentine." The testator replied: "Am making arrangements to leave this country on or about August 20 next." That was true, but it was for South Africa and not for the Argentine. He had previously stated to his brokers: "Income Tax. As I am only in London for three or four months and have no residence here I am not liable for this."

I can find nothing in these letters which negatives an abandonment of domicile in the Argentine. The statement to Mr. Douglas Fleming stands on another footing: "I am domiciled in the Argentine." But the question which I have to ask myself is whether that statement is to override the overwhelming evidence to the contrary. I cannot so treat it. It is suggested that having transferred all his investments to England, and being faced with income-tax, he repented leaving the Argentine and contemplated returning there. But even so (and the evidence does not support the suggestion) the result would be, not that he had retained his Argentine domicile of choice all along, but that he intended to reacquire an Argentine domicile of choice, and that intention, if formed, was never carried out. I find that the testator abandoned his domicile of choice and reverted to his domicile of origin, and so died.

It must be a matter of satisfaction to all except the plaintiffs that, in the result, effect will be given to the testator's wishes; and the plaintiffs have small cause to think themselves hardly used, for upon the death of the mother each received in cash, land, or stock, a value in Argentine currency which at the then rate of exchange amounted to about £44,000, and at the present rate of exchange to about £34,000.

His LORDSHIP pronounced for the will, to be proved in solemn form, directed that probate should be handed out to the executors, and made a declaration that the testator died domiciled in England.

An argument took place as to costs.

MR. JUSTICE HILL.—In my view this is a case in which the costs ought to follow the event. I can see no reason for departing from that rule. As I have said, I do not think the case has any merits. It is now established that the will expresses the real wishes of a mentally capable testator, and if it had

been defeated this would have led to a result which was contrary to the real wishes of the testator. The plaintiffs were not misled, there was no ambiguity about this document being his last will or about his mental capacity to make the will, but they set out to prove that, although those were his real wishes, in law he was not capable of exercising the power which he expressed in the will. That, no doubt, depended on a mixed question of fact and law. What was his domicile? I have no authority put before me for giving costs out of the estate in such a case as this, and in my judgment the plaintiffs set out to prove that the testator had a domicile which gave them a large share of his property, contrary to his real wishes. They have failed upon that, and it would be unfair that the successful party in such a case should be left to pay his own costs, still more that the beneficiaries under the will should be called upon to contribute to the costs. I give judgment that the defendants recover costs against the plaintiffs.

His LORDSHIP directed that the costs of the intervener should come out of the estate.

[Solicitors—Messrs. Thomas Cooper and Co.; Messrs. A. F. and R. W. Tweedie; Messrs. G. and A. Marshall.]

K.B. Div. (Wright, J.) 1928. Feb. 17.

SMITH, HOGG AND CO., LIMITED v. BAMBERGER AND SONS.*

Ship — Charterparty — Discharge of cargo—Meaning of "alongside"—Discharge on to quay and into lighters—Custom of Port of London — Respective obligations of shipowners and receivers.

The plaintiffs' steamer was chartered for the conveyance of a cargo of timber from Archangel to London, the charterparty providing, "The cargo to be brought to and taken from alongside the steamer at the charterer's risk and expense as customary." The defendants were indorsees of bills of lading which incorporated the terms of the charterparty. On arrival the plaintiffs discharged part of the cargo on to the quay and stacked it there and discharged part of it into lighters and stowed it in the lighters, and they brought this action, alleging that as the defendants did not take the cargo from alongside the steamer they (the plaintiffs) had had to incur the expense of stacking on the quay and of stowage in the lighters. The defendants pleaded that by the custom of the Port of London the shipowners were bound to bear the cost of unloading and stacking timber on the quay alongside the ship, and, in the case of overside discharge, the cost of delivery and stowage in the lighters.

Held, that under a contract of the kind in question, when discharge was on to the quay the cargo was "alongside" when it was available for release from the ship's tackle on the quay, and the obligation of the receiver to take it "from alongside" arose at that moment; but when the discharge was into lighters it was the duty of the shipowner to place the cargo in the lighter and the receiver's obligation only began after that had been done. The plaintiff shipowners in this case succeeded, therefore, in their claim against the defendant receivers in respect of the cargo discharged on to the quay, but their claim failed as regarded the cargo discharged into lighters.

In this action the plaintiffs, Smith, Hogg and Co., Limited, of Victoria-terrace, West Hartlepool, claimed from the defendants, Louis Bamberger and Sons, of Broad-street-buildings, E.C.2, £102 9s. 3d. in respect of the discharge of a quantity of timber from the plaintiffs' steamship Fernhill in Surrey Commercial Dock, London.

Under bills of lading of various dates in September and October, 1926, which incorporated the terms of a charterparty dated September 13, 1926, made between the plaintiffs and the White Sea Timber Trust, it was provided that a quantity of deals, battens, and boards shipped at Archangel should be delivered at Surrey Commercial Dock to the order of the Russian Wood Agency, Limited, or their assigns. The charterparty contained, *inter alia,* the following clause:—

"The cargo to be brought to and taken from alongside the steamer at the charterer's risk and expense as customary."

The property in part of the cargo passed to the defendants as indorsees of the bills of lading. The cargo was discharged in part on to the quay and in part into lighters.

The plaintiffs pleaded that in breach of their obligations under the bills of lading the defendants did not take the cargo from alongside the steamer, and that in consequence they (the plaintiffs) carried the cargo to and stowed it in the usual place in the docks for discharged timber at a cost of £102 9s. 3d.

The defendants contended that the cargo was to be discharged according to the custom of the port of discharge, and pleaded that by the custom and practice of the Port of London the shipowner was, in the case of timber, bound to unload and stack it on the quay alongside the ship. In the case of overside discharge they alleged that the custom was to provide only sufficient open lighters to receive the goods from the ship's tackle, and that the shipowner was bound to do the whole work of delivering the goods into the open lighters. They contended that they were under no liability in respect of the money claimed by the plaintiffs since, by the above customs, the shipowner was under an obligation to bear all costs of the unloading and stacking on the quay and the delivery and stowage in the lighters.

The defendants admitted that the plaintiffs discharged part of the cargo on to the quay and stacked it, but said that it was unsorted to marks or bills of lading. They alleged that the timber was subsequently removed and sorted by the Port of London Authority, labour in respect of which they (the defendants) were charged.

Mr. Le Quesne, K.C., and Sir Robert Aske appeared for the plaintiffs; Mr. Jowitt, K.C., and Mr. J. Dickinson for the defendants.

Mr. LE QUESNE, in opening the case, said that it raised the familiar question of the "alongside" clause. The defendants were holders of 31 of the 65 bills of lading. He referred to the customs of the Port of London with regard to Surrey Commercial Dock, and said that it was agreed between the parties

* Reported by CHARLES CLAYTON and W. B. THOMPSON, Esqs., Barristers-at-Law.

that no witnesses should be called as to any of the customs. He submitted that the customs were not in the present case binding upon the plaintiffs, because they were inconsistent with the terms of the charterparty.

He referred to *Glasgow Navigation Company v. Howard* (26 *The Times* L.R., 247 ; 15 Com. Cas., 88) ; *Aktieselskab Helios v. Ekman and Co.* ([1897] 2 Q.B., 83) ; *Mowbray Robinson and Co. v. Rosser* (38 *The Times* L.R., 413) ; *The Turid* (38 *The Times* L.R., 423 ; [1922] 1 A.C., 397) ; *W. N. Hillas and Co., Limited v. Rederi Aktiebolaget Acolus* (43 *The Times* L.R., 67 ; 32 Com. Cas., 69) ; *The Rensfjell* (40 *The Times* L.R., 458) ; and *Aktieselskabet Dampskibsselskabet Primula v. Horsley and Co.* (40 *The Times* L.R., 11).

Evidence having been called, Mr. JOWITT, for the defendants, said that they relied on three points : (1) The question of custom ; (2) if there were no custom the parties would be held to their strict contractual rights, and the shipowner would have to deliver to each consignee under his own bill of lading and could not merely dump all the cargo together on the quay ; and (3), whether there was a custom or not, the plaintiffs had paid money which, on their contention, was due from the defendants, and had done so when they had express knowledge of the fact that the defendants were repudiating the claim, and they could not, therefore, recover from the defendants.

There was a logical distinction between the extent of the services said to be obligatory and the extent of the area over which the services must be rendered. Goods which were put on to a quay alongside a ship were themselves alongside the ship. He referred to *The Nifa* ([1892] P., 411) ; *Northmoor S.S. Co. v. Harland and Wolff, Limited* ([1903] 2 I.R., 657). So long as the locality on which the services were to be rendered could properly be described as "alongside," the claimant was entitled to prove a custom that the services must be rendered on that locality. But if the locality was not alongside the custom could not be proved. Where there was a large quantity of timber cargo in a stack the outer edge of the stack was just as much "alongside" as the part of the stack nearest the ship ; the whole cargo could be described as having been discharged alongside.

With regard to the payment which the plaintiffs had made, the mere fact that they had made the payment under protest made no difference. *Maskell v. Horner* (31 *The Times* L.R., 332 ; [1915] 3 K.B., 106, at p. 120).

Mr. LE QUESNE replied. The result of the recent cases was that the shipowner had done his part in unloading when the goods had been lifted by the ship's tackle over the ship's rail and had been deposited by the tackle on the lighter, quay, or railway truck. To admit the alleged custom here would be to ignore the words of the charterparty. *Brenda Steamship Company, Limited v. Green* (16 *The Times* L.R., 226 ; [1900] 1 Q.B., 518) showed the duty of the shipowner apart from custom. Stowing cargo was no part of the work of discharge.

On the question of voluntary payment by the plaintiffs and their consequent inability to claim against the defendants for the amount, he referred to *Fletcher v. Gillespie* (3 Bing., 635). The payment in this case was not in fact voluntary, but was made under protest. *Wilson's Music and General Printing Company v. Finsbury Borough Council* ([1908] 1 K.B., 563, at pp. 568-571) ; *Falcke v. Scottish Imperial Insurance Company* (3 *The Times* L.R., 141 ; 34 Ch. D., 234, at p. 249).

MR. JUSTICE WRIGHT delivered the following considered judgment :—

This is a claim by the owners of the steamship Fernhill against the defendants, who were receivers of cargo under certain bills of lading. The Fernhill had loaded a cargo of deal battens or boards and delivered that cargo at the Surrey Commercial Dock. The cargo consisted of 1,125 standards, and the planks measured between 10 and 20 or 25ft. in length. Of that cargo the defendants were receivers under 31 bills of lading out of a total number of 65, and the quantity of cargo represented by these bills of lading was 569 standards. Of that quantity they took delivery of 326 standards on quay and 243 standards overside and into lighters. The mode of delivery of the remainder of the cargo was not given in evidence, though probably the same proportions went over on to quay and overside.

The plaintiffs' claim is for certain expenses incurred in the operation of discharging the ship. They say that that part of the operation ought to have been performed by the defendants, and they accordingly claim that these expenses should be borne by the defendants as receivers under the terms of their bill of lading. The plaintiffs say they incurred these expenses under protest—the defendants having repudiated all liability—and under notice that they would claim repayment from the defendants. Their claim is put as for damages for breach of contract, or, alternatively, for money paid at the implied request of the defendants.

The bills of lading were issued under a charterparty dated September 13, 1926, under which the Fernhill was to load a full cargo and deliver the same within a range of ports as ordered. She was in fact ordered to the Surrey Commercial Dock to discharge. The material clause is clause 3, the material parts of which are as follows : "The cargo to be discharged with customary steamship despatch as fast as steamer can deliver during the ordinary working hours of the respective ports and according to the custom of the respective ports, the cargo to be brought to and taken from alongside the steamer at charterer's risk and expense as customary." The bills of lading incorporated these terms and conditions of the charterparty so far as they related to discharge.

The method of discharging at the Surrey Commercial Dock has been described by a witness, Mr. Howes. The ship comes alongside the quay, and her rail is about 3ft. distant from the edge of the quay. The Port of London Authority allot a space on the quay appropriated to the cargo which is to be landed on the quay. That space is about the length of the ship, with an open space in the middle about corresponding to the amidships area of the ship where there is no cargo, and extending back over the quay for 30ft. or 32ft. from the side of the quay. The deck load is first discharged by hand. The discharge is conducted by a gang of 13 men, nine on the ship and four on the quay, and in addition, when there is discharge overside, there are four other men in the lighter. The pieces, so far as they are landed before the winches and derricks are brought into use, are handed separately over the ship's side and taken by the men on the quay. As the landing proceeds the pieces are laid on the quay so as to cover the whole allotted area with a single layer and so as to overlap over the quay edge for about 3ft. or 6ft. As soon as sufficient deck cargo is discharged to release the winches, the rest of the deck cargo and the cargo in the holds are discharged by means of the ship's derricks and slings, the derricks having a scope of swing of about 3ft. inshore over the quay edge. The planks in the sling descend on the quay, and are

brought to rest with one end resting on the quay and the other end on the ship's rail. The men on the quay release the sling and pick up or lap the planks, building them into a pile which will finally cover the whole allotted area to a height of 15ft. or 20ft. The pile is built by first building up the margins to seven or eight tiers, then filling in the middle space, and then repeating the process until all the cargo which is being put out on to the quay is discharged and piled. When the pile rises in height, what is called a fore and after—that is to say, two uprights and a cross-piece—is built above the ship's rail, and is used for the planks as they come out of the slings to rest against in place of the ship's rail, because the ship's rail is no longer at a sufficient elevation above the level of the timber on the shore. Each derrick always puts the planks down at the same place, and the men carry them away in order to do this operation of piling, which is only rough piling. The planks are discharged and piled without separation, according to the bill of lading sizes or marks. By a subsequent operation, which does not concern the ship on any view, the planks are carried away from the quay and measured and stowed or stacked in a place appropriate to the storage of timber. Such is the system with regard to cargo landed on the quay.

Now as to cargo landed overside into lighters the position is somewhat different. Delivery overside is to bills of lading sizes and marks, if any. The receivers' lighter comes alongside, and four men are provided by the ship to take delivery into the lighter. At first the deck cargo has to be delivered by hand, and it is put over the ship's side into the lighter, where the men receive it, getting the lengths, as far as possible, fore and aft of the lighter, and then they lay it on to the bottom of the lighter so as to fit in closely, otherwise the lighter would become top heavy. The lighters are about 10ft. beam and about 30ft. in length. When the derricks are working the pieces are slung over into the lighters and are guided into a fore and aft direction, and the sling is released so that the pieces fall with one end resting on the bottom of the lighter, or the bottom layers of timber, and the other end against the central athwartships beam in the lighter. As the discharge progresses the layers of timber rise in the lighter, and a pair of uprights with a cross-beam is rigged up across the beam of the lighter so that the upper ends of the deals, when released from the sling, may rest against it and the other ends rest on the deals in the bottom. The planks have to be placed in position in the lighter, and when they reach above the gunwale the tiers have to be bound by cross-tiers being interposed between the fore and aft tiers. This course is necessary in order to prevent the timber from falling off. Indeed, the whole method of stowage of the timber which I have described is necessary, not only to enable the lighter to carry the full load but also to render her seaworthy and navigable. When the lighter is loaded the receivers' men take her away from alongside.

Now the claim in the action was that by the contract the defendants, as receivers, had promised to bear all expenses "from alongside" because the contract is that the cargo is to be taken from alongside "at charterer's"—that is here the bill of lading holders—"risk and expense as customary." That involves two questions: What is meant by "alongside," and at what point does delivery by the ship cease and the taking by the receivers begin? The defendants relied on certain customs, the existence of which was not disputed by the plaintiffs, but their admissibility was disputed because the plaintiffs contended that they were inconsistent with the contract. It is necessary to distinguish delivery on to quay from delivery into lighters, in respect of which a separate custom was alleged and admitted. As to the former the custom was thus stated and it is set out at some length: "The goods are discharged from the steamer by the ship's stevedores with the ship's tackle, and stacked by the stevedores on to the quay without sorting to bill of lading sizes or marks. The first pieces discharged are used to make a stage projecting over the quay for about 6ft. towards the side of the steamer, and as the cargo is discharged a stack is made varying in size with the quantity discharged on to the quay but generally not exceeding the length of the steamer and extending back about 30ft. from the edge of the stage. The timber is later carried away from the stack by the Port of London Authority and by them sorted to bill of lading sizes and marks and piled in the usual place for storing timber. The ship's stevedores' charges for discharging the cargo and stacking it on the quay are paid by the shipowner and the Port of London Authority's charges for carrying the cargo from the quay and sorting and piling are paid by the consignees." As to the later discharge into lighters the custom was stated to be as set out in the case of *Glasgow Navigation Company v. Howard* (26 *The Times* L.R., 247; 15 Com. Cas., 88), in these terms: "By the custom and practice of the Port of London in the case of cargoes of lumber (including both Baltic and pitch pine lumber), the receiver is only liable to provide sufficient open craft alongside ready to receive the goods from the ship, and is under no obligation to have any men on such open craft to receive the goods from the ship's tackle or to stow the goods therein. The shipowner is bound to do the whole work of delivering the goods into the craft and of stowing the goods therein in the reasonable and ordinary manner so that the goods may not be damaged or imperilled, and so that the craft may be loaded to the usual and reasonable extent and may be properly and safely navigable." As was pointed out by the Court of Appeal in some of the cases to which I shall refer, the question at issue must now be considered in the light of the decisions with reference to similar customs at other ports. The leading case is that of *The Turid* (38 *The Times* L.R., 423; [1922] 1 A.C., 397), which was a case of delivery on to quay. In the judgments the cases relating to delivery into lighters are also discussed as distinguishable. I shall revert to that discussion later when I deal with delivery alongside into lighters. Clause 3 of the charterparty in that case was identical with the relevant clause now under consideration. It is, I think, clear from the judgments that the word "alongside" is to be construed in its natural and ordinary significance and that that meaning cannot be varied by a customary manner inconsistent with the fact. See also to the same effect the judgment of the Court of Appeal in *Mowbray Robinson and Co. v. Rosser* (38 *The Times* L.R., 413). Lord Birkenhead, whose judgment was concurred in by Lord Parmoor and Lord Atkinson, said in *The Turid* (*supra*) at p. 404: "I am myself of opinion that the word 'alongside,' if it does not suggest actual contact, does at all events suggest close contiguity, and not the less so because the ordinary obligation of the shipowner is admittedly only to deliver to the consignee the cargo his ship carries at ship's rail. A contract which requires delivery elsewhere extends this legal obligation." Lord Sumner, at page 415, said: "Doubtless the words 'alongside the steamer' may be satisfied, though the apparatus of recep-

tion, be it barge or cart or what not, may not be in actual contact with the ship's side. It may well be that the ship can be required to deliver to the full reach of her tackles." In that case the steamer lay 13ft. out from the quay and staging was necessary to be erected between the steamer's side and the quay, and the timber was carried over that staging and across the quay and piled on to a dump commencing about 10ft. from the edge of the quay. The House of Lords held that the cost of erecting the staging and carrying the timber across it and piling it on the dump fell on the receivers and was not part of the shipowner's obligation to discharge alongside and that a custom to the contrary was inconsistent with the charterparty. That case followed a decision in the case of *Holman v. Wade,* reported in *The Times,* May 11, 1877, and a decision in *The Nifa* ([1892] P., 411), where the steamer was moored 15ft. from the quay edge and the facts as to discharge were substantially similar. In the case of *Aktieselskabet Dampskibsselskabet Primula v. Horsley and Co.* (40 *The Times* L.R., 11), under similar words of contract Mr. Justice Greer said : "It was impossible to say that the goods were not alongside when they were on the quay before the sling was taken off," and he refused to make the shipowners responsible for the cost of carrying away and piling on the quay on the ground of custom. Similar questions came before the President in the Admiralty Court in the case of *The Rensfjell* (40 *The Times* L.R., 458). The President said at p. 462 : "The stage of the operation at which the shipowner is properly to be held to have completed his part of the discharge of cargo is that at which timber landed by means of the wire sling is put at the disposal of the receiver by the loosing of the sling." In some of the cases then in question the shipowners had acquiesced in the unloading of the timber from the ship by shore cranes which had a wider radius of swing than the ship's tackle. An attempt was made to distinguish these authorities in the case of *W. N. Hillas and Co., Limited v. Rederi Aktiebolaget Acolus* (43 *The Times* L.R., 67 ; 32 Com. Cas., 69), where under similar words of contract it was sought to enforce against the shipowner a custom requiring him to pay the expense of carrying the timber cargo to bogies on rails 18ft. from the ship, which was lying against the quay, and of building for that purpose part of the cargo into a platform between the ship's side and the line of rails. Lord Cave, Lord Chancellor, held that such claim failed. As further illustrating the meaning of the word "alongside" I may refer to the case of *Northmoor Steamship Company v. Harland and Wolff, Limited* ([1903] 2 I.R., 657), where the Court was clearly of opinion that the heavy logs of timber which had to be shoved into the water off the ship were "alongside" when at the place in the water into which they had been shoved from the ship.

I deduce from these authorities the conclusion that the cargo is "alongside" when it is available for release from the ship's slings if discharged by the ship's tackle and if discharged, as was the first portion of the deck cargo in this case, by being handed from the vessel, when it is laid with one end on the quay and the other resting against the ship. It is from this point, in the case of cargo landed on quay, that, in my judgment, the obligation of the receiver to "take from alongside" begins, and therefore all expense from that moment is expense which by the contract the receiver has agreed to bear.

Mr. Jowitt, however, has contended that that is not the true conclusion. He distinguishes the cases of *The Turid* (*supra*), *The Nifa* (*supra*), and *Holman v. Wade* (*supra*), on the ground that in those cases the ship was some way from the quay so that the intervening space of water had to be bridged, and, furthermore, that the edge of the pile nearest the ship was some distance away from the quay edge. He also seeks to distinguish the cases before the President of the Admiralty Court where the ship lay alongside on the ground that the pile began 4ft. from the edge of the quay, and the case of *W. N. Hillas and Co., Limited v. Rederi Aktiebolaget Acolus* (*supra*) on the ground that the bogie rails were 18ft. from the edge of the quay, and some cargo had to be laid on that intervening space. It is, however, clear from those cases that the mere fact that the ship is not alongside the quay is immaterial, and I think the whole area of the timber pile has to be taken into account and not merely the extreme edge nearest the ship. In this case the area extends at least 30ft. from the ship's side. I do not agree that the limit of the area remote from the ship is immaterial, and I do not accept Mr. Jowitt's contention that the cargo is to be visualized as if it were lifted from the ship in one piece and put down in one piece, so that the whole area which it covered when so deposited could be regarded as alongside the ship because it was as near as it could be. This argument is, I think, not in accordance with the facts. Nor can the result, in my judgment, be different where, as here, the defendants as receivers took, not the whole cargo, but only about one-half. The customary mode of discharge on to quay is to discharge without sorting and the location of the defendants' portion is unascertained.

I think that in a question of general mercantile importance such as this which involves the application, to conditions which for practical purposes are similar, of a common form of words in a common shipping document, it is desirable to attain to a clear and uniform rule. Lord Cave, Lord Chancellor, said in the case of *W. N. Hillas and Co., Limited v. Rederi Aktiebolaget Acolus* (*supra*), at page 68 : "Where the meaning of a commercial document in common business use has been the subject of judicial decision, it is plainly undesirable in construing a similar document to draw fine distinctions." I think that in such a case as the present of discharge on to quay the fair result of the authorities is that the shipowner has delivered alongside when the deals are released or are ready for release from the ship's tackle or are laid on the quay, and that the subsequent expense of carrying, arranging, and piling in the rough stack falls by contract on the plaintiffs.

Now the question of delivery into lighters is somewhat different and has been the subject of a separate line of cases. Mr. Le Quesne has argued that on the principles which should on the authorities be applied to discharge on quay, and which I have held should be applied, the shipowner's obligation is completed when the deals have been handed down from the ship and put on the lighter, or, if discharge is by the ship's tackle, when once the sling is released so that the deals fall inside the lighter, and that any arrangement, or, alternatively, any such stowage as the custom alleged here requires into the lighter, is at the receivers' expense as a taking away from alongside, just as much as stowing in a truck or piling on the quay has been held in the cases referred to above to be for the receivers' account. It has, however, been held in the case of *Aktieselskab Helios v. Ekman and Co.* ([1897] 2 Q.B., 83), under the same words of contract, that a custom was binding which required the

shipowner to place the timber into lighters. Apart from custom, the placing into lighters would be a joint operation, requiring the receivers to have their men in the lighter to take the goods as soon as they are within their reach. See the cases of *Petersen v. Freebody and Co.* (11 *The Times* L.R., 459 ; [1895] 2 Q.B., 294) and *Brenda Steamship Company Limited v. Green* (16 *The Times* L.R., 226 ; [1900] 1 Q.B., 518). As Lord Justice Chitty said in *Aktieselskab Helios v. Ekman and Co.* (*supra*) of the facts in that case : "The custom merely diminishes the obligation of the merchants to this extent, namely, that the timber coming over the ship's side is to be put on board the lighter by the ship's crew. When that operation has been performed, it is the duty of the merchants, in accordance with the charterparty, to take from alongside the cargo thus delivered." This is an authority binding me and fatal to Mr. Le Quesne's contention that the shipowner's part must cease when the timber is released from the sling. But the custom found in that case and said to be not inconsistent with the charterparty was to put the timber into lighters "in such a way and to such an extent that the lighters may fairly be deemed to be loaded." In the case of *Glasgow Navigation Company v. Howard* (*supra*), the custom now relied on was given effect to by Mr. Justice Hamilton. But Mr. Le Quesne points out that in that case no point was raised such as he now raises, that such a custom is inconsistent with the contract, as putting on the ship the obligation of stowing or trimming in the manner described, which he contended was an operation and expense after the ship's delivery had ceased and appertained to the receivers' obligation to take away. It is true that in that case it was not pleaded that the custom was inconsistent with the contract, nor is any direct reference made to the question in the judgment. Mr. Justice Hamilton points out the difficulty of having two sets of men in the lighter, one set being the ship's men engaged in placing the deals in the lighter, the other the receivers' men engaged in the extra nicety of trimming, and the evidence here shows that the operation of loading the lighter is treated as a single operation done in the way necessary to render the lighter seaworthy and able to carry the deals without capsizing or throwing them overboard. In *The Turid* (*supra*) Lord Sumner at page 415 speaks of the lighter as an apparatus of reception which is alongside, so also does Lord Birkenhead and at page 411, refers to the *Glasgow* case (*supra*) without disapproval, and thus explains it : "It is apparent, therefore, that the matter in controversy in the case was not that now under debate before your Lordships, but to a large extent, as the learned Judge said, the controversy was what was included in the word 'discharging' used in the documents," and in *W. N. Hillas and Co., Limited v. Rederi Aktiebolaget Acolus* (42 *The Times* L.R., 69 ; 31 Com. Cas., 59, at p. 64), Lord Justice Scrutton seems to treat the decision of Mr. Justice Hamilton in the *Glasgow* case (*supra*) as a decision that the custom was binding under the charterparty. If the lighter which is touching the steamer is treated as alongside, and the custom requires the steamer to discharge by placing the planks in the lighter, and the receivers' duty is to take away the lighter with the planks in it from alongside, the custom may properly define what constitutes the complete act of delivery into the lighter, without contradicting the contract, because the custom then merely explains what is meant by delivery. This is, I think, the reason why, in *The Turid* (*supra*), Lord Birkenhead describes this line of case as easily distinguishable from *The Turid* (*supra*), and I accept it as being the correct conclusion. I accordingly hold that as regards delivery into lighters the receivers' contention is correct and that the shipowners fail.

I must refer to two other contentions of Mr. Jowitt's. He argued that the shipowners could not rely on the custom as to delivery on the quay, not according to bill of lading sizes and marks, unless they accepted the whole custom as alleged. But I think this is erroneous. The customary mode of discharge must not be confused with a custom as to the incidence of expense. He further contended that on any view the plaintiffs could not succeed because they had paid the full expenses with express knowledge that the defendants refused to pay, and could not recover either as for damages for breach of contract or as for money paid at the implied request of the defendants. I think this contention is ill-founded. I have referred in this judgment to numerous cases where such claims as are here made have succeeded. In *The Turid* (*supra*, at p. 400), Lord Birkenhead states the claim there as being to recover damages for breach of charterparty, or, alternatively, as money paid at the defendants' request. Indeed, by the express terms of the contract the receivers have promised that the expense of taking from alongside shall fall on them, and *Fletcher v. Gillespie* (3 Bing., 635) is an express authority for a claim in a similar case, as on an implied request "for money paid in ease and for the benefit of the defendant." Mr. Jowitt relied on *Aktieselskabet Dampskibs Steinstad v. Pearson and Co.* (43 *The Times* L.R., 531), but there payment was purely voluntary ; here the documents show a protest by the plaintiffs, and there the shipowners did the extra work at their own cost, at their full volition, whereas here the plaintiffs did so because the defendants repudiated the obligation. Mr. Jowitt also relied on observations by Mr. Justice Hamilton in the *Glasgow* case (*supra*), as reported in 102 L.T., 172. But I have carefully considered these observations, and find nothing in them adverse to my conclusion on this point.

In the result the plaintiffs will succeed in that part of their claim which relates to the expense of delivery on to quay, and fail on that part which relates to delivery into lighters. It is not questioned that the expenses are apportionable, but I am relieved from deciding any question of figures.

[Solicitors—Messrs. Botterell and Roche, for Messrs. Botterell, Roche, and Temperley, West Hartlepool ; Messrs. William A. Crump and Son.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) } 1928. Feb. 9.

N. v. N.*

Divorce—Permanent maintenance—Husband's remarriage — Increased income — Settlement on second wife — Order for increased maintenance—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 190 (2) (*b*).

A man who had been divorced by his wife and whose means subsequently increased remarried and settled by ante-nuptial settlement on his second wife certain interests from the

* Reported by WILLIAM LATEY, Esq., Barrister-at-Law.

income of which he benefited by way of a joint establishment. He also had an income of £1,500 a year which was not the subject of the settlement. On an application by his former wife for increased maintenance,

Held, that it was not right to proceed on the footing that the man's income was £1,500 a year plus the income settled on the second wife, and award the former wife a third of the combined amount, but in making the award account should be taken not only of the £1,500 a year of which he had the free disposition but also of the pecuniary advantages accruing to him from the enjoyment of the joint establishment with the second wife.

This was an appeal by a divorced husband from an order by a Registrar increasing the amount of the permanent maintenance ordered to be paid by him to his former wife, the ground for the increase being that his financial position had improved.

The parties were married on September 15, 1909, and there was one child of the marriage, a son born on October 17, 1910. On April 28, 1925, the wife was granted a decree *nisi* dissolving her marriage. The Registrar in his report said that on November 13, 1925, the wife filed a petition for maintenance. She was then and continued to be in receipt of an annual income of £145 of her own. An answer and a reply to the petition for maintenance were filed. On April 26, 1926, the decree *nisi* was made absolute. On May 11, 1926, the husband, in anticipation of a second marriage, executed a document purporting to be an ante-nuptial marriage settlement on his second wife, to whom he was married on May 15, 1926. The settlement contained, in favour of his second wife, a declaration of trust of 500 fully paid £1 Ordinary shares in a limited company engaged in the export of coal by whom he was employed. On April 3, 1925, the husband had become a director of this company at a salary of £1,000 a year and became possessed of 600 Ordinary shares therein. In his answer, dated December 9, 1925, to the petition for maintenance, the husband stated that these shares were of the value of £600 or thereabouts and that he had derived no income therefrom. The company declared a dividend of 130 per cent. free of income-tax in respect of the first year's trading ending March 31, 1926, and he received £780 in dividends. This was taken into account in making an order for maintenance on November 23, 1926, whereby the husband was directed to pay the petitioner £400 per annum, less tax, and £100 per annum net for the maintenance of the child of the marriage.

On August 3, 1927, the petitioner filed a petition for increased maintenance, declaring the declaration of trust in favour of the second wife to be ineffective. On August 25, 1927, the husband filed his answer, in which he said that he received for the year ending March 31, 1927, a dividend of £612 10s. on his holding of 100 shares left to him after the ante-nuptial settlement. In that year he received director's fees amounting to £1,000 and the company made a net profit of £19,572. Counsel for the petitioner said that the income from the funds settled by the appellant on his second wife should be treated as his income, the total of which he computed at £4,300 a year. Counsel for the appellant submitted that the income from the shares settled on the second wife could not be taken into account and that the petition for increased maintenance should be dismissed. The Registrar treated the appellant as though he were in receipt of a gross annual income of £4,300, and on December 9, 1927, ordered that he should pay the petitioner £1,200 a year less tax, plus £150 per annum tax free for the child of the marriage.

Mr. Noel Middleton, Mr. H. R. Barker, and Mr. E. Riviere appeared for the appellant; Mr. Vaisey, K.C., and Mr. C. L. Beddington for the petitioner.

Mr. MIDDLETON submitted that, in view of the settlement, the 500 shares of the second wife could not be taken into account in fixing the amount of maintenance granted to the former wife. He referred to *Jagger v. Jagger* (42 *The Times* L.R., 315, 413; [1926] P., 93), in which it was held that the Court had no power to set aside an assignment of a divorced husband's property made by him in consideration of a second marriage, even if the result might be to defeat the claim of the wife petitioner to maintenance not yet actually ordered.

The PRESIDENT.—That is hardly on all fours. That was an assignment of choses in action only. My brother, Mr. Justice Hill, said in his judgment: "My decision in this case does not apply where the assignment is voluntary, *i.e.*, voluntary on the face of it, or expressed to be for a consideration which is found to be a sham."

Mr. MIDDLETON.—Lord Hanworth, M.R., said in his judgment on appeal in that case: "It must be remembered that a litigant is not entitled as of right to have his rights safeguarded before an order has been actually made on the principle of *quia timet*, and there is no disciplinary or statutory power in the Court to prevent a respondent to a petition from doing what he likes with his property before an order for maintenance has been made."

Continuing, counsel said that in the present case the whole of the appellant's separate income was barely sufficient to pay the increased amount ordered. He referred to *Hanbury v. Hanbury* (10 *The Times* L.R., 401; [1894] P., 315), in which it was held that the amount of maintenance payable by a husband to the petitioner wife must be based on the actual income which he was allowed to draw from the business in which he was a partner, although his share of the profits was larger, the difference being put to his credit in the partnership books. He submitted that the petitioner's rights were statutory and she was given no authority to order the life of her former husband after final divorce. It was never intended by the statute to increase a wife's maintenance except when the former husband's means had definitely increased. There was no restriction on his disposing of his property after decree absolute, and there had been no injunction in this case, but only an interim order.

Mr. RIVIERE read the ante-nuptial settlement, which, he said, was an assignment to two trustees in common form. The property assigned comprised a £500 life assurance policy (subject to a mortgage dated October 27, 1925, under which £175 and current interest were then owing), furniture and household effects, and the 500 shares in the company. This property was to be held upon trust for the second wife absolutely after her marriage with the appellant, "in consideration of the said intended marriage." The appellant also covenanted that any future assurance policies on his life and any shares in his company and any household effects to which he might become entitled during coverture should be similarly held by the trustees in trust for his second wife. As regards the shares the appellant became

the trustee for his wife. There were also covenants by the appellant to clear off encumbrances.

Mr. VAISEY said that this was a document of an unusual character and not of the ordinary kind for the benefit of a wife and children. The appellant continued to receive the income from the shares. If the settlement were good, a divorced husband who remarried could alienate everything.

The PRESIDENT.—No application was made for an injunction on the interim order.

Mr. VAISEY.—We did not know the facts.

Mr. VAISEY read section 190 (2) (*b*) of the Supreme Court of Judicature (Consolidation) Act, 1925, "Where . . . the Court is satisfied that the means of the husband have increased, the Court may, if it thinks fit, increase the amount payable under the order." He referred to *Bonsor v. Bonsor* (13 *The Times* L.R., 184 ; [1897] P., 77).

Mr. MIDDLETON, replying, said that the criterion must be the husband's ability to pay. Means not at his disposal or not under his control were not his means. He referred to the President's judgment in *Gilbey v. Gilbey* (43 *The Times* L.R., 283 ; [1927] P., 197) as to the principles governing the award of permanent maintenance.

It was agreed that the maintenance to be paid for the son should be £150 a year.

LORD MERRIVALE delivered judgment as follows:—

This is a case which involves the difficult considerations which constantly arise in applying principles derived from the Ecclesiastical Law, as it was administered in the Ecclesiastical Courts before the Matrimonial Causes Act of 1857 up to the state of things created by that Act and the introduction of the power of dissolution of marriage by order of the Court and the changes subsequently made in the relations of man and wife and in the relations of parties separated and parties divorced. One material consideration in this case which must be borne in mind is that the marital relation between the petitioner and the appellant has been brought to an end, and that she is not a wife who had obtained a decree of separation, *divorce a mensa et thoro,* as it was called in the Ecclesiastical Courts, and was still the wife of the man against whom she had obtained a decree. There is no marriage tie between these parties and there are not as between the parties the obligations which existed in the earlier state of the law and which were in force by decrees of the Ecclesiastical Courts. I have called attention repeatedly and I call attention again now—because I think it is most material to do so—to the fact that, in considering what is the statutory right of a petitioner whose marriage has been dissolved, in respect of maintenance out of the funds of her former husband, it will be found misleading if, by the tribunal in which the award is to be made, it is supposed that that state of things is founded upon the same facts as gave rise to a practice and an inveterate practice in the Ecclesiastical Courts whereby a wife who had obtained a *divorce a mensa et thoro* was entitled in normal circumstances to an award of something like a third of her husband's available means.

Having said that, I come to the facts in this case. The petitioner and the appellant had been many years married. There is a child of the marriage now who is said to be in his eighteenth year. The final decree of dissolution of marriage was made in 1926, rather less than two years ago, on the ground of the husband's adultery. There had been an order for alimony *pendente lite.* That is immaterial here. It was founded upon the best view that could be had of the means of the husband, and of the necessities of the wife for her maintenance pending the suit. I put that out of the case. While the cause subsisted and down to the decree absolute the petitioner was entitled to maintenance upon the terms of that order for alimony *pendente lite.* In the year 1925, three or four weeks before the decree *nisi* in the case, the husband's position in life underwent a substantial change. He had been the employee of a firm of coal brokers, who had paid him a substantial salary and who had paid him in part by salary and in part by commission. At that period, three or four weeks, as I say, before the decree *nisi,* the principal in the firm, the proprietor in the business, agreed with the appellant upon the formation of a joint stock company in which the proprietor of the business should be interested to the extent of two-thirds of the capital of £1,800 issued, out of a total of £2,000 nominal, and the appellant should be the proprietor of one-third, namely, £600 of the stock issued. The proprietor also made an arrangement with the appellant whereby he advanced the moneys. No doubt £2,000 was the working capital which was actually required, but he gave the appellant credit for the sum which was to provide him with what was virtually a one-third share in that business.

That change in the appellant's circumstances has proved highly beneficial to him. In the business as a director he began at once to receive a substantial income—director's fees as they were called—to the amount of £1,000 a year, and in the first year's working of the business it proved to be prosperous, as no doubt it was pretty sure to be, and, in addition to the £1,000, he became entitled in respect of the share which he had purchased on credit in the business, as I have indicated, to dividends amounting to £612. At any rate £1,000 was subject to income-tax, and as to the £600 odd there is some question. But he was earning that sum in the year 1925-26. It might be said that at that time he had an assured income of probably not less than £1,500 a year available to him. In that state of the case in November, 1926, before the results of the year's working had become known but when the conditions in the company were ascertained and it was apparent that it was a company which would do well, the petitioner applied for an order under the Act of Parliament for permanent maintenance. It was not an application for an order for security under the provisions incorporated from the Matrimonial Causes Act of 1857. It was an order for maintenance under section 190 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925. The application then being made, the learned Registrar made an order for maintenance at the rate of £400 a year less income-tax, and for an allowance of £100 free of income-tax for the maintenance of the one child of the marriage, a boy who was then about 16 years old.

In the year 1926-27 the joint stock firm had a very prosperous year. Their balance-sheet has been produced. They divided a very large sum in dividends, and they made substantial investments, and the result of the matter was that the appellant's share in the business, speaking of it as his share, intact at present—that which had been his purchased share in the business together with his earnings as a director—represented an income of something like £4,500 a year. These are not accurate figures ; they are round figures which have been used in the discussion. If he had the same proprietary rights in 1926-27 which he had had at the foundation of the company, he would have been a man with an income

of £4,500 during that year, but in addition he would have had his interest, to an extent of a third, in the capital which he and his co-director had carried to reserve and which was of a gross value of something like £12,000. Therefore, if the property in these subjects had remained his, or did remain his, there he was with earnings which appeared at a face value of something like £4,500, and a proprietary interest in reserve in which he and one other person were concerned, in which his interest, if it remained his own, would have been a third, that is to say, a capital sum of £4,000. The petitioner, having become aware of the good year which the joint stock business had had in the year 1926-27, proceeded under section 190 (2) (*b*) of the Supreme Court of Judicature (Consolidation) Act, 1925, to apply, the means of her husband having increased, that the amount payable under her maintenance order should be increased, and what she said was that the prosperous conditions to which I have referred should be the ground of an increase of the order for her maintenance proportionate to the prosperity of her husband's share in the business.

When the facts come to be examined a curious state of things is brought to light. It was known between the parties that immediately after the decree absolute had been made the husband had remarried, and it is known now that upon that marriage by an ante-nuptial settlement he had apparently, as far as was practicable to him, put under the absolute control of the lady who became his wife everything he had which was disposable, and he had also covenanted to assign to the wife *in futuro* policies of insurance and other interests which he might thereafter acquire. Looking at the settlement, it is not uncharitable to suppose that the author of it realized what the situation was, as between the appellant and the wife at whose suit he had been divorced, and that it was intended by that settlement to secure the appellant from claims of the petitioner in this suit in respect of a prospective improvement in his position of life. I myself am not surprised that it is pointed out that the settlement is of a singular kind, and that the object in view seems to be that the appellant, though at some risk to himself, should continue to enjoy all the advantages of any wealth he might acquire, but that by being at the absolute disposal of his intended wife, the lady whom he married, it should be safe from any attack on the part of his previous wife. That settlement was made and it is produced and relied upon.

It is said on the part of the husband that the settlement must either be impeached in point of law and got rid of, or it must be treated as a fact. It is said that, if it is to be got rid of, that must be done in the ordinary course of law, and the husband and his present wife, the lady in whose favour the settlement was made, must be brought into Court, and the settlement must be tested upon such evidence as can then be procured. If it is a secret trust, or if it is a fraudulent transaction, or if it is said that the transaction is against public policy, then let that be declared in a suit in which there are the proper parties. That is not so in this case, and it is conceded that the settlement must be taken, at any rate for the purposes of this inquiry, as a valid settlement, but it is said that, although there is a settlement here, it must be examined and it must be seen whether in truth the means which the husband had before he disposed of them in the way in which he purports to have done are not still his means.

The contest has waged chiefly around those provisions of the settlement which vest in the husband as trustee for the wife his proprietary interest in his shares in the joint stock company, or five-sixths of them. It is said on the husband's part that, if that stands, the dividends paid in respect of those shares are dividends belonging to the wife; the husband is merely trustee of those dividends for the wife. That is so. I am not going to pursue the matter with regard to the furniture in possession, the furniture hereafter to be acquired, and the insurance policy of £500 subsisting and any insurance policies in which the husband might hereafter be interested. They were chiefly used as ammunition for an attack upon the settlement, and, as it was said, not to cause it to be set aside, but to lead the Court to come to the view that the substantial interest in the whole of the assets affected by it remained in the husband. The settlement is an effectual settlement. The husband's receipts from 500 of the shares which he held in the joint stock concern were effectually transferred in equity to the wife; they are her property. The chattels in the house are held by trustees for her and the other interests which were effected are held in trust for her.

In that state of the case, with an effectual transfer of the husband's property to the extent to which it is transferred by the settlement, two questions have to be faced upon the wife's application. First of all, has there been an increase of the means of the husband since the award of maintenance of £400 a year was made, and, if there has been such an increase, how ought it to be reflected in the increased award, and to what extent has the Court jurisdiction to increase the award by reason of the improved position of the husband in the state of facts brought about by his own acts. It was contended by Mr. Middleton that there was not in truth an increase of the husband's means, meaning thereby faculties or ability, and that it was contrary to the principles laid down in the authorities which bind a Judge sitting here to hold that there had been an increase in his means. It was said that by effectual legal process he had divested himself of funds which would otherwise have been his, and the Court must take that into account. It is true that he has effectually divested himself, at any rate, for the time being, of his control over assets and his interest in assets which would have been his. What effect does that have? The Ecclesiastical Courts showed a decree of practical wisdom which well justified their existence and which anybody who considers their proceedings will attribute perhaps to the fact that those who conducted what were called Ecclesiastical proceedings were very learned lawyers skilled in civil law. They were not misled by appearances. When they considered what maintenance in the old times for the purpose of their decree—I safeguard myself again there—a husband should provide for a wife from whom he was separated by a decree of the Court, they looked at the realities. It is quite true that if he became voluntarily a pauper, or if he entered into religious orders in another Church and divested himself of his means, it might have been said that he had nothing. So far as I am aware there is not a case in which the Judge in the Ecclesiastical Courts had to deal with that kind of respondent. They were more worldly-minded.

But this emerges: The Court not only ascertained what moneys the husband had, but what moneys he could have if he liked, and the term "faculties" describes the capacity and the ability of the respondent to provide maintenance. And the thing went to this extent, that if a man were living at ease, upon

an income which was given him voluntarily by other parties, that income could be taken into account. And it went further than that : If a man were living in idleness and chose to refuse to earn money, his faculties were not treated as non-existent for that reason. The Court considered, having regard to the substance of the matter, what was the ability of the respondent to provide for the wife, and it made its decree while the relation subsisted upon the footing, which came to be almost stereotyped, that a wife separated from her husband by decree was entitled *prima facie* to about a third of his income in normal cases.

I have to consider this case bearing that in mind, but bearing in mind, too, that I am not here administering Ecclesiastical law. I am here applying the Act of Parliament of 1857 as it is reproduced in the Supreme Court of Judicature (Consolidation) Act, 1925, and I am dealing with the case of a woman who has procured a dissolution of her marriage, and I conceive that I must take into consideration the position in which they were and the position in which she was entitled to expect herself to be and would have been, if her husband had properly discharged his marital obligation, but I have no obligation cast upon me to ascertain what resources the husband at present has, and what mathematical proportion of them would have been assigned by an Ecclesiastical Court to a wife separated by a decree. I have no such task. What I have to ascertain is, the wife applying for an order for payment of moneys periodically for her maintenance and support, whether there has been an increase of the husband's means since a prior order, and what, having regard to her fortune and to his ability, and the conduct of the parties, the Court deems reasonable by way of an increased order. That is the problem to which I have to apply my mind and I put out of the case all the considerations which arise by reason of the fact that in an Ecclesiastical Court a wife separated by decree received normally one-third of the amount of her husband's income.

When I examine the order which is sought to be maintained on the part of the petitioner here, I see that it is an order which proceeds on the footing of the old Ecclesiastical practice, and upon the footing also that it may be expected that the income attributed to the husband which he could have had in 1926-27 if he had not made the settlement in question is to be taken into account in determining his ability to pay. The income which he could have had is spoken of as about £4,500 and the amount which has been awarded for the maintenance of the wife is very nearly as great as the net amount—it is something like three-quarters or four-fifths—of the moneys which in fact come to the appellant out of the joint stock concern. It is seen when that is examined that it proceeds upon the basis that the measure attributable is that which was applied in the Ecclesiastical Courts as between a husband and a wife who remained husband and wife. As I said, I put that aside.

It is seen, too, that the husband's means are treated as being the whole value of his earnings, and the interest which he originally had in the joint stock concern. It has ceased to be so. He has his earnings, £1,000 a year, he retains 100 shares, and he has a sixth of the dividends, but this exceptional year of 1926-27 in which, as is very reasonably pointed out in the appellant's evidence, people in his business were sure, or at least very likely, to get a very large excess of profit by reason of the peculiar circumstances of that year, has been taken as the basis of the order, and it has been left to the husband to get it reduced hereafter, if he can, by showing that his means have decreased. It seems to me that those are errors and I must bear that in mind, in considering what ought to be done.

What is it to which the wife here is entitled ? Has she shown there was an increase of the means of the husband ? In my opinion she has. He had in that year 1926-27 an income which came to him not very far short of the income which came to him in the year 1925-26. He had an income something like £1,500 a year. In the previous year it had been in that region—perhaps £1,600—but an income not far short. But he had something more. He had made a settlement on his wife, determinable, as has been pointed out, by agreement between them, whereby the other £3,000 which he earned—or something like that sum—call it X—was placed at the disposal of the wife. The matrimonial home was also vested in her, and the evidence is that he was sharing the advantages intended to be secured and in fact secured by settlement. There was provision for a joint establishment upon the footing of an income of £3,000 a year, or thereabouts, and the appellant, as of right, was enjoying the establishment so provided. It is said that I ought to put that out of the case, and that that is not an increase of the means or the abilities of the husband. It is quite true that it is not an increase of the money which comes to his bank account, but it provides for a large part of the expenses which fall upon him for livelihood and for maintaining his position in life, and it leaves free the sum which I called £1,500 a year—call it Y—to be dealt with by the Court, having regard to the increase in his means. Here is a divorced husband who has the substantial advantage of having his home provided for and secured from many vicissitudes by the ante-nuptial settlement into which he has entered, and, in addition to that, of moneys which come to him, to the extent, as is said, of £1,500 a year.

The real question is, in view of that increase in his abilities and bearing in mind that these persons were divorced before that improvement occurred, what ought to be done ?

The learned Registrar, as I have said, proceeded on the footing that it was a case for disregarding the settlement and for an award upon the footing of the old authorities in the Ecclesiastical Courts. I put that aside. That does not affect the award in respect of the child. I am happy to say that it has been agreed that the award of £150 a year in respect of the child shall be maintained. The question comes to be whether, in view of this increased means of the husband, something ought to be added to the £400 a year out of the free moneys which are at the husband's disposal, and whether something ought to be added notwithstanding that the parties have been divorced. I come to the conclusion that something ought to be added. Here is an income which has been treated as being £750 a year. Here is an interest in a great business. Here is great business capacity. All of these are advantages to which the wife during the marriage, the petitioner, was legitimately entitled to look forward. They are not accidental accessions of fortune. They are benefits which have arisen during the course of years, and by the development of the husband's faculties and position he has got the sum which has been spoken of as available.

What I propose to do, dealing with this matter on the principles I have indicated, is to direct that the permanent maintenance to be provided for the wife by the husband shall be £750 less income-tax, and the

maintenance to be provided for the son of the marriage shall be by consent £150 a year, free of income-tax.

Mr. MIDDLETON.—Then it will be £750 subject to tax over and above the £145 a year income which the first wife herself has, as from August 3, 1927 ?

The PRESIDENT.—Yes. The petitioner must have her costs.

[Solicitors—Messrs. Indermaur and Brown; Messrs. Waterhouse and Co.]

K.B. Div. (Rowlatt, J.) 1928. Feb. 23.

FRENKEL v. MACANDREWS AND CO., LIMITED.*

Ship—Bill of lading—Deviation clause—Extent of protection given to shipowners.

The plaintiff at Malaga shipped on a steamer of the defendants goods to be carried from Malaga to Liverpool. The bill of lading contained, *inter alia,* a deviation clause : "with liberty to touch at any ports whatsoever although they may be outside the route without it being considered a deviation." A vessel going direct from Malaga to Liverpool would turn westward on starting from Malaga, but the steamer in this case on leaving Malaga went eastward with the intention of picking up more cargo at Cartagena before going to Liverpool. Between Malaga and Cartagena the steamer met with bad weather, and some of the plaintiff's goods were lost. The plaintiff claimed damages, but the defendants contended that exceptions clauses in the bill of lading protected them from liability. The plaintiff answered that the steamer had deviated from the contract voyage, and that therefore the exceptions clauses did not apply.

Held, that although the deviation clause would have authorized the steamer to call at ports on either side of the contract route it did not justify the defendants in beginning the voyage by going in a direction opposite to the direction of the contract route, and that as there had been a deviation from the contract route the defence failed.

The plaintiff in this case claimed a sum of £2,293 in respect of the loss of olive oil sent from Malaga for carriage to Liverpool on a steamship, the Cervantes, belonging to the defendants.

Mr. Dunlop, K.C., and Mr. Stranger appeared for the plaintiff ; Mr. Clement Davies, K.C., and Mr. Cyril Miller for the defendants.

The points raised in the pleadings were as follows : The plaintiff was the owner of 134 barrels of olive oil shipped on the defendants' steamer Cervantes at Malaga under two bills of lading dated April 11, 1927, one for 110 barrels for delivery *via* Liverpool to Bradford and the other for 24 barrels for delivery at Liverpool. The plaintiff stated that the goods were shipped in good order and condition and were not so delivered, and he therefore claimed damages. Alternatively he said that the damage was due to negligent stowage or to the unfitness of the ship to carry the goods because she had no sufficient means of securing the barrels or preventing them from breaking.

By their defence the defendants admitted the title of the plaintiff, but did not admit that the barrels were shipped in good order and condition. They said that the bills of lading provided, *inter alia,* "not responsible for weight, contents, value, spiles, leakages, nor breakages." Alternatively they pleaded that if, as was not admitted, the damage was suffered as alleged, they were not liable by reason of the following provisions of the bills of lading :

"The ship is not answerable for loss damage or injury by . . . negligence or default of the captain crew . . . servants agents or other persons . . . leakages, breakages . . . wetting by rain or sea water . . . damage by contact . . . weakness of packages . . . accidents through defects of hull gear tackle . . . or any other accidents whatsoever, perils and risks of seas and rivers or navigation by steam.

"The responsibility for loss detention or injury will be limited to the original cost of the goods always provided that this does not exceed 50 pesetas per package . . . unless its contents and value have been declared in the bill of lading and proportionate freight paid.

"The ship is not responsible for any risk which may be an insurable one. Any claim . . . must be notified in writing . . . within 48 hours of the discharge of the package . . . if not, all right to claim will be forfeited.

"Ship not responsible for leakage.

"Ship not responsible for loss damage or pilferage of goods which can be covered by insurance."

Alternatively they pleaded that the damage, if any, which was not admitted, was caused by perils of the seas, in that after sailing from Malaga on April 11, 1927, with the barrels of oil the Cervantes met a gale on April 12 and owing to the violent motion of the vessel the barrels broke loose and could not be secured, and some of the oil was lost. The weather remained very bad until on April 14 the vessel reached Cartagena. The rest of the oil was discharged and sold there, and the plaintiff did not, as required by the bills of lading, make a claim with regard to it within 48 hours from the completion of the discharge. Alternatively, the plaintiff did not declare the value of the oil and the maximum liability of the defendants must be 50 pesetas per package. Alternatively the defendants were not liable at all because the damage could have been covered by insurance. Alternatively the oil was properly discharged and sold at Cartagena by the defendants as agents of necessity or at the implied request of the plaintiff, and the defendants paid the proceeds of the sale into Court.

By his reply the plaintiff pleaded that after loading the plaintiff's cargo, the Cervantes, without justification, deviated from the contract voyage and the perils of the sea were met with after the unauthorized deviation, and therefore the defendants could not rely on the provisions of the bills of lading.

By a rejoinder the defendants pleaded a clause in the bills of lading :

". . . With liberty to touch at any ports whatsoever although they may be outside the route without it being considered a deviation . . . to discharge, reload, trans-ship, send to destination by any means of

* Reported by W. B. THOMPSON, Esq., Barrister-at-Law.

transport, all responsibility of the ship ceasing on discharge from deck."

They also said that the damage would have occurred whether the steamer had deviated or not, and that in fact the voyage made by the Cervantes was an ordinary business voyage as usual in the trade and was not a deviation at all.

Mr. DUNLOP, in opening, said that the main point of the case was whether there had been a deviation. The voyage was specified as from Malaga to Liverpool, and by the construction which had been given by the Courts to deviation clauses any permissible deviation must be such as would be allowed on the route of that voyage. The vessel on starting from Malaga, instead of turning west towards Liverpool, turned east into the Mediterranean, and she never therefore began the contract voyage at all. There was a second point in the case, that the vessel was unseaworthy owing to the fact that she had not the necessary fittings by which the barrels could have been secured and prevented from falling or rolling about.

On the question of deviation he referred to *Leduc and Co. v. Ward* (4 *The Times* L.R., 313 ; 20 Q.B.D., 475) ; *Glynn v. Margetson and Co.* (9 *The Times* L.R., 437 ; [1893] A.C., 351) ; *White v. Granada S.S. Company, Limited* (13 *The Times* L.R., 1) ; *United States Shipping Board v. Bunge and Born, Limited* (42 *The Times* L.R., 174) ; and *The Dunbeth* ([1897] P., 133). The power to deviate "outside the route" only amounted to a power to turn to the right or to the left when on the route of the voyage ; here the vessel started from Malaga in the opposite direction and was never on the route at all. The "route" was a line between two points, and when on that line the ship could call at points on either side of it ; but the beginning and the end of the voyage must always be on the route.

He referred also to *Evans, Sons and Co. v. Cunard Steamship Company, Limited* (18 *The Times* L.R., 374) and said that that was an exceptional case and turned on the question what was the agreed voyage ; the question of deviation did not really arise there. In *Hadji Ali Akbar and Sons, Limited v. Anglo-Arabian and Persian Steamship Company, Limited* (22 *The Times* L.R., 600) the deviation clause authorized deviation in three directions, but in this case the clause only authorized deviation in one direction. Leave to go outside the route did not mean leave to go in the opposite direction. This case was similar to *T. M. Duché and Sons v. Owners of Steamship Maria* (3 Ll. L., 184). If there was a deviation the shipowner would be liable, even when the damage occurred before the deviation took place.

In any event, if there was an ambiguity about the deviation clause here the clause must be construed against the shipowners relying on it. And evidence that the defendants' ships regularly did what the ship did in this case would not be admissible because that would be attempting to vary by parol evidence the contract in the written bill of lading.

On the question of unseaworthiness, he submitted that the fact that the ship had not appliances for holding the barrels firmly constituted unseaworthiness for the purposes of this particular cargo.

Evidence for the plaintiff having been called,

Mr. CLEMENT DAVIES, for the defendants, called evidence to show that on this voyage the ship followed the usual procedure. The ships of the defendants' line were engaged in the Spanish coastal trade and called at many ports, discharging and loading cargo from and to Britain. The storm began on the early morning of the day after the ship left Malaga and was of extraordinary violence ; the ship got out of control and lay with the wind and sea abeam, straining, labouring, and pounding, and the cargo broke loose.

Evidence was also given as to the way in which the cargo was stowed.

Mr. CLEMENT DAVIES submitted that there was no evidence of unseaworthiness ; if anything wrong was done at all it was bad stowage, but he submitted that what happened was due to perils of the sea and there was not even bad stowage. That being so, the defendants were protected by the conditions in the bill of lading unless they had lost that protection by deviating from the contract voyage. Whether there had been a deviation or not depended on the wording of the contract. Originally, when there was no deviation clause in bills of lading, a ship was bound to go direct from the loading port to the discharging port (*Davis v. Garrett*, 6 Bing., 716). Then shipowners inserted a clause giving liberty to call at any port or ports in any order, but the Courts held that that only authorized calling at ports on the route of the contract voyage (*Leduc and Co. v. Ward, supra* ; *Glynn v. Margetson and Co., supra*). Then the shipowners inserted "whether on the route or not," and on that they were at last successful (*Evans, Sons and Co. v. Cunard Steamship Company, Limited, supra*). The case of *T. M. Duché and Sons v. Owners of Steamship Maria* (*supra*), relied on by the plaintiff, was distinguishable, because the ship there was not running in a regular line, on a customary route which was well known to every one at the port of shipment. Here, he submitted, the regular practice of the defendants' steamers was to follow the route taken in this case, and there was in fact no deviation at all ; but, if it was necessary for the defendants to rely on the liberty to deviate, they had not exceeded their right. The wording of the bill of lading in this case was practically identical with that in *Evans, Sons and Co. v. Cunard Steamship Company, Limited* (*supra*) and *Hadji Ali Akbar and Sons, Limited v. Anglo-Arabian and Persian Steamship Company, Limited* (*supra*). In *Morrison and Co., Limited v. Shaw, Savill and Albion Company, Limited* (32 *The Times* L.R., 712 ; [1916] 2 K.B., 783) there was a wide liberty of deviation in New Zealand but not between New Zealand and London, and the loss occurred in the English Channel. The liberty given to deviate in *United States Shipping Board v. Bunge and Born, Limited* (*supra*) went no farther than that in *Leduc and Co. v. Ward* (*supra*) and was not as wide as in this case. *Foreman and Ellams, Limited v. Federal Steam Navigation Company, Limited* (44 *The Times* L.R., 250) was a case with a wide deviation clause and Mr. Justice Wright, at page 252, discussed the effect of it in a business sense.

The plaintiff relied on *T. M. Duché and Sons v. Owners of Steamship Maria* (*supra*), but he (counsel) had obtained the papers in that case and found that the bill of lading was not being used by a regular liner but by a small Spanish steamer making a single voyage, and in the translation from the Spanish the important word "whatsoever" was omitted in the bill of lading. The effect of "whatsoever" was shown in *Joseph Travers and Sons, Limited v. Cooper* (30 *The Times* L.R., 703 ; [1915] 1 K.B., 73) and *Reynolds v. Boston Deep Sea Fishing and Ice Company, Limited* (38 *The Times* L.R., 429). The contention of the plaintiff would give no meaning to the words "outside the route."

Mr. DUNLOP replied, and submitted that if the barrels had been properly secured the damage would

not have been suffered. It was not a mere case of bad stowage.

On the point of deviation he was not called upon.

MR. JUSTICE ROWLATT stated the facts and said that the plaintiff based his claim on the two grounds of unseaworthiness and deviation. As to the first point, he held that the evidence did not show any unseaworthiness, and on that he decided against the plaintiff. The real point of the case was the deviation. The plaintiff had shipped goods by the defendants' steamers for many years and knew that they went to ports up and down the coast, but the case was different from *Evans, Sons and Co. v. Cunard Steamship Company, Limited* (18 *The Times* L.R., 374) because there the only route taken by the steamers was known to be away from the ultimate destination, whereas here it might be either away from or towards the destination. Many cases had been cited, but in *T. M. Duché and Sons v. Owners of Steamship Maria* (3 Ll. L., 184) this same bill of lading had been before Mr. Justice Hill and he had held that a precisely similar deviation was not authorized. He (Mr. Justice Rowlatt) felt that he ought to follow that decision. It was argued that in that case in the translation of the bill of lading the word "whatsoever" had been improperly omitted and that this case was therefore distinguishable, but he could not assume that the learned Judge there was misled. Probably he had the original Spanish document before him.

Judgment must therefore be for the plaintiff, but the defendants must have the costs on the issue of seaworthiness.

A stay was granted on terms.

[Solicitors—Messrs. Middleton, Lewis and Clarke; Messrs. Richards and Butler.]

Judicial Committee of the Privy Council. (Viscount Haldane, Lord Shaw of Dunfermline, and Lord Carson.) — 1928. Feb. 24.

UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION (INCORPORATED) AND OTHERS v. MORTER.*

Will — Bequest to association — Validity — Objects of association—Whether shown to be unlawful.

The Board upheld the validity of a bequest to the Universal Negro Improvement Association for the African Redemption Fund on the ground that the objects of the association had not been shown to be unlawful.

This was an appeal from a judgment of the Chief Justice of British Honduras with reference to the validity of certain bequests to "the Parent Body of the Universal Negro Improvement Association, for the African Redemption Fund," which the Chief Justice had held to be invalid.

Mr. Gavin Simonds, K.C., and Mr. Wilfrid M. Hunt appeared for the appellants; Sir T. Willes Chitty, K.C., and Mr. Roger S. Bacon for the respondent.

VISCOUNT HALDANE delivered the following judgment of the Board:—In this case the learned Chief Justice of British Honduras who tried it had a difficult task, arising out of somewhat obscure materials. But their Lordships think that his judgment ought not to stand.

The first appellant is a corporation that is a beneficiary under the will dated February 15, 1924, of one J. E. Morter, a planter at Belize in British Honduras, who died on April 7 in the same year. The second appellants represent other societies, also interested as beneficiaries, who were made defendants (along with the first appellant). The respondent, as plaintiff, commenced an action against the executors and trustees of the will to set it aside. She was the widow of the testator and claimed administration on the ground of intestacy, and, alternatively, a declaration that certain of the devises and bequests in it were void. The executors and trustees have not appeared in this appeal.

The testator, by his will, devised and bequeathed the residue of his real and personal estate to the Parent Body of the Universal Negro Improvement Association, for the African Redemption Fund. It is not in dispute that if this be a valid gift the first appellant may be taken as representing the Parent Body of the Universal Negro Improvement Association named in the will, a conclusion which is in accordance with the finding of the learned Judge who tried the case. The point was taken for the respondent that the description of this beneficiary was so vague as to make the gift void for uncertainty. Their Lordships think that Chief Justice Sisnett was right in holding on this point that, if the gift was a valid one, the beneficiary had been identified as representing the first appellant, and that there is a direct gift to it for the Redemption Fund without the constitution of a formal trust. The real question of difficulty is whether the objects of the appellant association were such as to render the gift to it in the will void for illegality.

In considering this question it is necessary to look at the constitution of the first appellant. This was a body incorporated in the State of New York on June 17, 1918. The purposes expressed in the certificate of incorporation were to promote and practise the principles of benevolence, and for the protection and social intercourse of its members, and for their mental and physical culture and development, and to extend a friendly and constructive hand to the negroes of the United States. So far the purposes were *prima facie* free from illegality. The territory in which its operations were to be principally conducted was that of United States territories and possessions. The principal office was to be at an address in the city of New York.

On July 26, 1918, there was also incorporated under the business corporation law of the State of New York a stock corporation for purely business purposes with its principal office also in the city of New York. It was called the African Communities League, and the stockholders were in the main the same persons as those already incorporated as the Universal Negro Improvement Association. There is nothing in the declared purposes of either of these bodies that is contrary to British law. A branch of the association and of the league was, on March 15, 1920, formed in British Honduras.

There was a printed book which was put in evidence. It is called the "Constitution and Book of Laws" made for the government of the Universal Negro Improvement Association, Inc., and the African Communities League, Inc., of the World, and it has been repeatedly re-issued since 1918. It defines these bodies as founded by persons desiring

* Reported by SIR W. J. SOULSBY, Barrister-at-Law.

to work for the general uplift of the negro peoples of the world. There was also a voluntary society called the Universal Negro Improvement Association and African Communities League, which the learned Chief Justice found to be the body intended by the testator under the description of the Parent Body of the Universal Negro Improvement Association. This body consisted of much the same persons as those incorporated, and was also subject to the Constitution Book. The book, at the end of article 13, purports to enable the raising of a fund from all negroes for the purpose of the redemption of Africa. The purpose of the fund was to be to create a working capital for organization, and to advance the cause for the building up of Africa. There was to be a Potentate and Supreme Commissioner of negro blood who was constitutionally to control all the affairs of the association and league, and of all other societies. He was to form an executive council to assist him in his administration. There were to be divisions, and each when created was to elect its own officers, with the approval of the President-General.

So far all that was provided was harmless, but later on in the book were contained rules and regulations for Universal African Legions of the association and the league. These laid down that there should be an auxiliary body formed out of the members, to be designated the Universal African Legions. They were to prepare men for service by teaching them military skill and discipline, and by registering them according to the various trades in which they had been trained. The men, with their officers, were to be organized as an army and to be under military discipline, and to obey the Potentate, and so behave as to secure that "God's divine purpose" might be accomplished in the freedom of all mankind from slavery and despoliation, and to bring about the success of the cause of the redemption of Africa.

One Marcus Garvey, who had been connected with the first appellant from the beginning, had become its President-General, and had been elected and styled "Provisional President of Africa." He had made speeches in New York, and had published them in a book. "We are not," he appears to have said, "engaged in domestic politics, in church building, or in social uplift work, but we are engaged in nation building." What they sought, he went on, was independence of government, with one President in Africa. They would fight for this, as black American citizens, as black British subjects, as black French, or Italian, or Spanish citizens, in response to the cry of their fathers for the redemption of their motherland, Africa. They might yet run out, among others, General Smuts, as other rulers had been expelled. The black man's back was to the wall, and he was going to show the teeth of the tiger. About this four hundred million negroes were determined.

The purposes so expressed were, the learned Chief Justice found, to be the principal and ultimate object of the fund, and it may well be that Mr. Marcus Garvey, who was apparently of negro descent and an impassioned person, when he spoke so expressed the views of many other members of the association besides himself. But the objects laid down in the speeches do not appear to be set out in the constitution of the association. Had they been so, it may well be doubtful whether the authorities of the State of New York would have permitted the incorporation. Moreover, it is significant that although the association had its head office in New York City, where its domicile must be taken to be, and appears to have courted publicity, no step had been taken by the State authorities to interfere with it. But the police appear to have been watchful, for it seems that Marcus Garvey personally was, indeed, prosecuted and convicted for using the United States mails for obtaining money by false pretences from the members of the negro race. But the association was not interfered with by the American Government, notwithstanding the statements made by Garvey which have been quoted. The Government may have taken the view that these statements were not to be regarded seriously, and were of no importance. The authorities appear to have incorporated the bodies concerned, and then to have taken no step towards treating them as having been originally or having become illegal on account of their purposes.

Their Lordships desire to guard themselves from its being supposed that they in any way question the principle that a provision made in a will or contract can stand if under it a fund is given for purposes some of which are illegal, with no provision for separating these from other purposes which are valid, or for apportionment. But it is not every use of words that is to be taken seriously. Here it is important to observe that the authorities of the place where the Association had its headquarters and had been incorporated do not appear to have treated the language used in the published book of Garvey's speeches as of a serious character, such as to warrant proceedings on the ground of illegality. The bodies concerned, and particularly those incorporated, had certain purposes which were, so far as they went, charitable and legal. It was only in virtue of the Constitution and Book of Laws and in the speeches of President Garvey that these objects were extended to matters which might be objectionable in the eye of the law. Whether such illegally expressed utterances were to be taken as seriously intended or as more than exuberant oratory of a kind which is not uncommon in public places is, in their Lordships' opinion, a question not only for the laws of the State of New York, but, of course, also for those of every country in which consideration has to be given to the true intent and meaning of a bequest which is to receive effect within its territory. No action within the New York State is no doubt a circumstance to be taken into consideration, and their Lordships see no more occasion for attaching a seditious meaning to high flown language than did the American authorities.

It is to be observed, further, that at the trial of the action no evidence of New York law was tendered to prove what in a British Court was only an allegation of fact—the illegality of the objects of the New York Associations.

Their Lordships think that in the absence of such evidence the learned Chief Justice Sisnett went too far when he held that it had been proved that the association and the South African Redemption Fund had been shown to be bodies incorporated for illegal objects. It is not improbable that the course taken by the American authorities, with whom the decision of this question primarily rested, was the wise one. They simply took no notice of the association, although it was performing its charitable functions at least publicly and was paying large salaries to its officers. Apparently they did not treat the belligerent ideas as so seriously or definitely put forward that the law would take cognizance of them as threats to commit crime. If that be right, this fund ought not to be treated as one which a foreign Court can regard as unlawful.

Upon this footing the other point made at the

Bar does not arise. It was said for the respondent that a new trial cannot be obtained unless a motion to that effect is made within a limited time in the Court below. Their Lordships do not think that this is an application for a new trial within the Rules of Procedure of the Supreme Court of British Honduras which contain the provision. The whole materials are before them, and the question is one of law simply, appearing on the face of the judgment.

They will humbly advise his Majesty that the order of the Court below should be discharged, and that the action should be dismissed. The learned Judge directed, after careful consideration, that the costs of the plaintiff and of the executors as between solicitor and client should be allowed out of the estate, and that similarly the defendant association should be allowed half of their costs out of the estate, again as between solicitor and client. It was the looseness of the testator's directions which gave rise to the litigation, and their Lordships think that this order was right and should stand excepting that the defendant association and the other appellants should now have the whole of their costs out of the estate. As regards the costs of this appeal, all the parties who have appeared should have their costs out of the estate, but only as between party and party.

[Solicitors—Messrs. Withall and Withall ; Messrs. Norris, Allens and Co.]

Chan. Div. (Eve, J.) 1928. Feb. 24.

RICHARDSON v. ABERTILLERY URBAN DISTRICT COUNCIL. THOMAS v. SAME.*

Education—Local education authority—Education committee—Powers—Delegation to sub-committee — Non-provided schools—Dismissal of teachers by sub-committee—Whether delegation *ultra vires*—Education Act, 1921 (11 and 12 Geo. V., c. 51), ss. 4, 148 (1).

The plaintiffs were employed by the defendants, a local education authority, as assistant teachers in non-provided schools and were subject to a month's notice. Owing to financial difficulties the defendants, considering the matter to be urgent, appointed a sub-committee with plenary powers to carry out measures of economy, and the education committee of the defendants handed over their powers in the matter of economy to this sub-committee. A month's notice was given to the plaintiffs by the sub-committee, and they brought actions against the local education authority and each moved for an interlocutory injunction restraining the defendants from attempting to enforce the notice. The ground on which the plaintiffs moved was that under s. 4 of the Education Act, 1921, the defendants had acted *ultra vires* in delegating their powers under the Act to the sub-committee.

Held, that under s. 4 of the Act both the local education authority and their education committee had a right to delegate their powers, and the motions failed.

His LORDSHIP heard motions by Mr. Worthy Richardson and Mr. John James Thomas, the plaintiffs in these two actions, raising questions as to the power of a local education authority to delegate their powers of dismissing teachers to a finance sub-committee. The two motions were, by consent, heard together. In each the plaintiff asked for an interlocutory injunction that the defendants, their servants and agents

"be restrained from dismissing or purporting to dismiss the plaintiff from his office as assistant master in the [Blaentillery Mixed School] until his engagement as such assistant master shall have been duly and lawfully determined and from in any way acting on a notice dated January 31, 1928, served on the plaintiff by or on behalf of the defendants and purporting to terminate his said engagement or attempting or purporting to enforce the same or any alleged right thereunder until judgment or further order."

Mr. C. E. E. Jenkins, K.C., and Mr. R. F. Roxburgh appeared for the plaintiff Richardson ; Mr. F. H. Maugham, K.C., Mr. J. B. Melville, K.C., and Mr. R. H. Hodge for the plaintiff Thomas ; Mr. Upjohn, K.C., and Mr. A. C. Nesbitt for the defendants.

Mr. Richardson's affidavit stated that he was a trained certificated teacher, and that, on July 1, 1922, he was appointed to the teaching staff of the education committee of the defendants, as local education authority, as from August 29, 1922, at a salary in accordance with Standard Scale III. of the Burnham Scale of Teachers' Salaries, and subject to his engagement being terminable by one calendar month's notice to end on the last day of the month. On August 29, 1922, the plaintiff took up his duties as assistant master at the Blaentillery Mixed School and had held that post ever since, and claimed to hold the same at the present time. On January 31, 1928, he received a notice of that date, purporting to terminate his appointment on February 29, 1928. That notice, the plaintiff alleged, was not served on him in pursuance of any resolution of the local education authority or the local education committee, but by and in pursuance of some resolution of a body called the sub-finance committee, which had no power to cause such notice to be served.

Mr. Thomas's affidavit, in addition to setting out his appointment and the notice served, referred to the delegation of certain of the local education authority's powers to a finance sub-committee which resolved, on giving notice, to determine the engagements of all head and assistant teachers in their area.

Mr. UPJOHN, before reading the defendants' affidavit, said that the reason why there were two actions was that there were two wealthy trade unions which thought that they would like to spend a little of their money in litigation.

In an affidavit sworn by Mr. Sydney Pask, chairman, Mr. William Francis Walters, and Mr. Henry Theophilus Spencer, councillors, of the defendant council, it was stated that, before the close of 1927, the council, owing to its heavy commitments in the carrying out of its statutory powers and duties, got into financial difficulty and applied to the Ministry of Health for sanction of a loan by way of overdraft. The funded indebtedness of the council was already considerable ; the rates for 1927-8 were 26s. 4d. in the pound in one of the two parishes in the area, and 24s. 5d. in the other, exclusive of a water rate of 7½ per cent. on the gross annual value

* Reported by J. W. HALL, Esq., Barrister-at-Law.

of premises supplied. The collection was largely in arrear.

The Ministry of Health was not willing to sanction further borrowing unless the defendants undertook further measures of economy. The Ministry's requirements were embodied in a letter dated January 6, 1928. A special meeting of the council was held on the same day, when the council, considering that the matter was urgent, appointed the three deponents as a sub-committee with plenary powers to act. On January 13 the sub-committee met and resolved :—

"That the requisite notice be given to all head teachers, assistant teachers . . . and the two attendance officers to terminate their appointments."

On January 16, 1928, the education committee (of which the deponents were members) resolved :—

"That the education committee hand over to the special sub-committee of three the powers of the education committee with regard to economy, but it shall not include the surrender of our autonomy to the county council or anyone else."

On January 30 the sub-committee instructed the clerk to the council and the secretary to the education committee to send notices to teachers on the following day, and they did so. The notice was signed by the clerk and secretary.

In so doing, the deponents stated, the sub-committee acted *bona fide* in what it conceived to be the best interests of the district and the ratepayers, and with a view in the main to a readjustment of the terms of service entered into by teachers, and not with any object of permanently discharging teachers from the employment of the council, save in so far as, on a reorganization of arrangements, it might be found possible to reduce the total number employed.

Mr. JENKINS, in opening Mr. Richardson's case, submitted that the action of the sub-finance committee—the "Big Three," as they were called locally—was wholly *ultra vires*. The Education Act, 1921, provided :—

"Section 148. (1) A local education authority may appoint necessary officers, including teachers, to hold office during the pleasure of the authority, and may assign to them such salaries or remuneration (if any) as they think fit, and may remove any of those officers."

"Section 4. (1) Every council having powers under this Act shall have an education committee . . .

"(2) . . . (*a*) All matters relating to the exercise by the council of their powers under this Act, or of any powers connected with education conferred by or under any other Act, scheme, or order on the council expressly as a local education authority or as a council having powers under this Act, except the power of raising a rate or borrowing money, shall stand referred to the education committee, and the council, before exercising any such powers, shall, unless in their opinion the matter is urgent, receive and consider the report of the education committee with respect to the matter in question ; (*b*) the council may also delegate to the education committee, with or without any restrictions or conditions as they think fit, any such powers as aforesaid, except the power of raising a rate or borrowing money. . . .

"(5) An education committee may, subject to any directions of the council, appoint such and so many sub-committees consisting either wholly or partly of members of the committee, as the committee thinks fit."

The defendant council had, by resolution, delegated its powers to the education committee, under section 4 (2) (*b*).

Counsel, continuing, said that the Ministry did not suggest any particular direction for economy.

Mr. UPJOHN.—Every direction.

Mr. JENKINS.—The question of economy on education must be considered by the education authority, and it had never been considered by anyone. Under pressure from the Minister the defendants accepted his suggestion that a sub-committee with plenary powers should be appointed. If that meant "with the power of dismissing teachers" it was *ultra vires*, and the fact, if so it was, that it was suggested by the Ministry did not make it legal. On the right to dismiss teachers he cited *Price v. Rhondda U.D.C.* ([1923] 2 Ch., 372) and *Short v. Poole Corporation* (42 *The Times* L.R., 107 ; [1926] Ch., 66). The dismissals in this case did not purport to be made on educational grounds, but for economy.

MR. JUSTICE EVE.—You seem to be asking for a mandatory injunction to employ the plaintiff.

Mr. JENKINS.—The relief I ask is in form negative. As drafted in Mr. Richardson's notice of motion it is, I admit, too wide, for it might prevent the defendants from beginning *de novo*. It must be restricted, as Mr. Thomas's notice is, to restraining them from acting on the purported notice of dismissal of January 31. The original delegation to the sub-committee being a mere nullity, its acts were incapable of ratification.

Mr. MELVILLE said that this was not merely an action affecting a few teachers at Abertillery. Those instructing him were concerned to defend the Burnham scale, on the basis of which the Board of Education paid three-fifths of the salaries. The First Schedule to the Education Act, 1921, provided a scheme for the appointment of education committees which, he submitted, must be followed. They might as well have delegated their powers to the fire brigade as to a sub-committee like this. The collective psychology of the committee was affected by the purpose for which it was appointed. A finance committee would primarily concern itself with finance. The reservation of autonomy in the resolution appointing the sub-committee suggested that the education committee intended the sub-committee to report its recommendations to the education committee, and, if it recommended a reduction of teachers' salaries, the education committee must take the appropriate steps. He referred to *Fennell v. East Ham Corporation* ([1926] Ch., 641).

Mr. UPJOHN said that since hearing Mr. Melville they knew a little more of the motives underlying these actions. They were brought to maintain the salaries of teachers in this afflicted area, with a debt of £500,000, on scale III. of the Burnham Award, which was not an award in any ordinary sense of the word. Scale III. was the highest scale, and to maintain it, at least till the trial, was the object of the motions. Teachers were in no better position than the council's scavengers. If the former could get an injunction to restrain the alteration of their salaries, so might the latter, and economy would become impossible.

In delegating its powers to the education committee under section 4 (2) (*b*), the council did not abandon the power to act itself, and it was quite entitled to treat the need for economy as a matter of urgency under section 4 (2) (*a*). It was said that this sub-committee took no heed of educational needs, but was only concerned to cut down the salaries of the poor teachers. But how could education be carried on without regard to economy ? The education authority, which was bound to provide for the educational needs of the district, was entitled

to say: "If we continue to pay the salaries on the Burnham scale, we cannot continue to function at all, but must close our schools, for we cannot pay all that we collect to teachers to the exclusion of the other public services for which we are responsible. We must reduce salaries all round, including those of the teachers, otherwise our schools must be closed, and we know not when and by whom they will be reopened."

He submitted that the council had complied with both branches of section 4 (2), and that there were no grounds for contending that the notice was void. The position of teachers was different in the case of provided and non-provided schools. In the present case the schools were non-provided; there was no question of a statutory position, but merely of a contract of service during the pleasure of the authority, and this would not be enforced by injunction. He referred to *Smith v. MacNally* (28 *The Times* L.R., 332; [1912] 1 Ch., 816); *Martin v. Eccles Corporation* (35 *The Times* L.R., 262; [1919] 1 Ch., 387); *Hanson v. Radcliffe Urban District Council* (38 *The Times* L.R., 667; [1922] 2 Ch., 490). The points taken by the plaintiffs were covered by *Young v. Cuthbert* (22 *The Times* L.R., 251; [1906] 1 Ch., 451).

This was simply a dilatory objection. Why should the plaintiffs not have objected that the notices were bad and given the defendants the opportunity to regularize them at the cost of another month's salary instead of launching two actions?

Mr. JENKINS and Mr. MELVILLE replied.

MR. JUSTICE EVE, in giving judgment, said that in these two actions the plaintiffs claimed substantially the same relief. Mr. Richardson originally claimed an injunction in terms much too wide, but had since brought himself into line with Mr. Thomas, and both claimed an injunction to restrain their employers from terminating their employment.

If during his judgment he used the singular, it was to be understood that his observations applied to both plaintiffs. Both were engaged under section 148 of the Education Act, 1921. On the face of it there was a contract entered into in pursuance of the statute and this contract was terminable by the employers in accordance therewith. *Prima facie*, the position was not one which would entitle the plaintiff to ask the Court to interfere by injunction.

What was asked would, in fact, be granting an injunction as a step to specific performance of a contract of service, and the Court never did this. But it was said that this was a contract with a public body, and that the law was different in the case of such a contract of employment. In *Short v. Poole Corporation* (42 *The Times* L.R., 107; [1926] Ch., 66) Lord Justice Warrington (as he then was) said at page 90:—

"Is the position of a public body . . . different from that of an individual? In my opinion it is different only in this, that being established by statute for certain limited purposes, no act purporting to be that of the public body can have any operation as such, if the individuals purporting to exercise the functions of the public body have, in performing the act in question, transcended the limits of the authority conferred upon it.

The objects and obligations of the education committee were set out in section 17 of the Education Act, 1921. [His Lordship read the section.]

It was said in the first place that the authority here, in determining to serve this notice, was not acting in pursuance of a statutory obligation, but as a mere matter of finance. But it had become necessary for the authority, if it were to be assisted by the Minister, to adopt a strict policy of economy all round. He could almost take judicial notice of the fact that in many areas education expenses were very heavy, and that they would be one item in which economy would have to be considered. So far as the attempt to impugn the notice on the ground of motive was concerned, he could not possibly entertain it.

It was then said that the formalities adopted were such as to make the notice totally irregular. The education authority had passed a resolution delegating all its powers to the education committee. That would not sterilize the authority, for a principal had always concurrent powers with his agent.

After describing the appointment of the sub-finance committee, and the steps leading up to the giving of the notice, his Lordship said that it seemed to him that the giving of notices was well within the powers of that sub-committee. The appointment and dismissal of teachers was clearly within the powers of the education authority, and on January 16 the education committee resolved that its powers with regard to economy should be delegated. The conclusion was irresistible that, both on behalf of the authority and of the education committee, the sub-finance committee was invested with the power and duty of deciding how economy was to be effected both in the general work of the council and in education. It could not be doubted that the education authority had authority to delegate its powers. The education committee had statutory powers of delegation under section 4 (5). He would have been prepared to hold to that effect, and it was satisfactory to find that the same view was taken by Lord Justice Buckley in *Young v. Cuthbert* (22 *The Times* L.R., 251; [1906] 1 Ch., 451).

Apart altogether from that, he was of the clear opinion that it was open either to the council or to the education committee to ratify what was done, and by the position which it had taken in this action the council had ratified it.

In the result there would be no order on the motions.

[Solicitors—Mr. Eric G. Floyd; Mr. W. Ewart Craigen; Messrs. Church, Adams, Tatham and Co., for Messrs. Dolman and Son, Abertillery.]

K.B. Div. (Rowlatt, J.) 1928. Feb. 28.

BRICE AND SONS v. CHRISTIANI AND NIELSEN.*

Contract — Hiring of crane-barge — Owners to insure crane against all risks—Accident not covered by policy—Claim by owners against hirers for damage to crane—Owners' breach of contract to insure—Failure of claim.

The defendants hired a crane-barge from the plaintiffs, one of the terms of the contract being that the plaintiffs would insure the crane against all risks, the defendants paying the premium. The plaintiffs accordingly took out a policy covering, as they thought, all risks. The crane, when proceeding to lift a load, broke away from its bedplate and fell over and was damaged. It was then found that the accident was not

* Reported by W. B. THOMPSON, Esq., Barrister-at-Law.

covered by the policy, and the defendants refused to pay for the damage. In an action for breach of contract,

Held, that though the defendants had failed to discharge the onus, which was upon them, of proving that what happened was not the result of negligence by their servants, yet, as the agreement in regard to insurance was intended to be an arrangement for the benefit of both parties, and as the accident came within the description "all risks" and the defendants had stipulated that they were not to bear those risks, the action failed.

The plaintiffs in this action claimed damages for an alleged breach of contract in relation to the hire of a crane-barge.

Mr. Raeburn, K.C., and Mr. Dickinson appeared for the plaintiffs; Mr. Dunlop, K.C., and Mr. Willink for the defendants.

The plaintiffs were barge owners at Rochester. They had a number of barges which were fitted with steam cranes, and which they used for lifting clay to be used in the manufacture of cement. They also let out crane-barges to other persons who wished to hire them for lifting purposes.

In March, 1927, the defendants, who were engineering contractors, had taken a contract to repair a jetty belonging to the Shell-Mex Company, at the mouth of the Thames. The jetty had been damaged by a steamer running into it, and the defendants required a crane to lift the damaged timbers. They hired a crane-barge from the plaintiffs at a charge of £30 a week, which was the charge the plaintiffs usually made for such a hiring. The crane was able to lift a weight of five tons.

On March 21, 1927, the crane began to work at the jetty, and work was continued without incident until March 31, when an accident happened which led to the present action being brought. A diver had been down among the wreckage, and the crane driver was ordered to lift the load, but nothing happened until the crane itself broke away from its bedplate and fell over, and was seriously damaged. The plaintiffs claimed damages, but the defendants refused to pay, on the ground that the damage should have been covered by insurance.

It had been part of the contract that the plaintiffs should insure the crane against all risks during the period of hiring by the defendants, and that the defendants should pay the premium for the insurance. The plaintiffs accordingly took out a policy covering, as they thought, all risks; but when the accident happened it was found that it was not covered by the policy. The defendants contended that a policy should have been taken out covering the risk of toppling over, which was usual in dealing with the insurance of cranes on land. The plaintiffs, however, said that with their many years' experience they had never heard of such an insurance on crane-barges.

Mr. RAEBURN submitted that the accident happened through the negligence of the defendants in setting the crane to try to lift something which was too heavy for it, and the burden of proof that they had not in fact been negligent was on the defendants, *The Merchant Prince* (8 *The Times* L.R., 430; [1892] P. 179, at p. 187). Even if the plaintiffs had taken out a toppling over policy and had recovered against the underwriters, the latter would have been subrogated to the rights of the plaintiffs against the defendants. Evidence having been called for the plaintiffs,

Mr. DUNLOP, for the defendants, submitted that there was no liability on the defendants under the contract. At an interview between the parties at which the hiring was arranged the defendants made it clear that they would not be responsible for any risks whatever, and the plaintiffs agreed to insure against all risks if the defendants would pay the premium. The defendants agreed to pay the premium, and consequently by the express contract they were free from all liability. At common law they would, as hirers, have been liable for negligence, but the terms of the contract excluded any such liability.

Further, on the facts, there was no negligence. The crane was hired to do work which was known to be difficult and dangerous. The defendants employed a skilled diver to go down and fix the hook of the crane on to the things which were to be lifted, and the work was done with proper skill and care.

Evidence was then called for the defence.

The diver, who said that he had had 30 years' experience, described the state of the jetty as a mass of *débris*, all crumpled up. He went down to prepare the lifts for the crane, and while on the bottom he had to saw through piles, loosen bolts, and break the material up. When he had got the parcel ready he fixed the hook and sling to it. He had to stand on the bottom of the river, and as it was quite dark he had to judge by feeling when the parcel was ready for lifting. This crane-barge was working from March 21 to March 31 without any trouble occurring.

Mr. DUNLOP submitted that when the accident happened the crane was doing just the work which was contemplated by the contract. It was not that the crane was set to lift something which was too heavy for a five-ton crane to lift; the parcel to be lifted was a proper one, but for some reason which nobody knew it apparently caught in the *débris* and would not come away. The diver had done his best in circumstances of great difficulty, and there was no negligence.

Apart from that, there was the insurance agreement between the parties, which was intended to cover both the risks which at common law would have been for the account of the hirers, and the risks for which the owners would have remained responsible. The policy which the plaintiffs eventually took out did not in fact cover all risks, but that was no affair of the defendants. If the insurance was not to relieve the defendants from liability for negligence, which was their only liability at common law, they were paying a premium for nothing. And if the plaintiffs did not insure as they undertook to do against all risks, the defendants could counterclaim for breach of contract.

Mr. RAEBURN replied. There was no clear, unambiguous provision in the contract to relieve the defendants from liability for the negligence of their servants.

MR. JUSTICE ROWLATT, in giving judgment, said that it was an interesting case, and in some respects by no means easy. The ordinary rule of law was that a person who hired the property of another and handed it back in a damaged condition was liable unless he could show that the damage had not been caused by negligence on his part. His Lordship stated the facts, and said that the work of a diver on the bottom of a river, moving in total darkness among wreckage, was really unimaginable to people who spent their time in a Law Court, but he had come to the conclusion that the defendants had failed to

prove that what happened was not the result of negligence by their servants. If that was all, the action would succeed. But there was the point about insurance, and on that he must hold that the defendants were entitled to succeed.

The agreement was, "It has been agreed between us that you insure against all risks at our expense." Mr. Raeburn contended that that was an agreement solely for the benefit of the owners, that they were letting the crane-barge out for work which would involve unusual risk, but were only charging their usual hiring rate for it, and that they therefore wished to be protected by insurance. But in his (his Lordship's) view the proper construction of the agreement was that it was meant to be an arrangement for the benefit of both parties. The hirers were stipulating that they would not accept any responsibility, and if made for the benefit of both parties it was a very common-sense arrangement. So the only question really was whether this accident came within the description of "all risks." He was clearly of opinion that it did. The defendants would never have agreed to pay the premium for an insurance which would have left them liable; they knew that the undertaking would involve risks, and they refused to bear these risks themselves. On that ground, therefore, there must be judgment for the defendants.

His LORDSHIP then held that a sum which had been paid into Court in respect of the hiring was sufficient, and gave judgment for the defendants, with costs.

[Solicitors—Messrs. Keene, Marsland, Bryden, and Besant; Messrs. Thos. Cooper and Co.]

Court of Appeal.
(Scrutton and Sankey, L.JJ., and Russell, J.)
1928. Feb. 16.

TURNER v. WATTS.*

Landlord and Tenant — Restrictions — Weekly tenancy — Determination — Agreement by tenant to purchase house — Rescission of agreement—Position of tenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 12 (7).

By an agreement in writing dated August 28, 1926, the defendant, who was the weekly tenant of a house to which the Rent Restrictions Acts applied, agreed to buy it from the plaintiff, the landlord, for £900. The agreement also provided that the defendant acknowledged owing the plaintiff £63 10s. arrears of rent and that the plaintiff would accept £50 in settlement; that, until certain mortgages had been transferred from the plaintiff to the defendant, the plaintiff should remain in absolute ownership of the premises; and that, until the completion of the conveyance, the defendant, who was to remain in possession, should pay to the plaintiff interest on the £950 at the rate of 6 per cent. with interest on interest dating from September 1, 1926. The defendant also agreed to pay certain deposits, the plaintiff, on failure of such payments, to be entitled to rescind the agreement and enter into possession of the house. The defendant agreed to maintain the house in a good state of repair and to pay rates, taxes, and insurance.

On February 27, 1927, the plaintiff rescinded the agreement under the powers reserved in it and on the defendant's refusing to give up possession brought an action, claiming (*inter alia*) possession.

Held, (1) that the agreement of August 28, 1926, amounted to a surrender of the weekly tenancy previously held by the defendant, and (2) that the defendant was not protected by the Rent Restrictions Acts, because after the agreement of August 28, 1926, if the defendant remained in possession of the house as a tenant, she was a tenant at will at no rent and her tenancy came within s. 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, being at a rent less than two-thirds of the rateable value and by reason of that subsection must be ignored and the plaintiff had an unrestricted right to possession.

Decision of the Divisional Court (44 *The Times* L.R., 105) affirmed.

This was an appeal from a decision of the Divisional Court (44 *The Times* L.R., 105) on an appeal from Bristol County Court. The plaintiff brought an action in the County Court for possession of certain premises and for arrears of rent and mesne profits.

The premises—529, Fishponds-road, Bristol—were a dwelling-house to which the Rent Restrictions Acts applied. By an agreement in writing dated August 28, 1926, the defendant, who was a weekly tenant at a rent of £1 2s. 2d. a week, agreed to buy the house from the plaintiff for £900. She remained in possession pending the completion of the purchase. The agreement was in force from its date to February 27, 1927, and on that day it was rescinded by the plaintiff in pursuance of a power reserved in the agreement. By the agreement the defendant acknowledged that she was indebted to the plaintiff in the sum of £63 10s. arrears of rent and the plaintiff agreed to accept £50 in full settlement of that debt. The plaintiff agreed to sell and the defendant agreed to buy the house for £900 "together with £50, arrears of rent as aforesaid, making a total of £950."

Clause 4 of the agreement was: "That until suitable arrangements can be made for the transfer of the existing first and second mortgages from the vendor to the purchaser the vendor shall remain in absolute ownership of the premises and that until the completion of the conveyance the said Maud Watts [the defendant] will pay to the vendor interest on the aforesaid £950 at the rate of 6 per cent. per annum with interest on interest dating from the first day of September, 1926."

The defendant further agreed to increase, by monthly payments of £5, her deposits in two companies which were said to be second mortgagees of the house. If she should be more than 14 days in arrear with any of the deposits the plaintiff might forthwith rescind the purchase agreement and enter into vacant possession of the house. The defendant agreed to assign her dividends in those companies to the plaintiff as collateral security until the interest

* Reported by T. W. MORGAN, Esq., Barrister-at-Law.

due to him under the agreement had been paid. The defendant agreed to pay all rates, taxes, insurance, repairs, and outgoings as from September 1, 1926, and to keep the house in good repair. The plaintiff undertook to procure a transfer to the defendant of the second mortgage as soon as the deposits should have been increased to £100, and after this the defendant was to enter into the unrestricted possession of the premises together with the conveyance subject only to any payments still due on mortgage or by way of interest under clause 4 of the agreement.

The County Court Judge gave the plaintiff judgment for possession. The Divisional Court held that the effect of the agreement, as indicating the intention of the parties, was to determine the weekly tenancy and to substitute for it either a licence or a tenancy at will which, in its turn, was revoked or determined by the rescission of the purchase agreement. The defendant, therefore, had no contractual right to resist the claim for possession. The Divisional Court held, further, that the defendant was not protected by the Rent Restrictions Acts. After August 28, 1926, the defendant remained in possession of the house by virtue of the contract of purchase and not as a statutory tenant. Under that contract she was either a licensee or a tenant at will. After its rescission, if she had been a licensee, she was not a tenant who had held over under the Acts; if she had been a tenant at will, her tenancy had been at no rent and, by section 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, it must be ignored, with the result that the house was to be treated as untenanted and the plaintiff had an unrestricted right to recover possession of it.

The defendant appealed.

Mr. Cecil Havers appeared for the appellant; Mr. du Parcq, K.C., and Mr. W. G. H. Cook for the respondent.

Mr. Cecil Havers, for the appellant, said that two points only were relied on in the appeal. They were: (1) That the weekly tenancy had never been determined; and (2) that the defendant was protected by the Rent Restrictions Acts. The agreement of August 28, 1926, did not involve a surrender of the weekly tenancy previously held by the defendant. A surrender could only be made to the person in whom was vested the immediate legal reversion. It was for the plaintiff to satisfy the Court that the immediate legal reversion was vested in him. The plaintiff had mortgaged the house to two companies and, therefore, a surrender to the plaintiff would not be effective (see *Robbins v. Whyte,* 22 *The Times* L.R., 106; [1906] 1 K.B., 125). The evidence before the Court was that there were two mortgages on the house and if the plaintiff was going to rely on the doctrine of surrender the onus was on him to show that he had the legal estate.

Further, the contract of purchase was conditional on a good title being shown by the vendor. There was nothing in the agreement to exclude the usual implied condition with regard to title (see *Doe d. Gray v. Stanion* (1 M. and W., 695)). The question was whether it was the intention of the parties that there should be no surrender until the vendor had in fact made out a good title. On the true construction of the agreement of August 28, 1926, there was no agreement between the parties that the term should immediately come to an end. The parties did not intend that there should be an immediate surrender, but only when Mrs. Watts was entitled to her conveyance and obtained it (see *per* Baron Parke in *Weddall v. Capes,* 1 M. and W., 50, at p. 52).

But even assuming that there was a surrender of the weekly tenancy, the defendant was in possession of the house and was entitled to the protection of the Rent Restrictions Acts. The learned Judges of the Divisional Court had followed *Bracey v. Pales* (43 *The Times* L.R., 69; [1927] 1 K.B., 818). The Divisional Court was wrong. Counsel referred to *Barton v. Fincham* (37 *The Times* L.R., 386; [1921] 2 K.B., 291); *Joy v. Eppner* (41 *The Times* L.R., 136; [1925] 1 K.B., 362); *Waller and Son v. Thomas* (37 *The Times* L.R., 325; [1921] 1 K.B., 541); and *Jenkinson Wright* (40 *The Times* L.R., 858; [1924] 2 K.B., 645).

Mr. du Parcq, K.C., and Mr. W. G. H. Cook for the respondent were not called upon.

Lord Justice Scrutton, in giving judgment, stated the facts and said that the case was an odd and complicated one. It had been clearly argued and had resolved itself into two questions, which were: (1) Whether the agreement of August 28, 1926, amounted to a surrender of the tenancy which the defendant previously held from the plaintiff; and (2) if there was a surrender of the tenancy, whether the defendant was entitled to the protection of the Rent Restrictions Acts.

With regard to the question of the surrender of the tenancy, it was contended on behalf of the defendant that a surrender, to be effective, must be to the person entitled to the legal interest in the premises, and in this case the plaintiff was not the person entitled to the legal interest, because the premises were mortgaged and that the mortgagees had the legal interest in the premises. It was said by Mr. Justice Warrington (as he then was) in *Robbins v. Whyte* (22 *The Times* L.R., 106; [1906] 1 K.B., 125, at p. 130): "It is well settled that the surrender of a lease is good only if made to the person in whom the reversion expectant on the determination of that lease is vested, otherwise there will be no merger of the term. The result, therefore, is that, in my opinion, the surrender which purported to have been made on November 25, 1904, had no effect in law, and consequently that the lease is still subsisting, and the plaintiffs are accordingly entitled to the rent for which they now sue."

That point was not taken in the County Court, nor in the Divisional Court, and it would require more information than was at present before the Court to enable the Court to decide it. It depended on whether the mortgages were legal mortgages or equitable mortgages. Whatever they were, there were unusual features about them. The documents were not before the Court. This being a case, therefore, where, in order to determine the point, more information was required than was available, it fell within the rule of the Court which did not allow points to be taken on appeal that had not been taken in the Court below.

Then it was argued that on the construction of the document itself the agreement of August 28, 1926, did not amount to a surrender of the tenancy. It was an odd agreement, but he (Lord Justice Scrutton) must hold that it was a surrender of the weekly tenancy previously held by the defendant from the plaintiff.

Then it was said that, if the agreement of August 28, 1926, did surrender the weekly tenancy, the defendant was in possession of the house and was protected by the Rent Restrictions Acts. The answer given by the Divisional Court to that point

was a sound one. If the defendant was in possession of the house as a tenant, she was a tenant at will, and at no rent, and her tenancy came within section 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as it was at a rent less than two-thirds of the rateable value ; and by reason of that subsection it must be ignored and the Rent Restrictions Acts did not apply to that tenancy but applied in respect of the dwelling-house as if no such tenancy existed or ever had existed.

For these reasons the appeal must be dismissed with costs.

LORD JUSTICE SANKEY, in concurring, said that two points had been taken on behalf of the defendant : (1) That the agreement of August 28, 1926, did not amount to a surrender of the tenancy ; and (2) that the defendant was protected by the Rent Restrictions Acts. The Divisional Court decided both points in favour of the plaintiff.

It was contended on behalf of the defendant that there could be no surrender of a tenancy except to a person having the legal interest in the premises and that the plaintiff in this case, having mortgaged the premises, did not possess the legal interest. *Robbins v. Whyte* (22 *The Times* L.R., 106 ; [1906] 1 K.B., 125) was relied on. But that point was not open to the defendant in this Court as he had not taken it in the Court below and it depended on documents which were not before the Court. Then it was said that the agreement of purchase did not operate as a surrender of the tenancy. But looking at the agreement as a whole and construing it, he (Lord Justice Sankey) was of the opinion that it was either an express surrender of the tenancy or a surrender by operation of law.

With regard to the question whether the defendant was protected by the Rent Restrictions Acts, he (the Lord Justice) had nothing to add to what had been said on that point by Lord Justice Scrutton.

MR. JUSTICE RUSSELL concurred.

[Solicitors—Messrs. E. C. Rawlings, Butt and Co., for Mr. F. E. C. Habgood, Bristol ; Mr. Theodore Roberts.]

Court of Appeal.
(Scrutton and Sankey, L.JJ., and Russell, J.)

1928.
Feb. 23.

BROOME v. AGAR.*

Defamation—Slander—Chauffeur giving "joy rides" in employer's motor-car—Verdict that words were not defamatory.

The plaintiff, a chauffeur formerly employed by the defendant, brought a slander action against the defendant, complaining that during his employment she had falsely alleged that he gave "joy rides" to women in her motor-car. The jury found that the defendant spoke the words but that they were not defamatory of the plaintiff. On an application for a new trial on the ground that the verdict was perverse and one which no jury could reasonably find,

Held, (Russell, J., dissenting), that it was for the jury to say whether the words did or did not constitute a slander, and their verdict must stand.

* Reported by E. J. M. CHAPLIN and T. W. MORGAN, ESQRS., Barristers-at-Law.

This was an application by the plaintiff for a new trial in a slander action brought by Mr. Alfred Broome, a chauffeur, of Chesham-place, S.W., against his late employer, Mrs. Mary Agar, widow, of 8, Balfour-place, W. The plaintiff complained that the defendant slandered him on two occasions in November, 1926, by falsely alleging that he gave "joy rides" to women in her Rolls-Royce motor-car. The defendant denied that she spoke the words complained of, and that they were defamatory of the plaintiff, and she pleaded privilege. Alternatively, she said that in their ordinary meaning the words were true in substance and in fact.

The jury found that the defendant spoke the words complained of, but that they were not defamatory of the plaintiff. Judgment was accordingly entered for the defendant.

The plaintiff applied for a new trial on the ground that the verdict was perverse and one which no 12 reasonable men could find.

Mr. Charles, K.C. (as he then was), and Mr. Rowland Thomas appeared for the appellant ; Mr. Gordon Alchin for the respondent.

LORD JUSTICE SCRUTTON, in his judgment, said :—This application for a new trial in a case tried before the Lord Chief Justice raises an important question as to the functions of the Judge and jury in a civil action for defamation. The plaintiff was formerly chauffeur to the defendant, an elderly and wealthy lady. There had been, apparently, some friction in the defendant's household. The French cook had sent an anonymous letter to her mistress accusing the chauffeur of driving a woman about in his mistress's car ; the lady's maid was apparently pointed at. The chauffeur left the service, and brought an action, not for wrongful dismissal, but for two slanders. The first alleged slander, as proved by the evidence, *i.e.*, of the lady's maid, Edwards, for the plaintiff, was that the defendant, on being told that the plaintiff was out, said : "I expect he is out 'joy-riding' with my car now, Edwards. Broome (the plaintiff) is a 'rotter.'"

The second alleged slander was a statement by the defendant to a member of the Rolls-Royce establishment in Conduit-street, which had supplied the car and which supplied chauffeurs.

The Judge left to the jury the question : "Were the words complained of spoken by the defendant ?" and they answered "Yes." This must refer to the words alleged by the plaintiff's witnesses, not to the words pleaded, which were different, or to the words alleged by the defendant's witnesses. The Judge then left to the jury the question : "Were they defamatory of the plaintiff ?" to which the jury answered "No."

On this, the plaintiff's counsel moved for a new trial, alleging, in the language of *Metropolitan Railway Company v. Wright* (2 *The Times* L.R., 553 ; 11 App. Cas., 152, at p. 156), that the verdict was such as 12 reasonable men could not, or ought not to have, come to. See *Solomon v. Bitton* (8 Q.B.D., 176, at p. 177) ; and *Webster v. Friedeberg* (17 Q.B.D., 736, at p. 737). When asked whether he claimed that the Judge should have directed the jury to find that the words were defamatory, or have entered judgment for the plaintiff on the ground that the words were only capable of a defamatory meaning, he replied that he did not claim this, but only asked for a new trial in which the question should again be submitted to a jury.

Since Fox's Act of 1792 (32 Geo. III., c. 60), it has been a commonplace of civil procedure that "libel or no libel, since Fox's Act, is of all questions

peculiarly one for a jury," *per* Lord Coleridge, C.J., in *Saxby v. Easterbrook* (3 C.P.D., 339, at p. 342). There are also the weighty words of Sir James Shaw Willes in *Henwood v. Harrison* (L.R., 7 C.P., 606, at p. 627) : "the jury in civil cases, equally as in criminal cases, are the proper tribunal to determine the question of libel or no libel. This was affirmed by the declaratory Act of 1792, and has been often recognized."

That this expressed the popular view at the time is shown by the ballad which, as Lord Mansfield quoted it in the judgment in *Rex v. Shipley* (4 Doug., 73, at p. 168), I also may venture to quote with approval :

"For Sir Philip well knows
His innuendos
Will serve him no longer
In verse or in prose ;
For twelve honest men have decided the cause,
Who are judges of fact, though not judges
of laws."

It is true that Fox's Act in terms relates to criminal prosecutions, but it has been said to be "only declaratory of the Common Law." The Act allows the jury to find a general verdict of not guilty and relieves them from the necessity of finding the prisoner guilty on proof of the publication and innuendoes, the Judge finding whether the publication was a libel. To understand the Act one must look at the cases of *Rex v. Withers* (3 Term Rep., 428), *Rex v. Dean of St. Asaph* (3 Term Rep., 428, *n*), *Rex v. Shipley* (*supra*), and *Rex v. Woodfall* (5 Burr., 2661), as explained by Lord Blackburn in *Capital and Counties Bank v. Henty* (7 App. Cas., 741, at pp. 772 to 775).

The practice of the Judges generally had been to hold that the only questions for the jury were the publication, and the truth of the innuendoes ; libel or no libel, was a question for the Judge. The juries endeavoured to defeat this by finding general verdicts of not guilty, or verdicts of "guilty of publishing only." Mr. Justice Willes, in *Shipley's* case (*supra*) upheld the right of the jury to find innocence or criminality, libel or no libel, or to find a general verdict of not guilty though the Judge directed them that the document was a libel without being liable to any penal consequences. The Legislature by Fox's Act adopted the view of Mr. Justice Willes and negatived the view of Lord Mansfield, and it has been since a fundamental principle that libel or no libel is for the jury.

One restriction has indeed been made ; it is well established that if the Judge is of opinion that the words are not capable of a defamatory meaning he should withdraw the case from the jury. This restriction is in favour of the defendant ; it was conclusively established in *Henty's* case (*supra*), a striking case, where the publication of a circular that Henty would not take cheques of the bank, published at a time when another bank had failed, caused a run of a quarter of a million pounds on the plaintiff bank, and after great difference of judicial opinion the words were held not capable of a defamatory meaning. But it is a long step to pass from the power of a Judge to withdraw the case from a jury on the ground that he thinks that the words are not capable of a defamatory meaning to the position that, if a Judge or Judges think that words are only capable of a defamatory meaning, he or they can enter judgment for the plaintiff without a finding of the jury, or direct the jury to find that the words are defamatory, or keep on ordering a new trial because the jury will not return the verdict which the Judges think they ought to find. The Lord Chief Justice in the present case, when asked for a stay of execution, refused, saying : "The case was eminently one for the jury." I think that he took the correct view. I might have given a different verdict, but I am not the tribunal to answer the question. Libel or no libel is for the jury, if the words are capable of a defamatory meaning. As Lord Blackburn says in *Henty's* case (*supra*, at p. 771), "But, independently of all questions as to privilege, the manner of the publication, and the things relative to which the words are published, and which the person publishing knew, or ought to have known, would influence those to whom it was published in putting a meaning on the words, are all material in determining whether the writing is calculated to convey a libellous imputation. There are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances." Such a question as whether, considering all the circumstances referred to by Lord Blackburn, the words proved by the plaintiff in this case had a defamatory meaning seems peculiarly fitted for the consideration of a jury, which, and not the Judge, is the tribunal appointed by the Constitution to determine them.

If the jury in this case had, as they had a constitutional right to do, declined to answer questions and found a general verdict for the defendant, in my view the Court could not possibly have interfered. It was said that there might be cases where the words were so clear that a verdict that they were not defamatory must be set aside. The instance given was : "He is a thief." Yet I see that where the words alleged ran (*Thompson v. Bernard* ; 1 Camp., 48), "T is a damned thief and so was his father before him and I can prove it. He received the earnings of the ship and ought to pay the wages," Lord Ellenborough withdrew the case from the jury. I agree with the view of the late Mr. Blake Odgers (Odgers on Libel, pp. 110 & 111) : "The proper course is for the Judge to define what is a libel in point of law and to leave it to the jury to say whether the publication in question falls within that definition. And this is a question pre-eminently for the jury ; whichever way they find, the Court will rarely, if ever, disturb the verdict, if the question was properly left to them." I hesitate to say that a case may never arise for interference, but I cannot think that the present case is one. There are very few cases where a jury having found "no libel" the Court has interfered with their verdict. In *Levy v. Milne* in 1827 (4 Bing., 195), a case of a satirical ballad on "Levy the Bum" where the jury found no libel, Chief Justice Best, who apparently took a very hostile view of Fox's Act, said that it did not apply to civil cases ; it only applied to criminal cases. Later authorities, however, treat the Act as only declaratory of the Common Law. Chief Justice Best treats a jury who found "no libel" against the direction of the Judge, as finding the law erroneously. It was this view of their functions, that of Lord Mansfield, that Fox's Act was intended to destroy. In *Parmiter v. Coupland* (6 M. & W., 105) where the Court held that the Judge need not direct the jury whether the publication was a libel in law, they set aside the verdict that it was "no libel" as wrong. But Baron Alderson said that the Judge would be wrong if he were to take upon himself to say that the words were a libel. I think the Court would be equally wrong to set aside the verdict of a jury of "no libel" because

they, the Judges, thought it was a libel. In a recent case in the Privy Council, *Rop v. Smith's Newspapers* (unreported), the Court ordered a new trial in a case where the jury amongst other findings complained of had found "no libel," but the Australian Statute law seems to be different from the English law and it does not appear whether Fox's Act was called to the attention of the Court on this point. On the other hand in another Australian case (*Australian Newspaper Company, Limited v. Bennett*, [1894] A.C., 284) where a newspaper was called the "Evening Ananias" and the jury found for the defendants, the Court declined to interfere with the verdict, reversing the judgment of the Court below which had granted a new trial, Lord Herschell saying at page 288: "Whether a word is, in any particular instance, used, and would be understood as being used, for the purpose of conveying an imputation upon character must be for the jury."

In the present case the first alleged slander, using the words "joy riding" and "a rotter," and published only to the lady's maid who was supposed to be a partner in "joy riding," was, it appears to me, a matter peculiarly for the consideration of the jury as to "libel or no libel." The other slander, "using for private purposes," is in the same position. Whatever view I might have formed, I prefer to adhere to the view that "libel or no libel" is peculiarly a question for the jury; that only in the most extreme cases should the Judge allow his view to override that of the constitutional tribunal; and that the present is not such a case. The appeal should, in my opinion, be dismissed, with costs.

Lord Justice Sankey.—In this case the plaintiff, a chauffeur, sued his mistress for slander. The jury found that the words complained of were uttered, but were not defamatory. Thereupon the Lord Chief Justice entered judgment for the defendant. From that judgment the plaintiff appeals and asks for a new trial upon the ground that the words were of such a character that they could not be other than defamatory, that 12 reasonable men could not find otherwise and that therefore the verdict was perverse. The facts are as follows. The defendant, having received an anonymous letter informing her that a lady was driven about in her car in the evening, taxed the plaintiff with it and as a result of the interview gave him notice to leave her service. She then went to the garage of the Rolls Royce company to get another chauffeur. There she saw the company's senior salesman, Mr. Henderson, and said: "I am sorry to get rid of my present man as he has been a very good man and has been in my employment for quite a number of years, but it has recently come to my knowledge that he has been using my car for private purposes. When I challenged him with it he would neither admit it nor deny it, but was impertinent to me, and under these circumstances I had to get another man." The plaintiff afterwards saw Henderson and asked him whether there was any chance of his getting another job and was told that if he went to the garage superintendent he would be given a form which he should fill up and return. Subsequently the defendant said to one Florence Edwards, her maid, "I expect Broome is out joy-riding with my car now: Broome is a rotter: I could do no other under the circumstances than ask Broome to leave my service." The said Florence Edwards was in fact the person referred to in the anonymous letter. The statements made by the defendant to Henderson and Edwards contained the slander complained of. The plaintiff contends that the words meant and were understood to mean that the plaintiff had been guilty of a serious breach of duty in his service to her and guilty of grossly improper conduct as a chauffeur and was not a fit person to be entrusted with the responsibilities of a chauffeur, and that he had been guilty of a criminal offence. The question for decision remains, Is the plaintiff entitled to a new trial on the grounds above alleged? In my view it is not the law, which is well settled, but the application of it, which causes the difficulty in this case. The principles were laid down in *Metropolitan Railway Company v. Wright* (2 *The Times* L.R., 553; 11 App. Cas., 152) where Lord Halsbury said, at page 156: "If reasonable men might find . . . the verdict which has been found, I think no Court has jurisdiction to disturb a decision of fact which the law has confided to juries, not to Judges."

In *Australian Newspaper Company, Limited v. Bennett* ([1894] A.C., 284) the head note is: "In an action for libel, a jury of four by a majority found a verdict for the defendants; the Supreme Court set aside this verdict and ordered a new trial. *Held*, that this order must be discharged. There was evidence on which the jury could find that the defendants had not reflected upon the plaintiff's character. The use of the word 'Ananias' as applied to the plaintiff's newspaper did not necessarily impute wilful and deliberate falsehood to him; whether it was used extravagantly or for the purpose of conveying an imputation on the plaintiff was a question for the jury." Lord Herschell said: "Mr. Justice Windeyer observed in the course of his judgment that he admitted that the Court would only be justified in reversing the finding of the jury 'if their decision upon that point is such as no jury could give as reasonable men.' This is a correct statement of the law. Their Lordships have not, any more than the Court below had, to determine in the present case what is the conclusion at which they would have arrived, or what is the verdict they would have found. The only point to be determined is, whether the verdict found by the jury, for whose consideration it essentially was, was such as no jury could have found as reasonable men."

Since Fox's Act "libel or no libel" has always been held to be a question peculiarly one for a jury, and although Fox's Act applies to criminal law, it has for some years generally been thought that the law in civil actions for libel is the same as it was expressly enacted that it was to be in criminal cases, see *per* Lord Blackburn in *Capital and Counties Bank v. Henty* (7 App. Cas., 741, at p. 775).

What then are the proper functions of Judge and jury in an action for libel or slander? So far as the Judge is concerned it is for him to say whether the words complained of can, under the circumstances, bear a defamatory meaning. If they cannot, it is his duty to withdraw the case from the jury. It is not, however, open to the Judge to say that the words do bear a defamatory meaning, that is for the jury, but the jury must have evidence upon which they can found their verdict and if there is no evidence upon which they can find that the words were not defamatory, or if it can be conclusively proved that they have not exercised any reasonable discretion at all, an appellate Court may grant a new trial.

Cases can be found where a new trial has been so granted, but the circumstances are very exceptional, *Levy v. Milne* (4 Bing., 195), *Parmiter v. Coupland* (6 M. and W., 105), and *Hakewell v. Ingram* (2

C.L.R., 1397). In *Levy v. Milne* (*supra*), a case of libel, the jury before whom the cause was tried inquired whether a shilling would carry costs, and being answered in the affirmative found a verdict for the defendant. The Court granted a new trial, Chief Justice Best saying : "It is one of the most beautiful parts of our constitution, that when anything occurs in one tribunal which appears to be wrong, it may be afterwards corrected by another." In *Parmiter v. Coupland* (*supra*), also a case of libel, in the *Hampshire Advertiser*, on a former Mayor of Winchester, the Court granted a new trial upon the ground that the verdict was "unquestionably wrong," see the judgment of Baron Parke. In *Hakewell v. Ingram* (*supra*), another case of libel, the words were undoubtedly strong. Writing with reference to the plaintiff in relation to his wife it was stated : "She was compelled to resort to the police court for the little help which our glorious English constitution gives to the English wife and mother." The Court thought that it was clearly a libel and that the verdict was manifestly wrong, and granted a new trial, although Mr. Justice Maule delivered a strong dissenting judgment. On the new trial the jury found for the plaintiff, damages one farthing.

In libel there are fewer difficulties in the way of a new trial than in slander, for in the former case the words appear in print without the surroundings which may accompany the words in the latter case. Spoken words divorced from their context and surroundings may appear to be a slander but when controlled by such context and such surroundings may be nothing of the sort. Gesture, tone of voice, expression of countenance, all of which are absent in libel, may materially affect the spoken words. One recalls the instance of the lady who in a West End drawing room accused a noble Lord of being a thief, but when one is told that she said with a smile : "Lord X, you are a thief, you have stolen my heart," one recognizes that to call a person a thief is not necessarily actionable. In an action for slander a Judge is not entitled to say to the jury : "I direct you that the words spoken of are defamatory and your duty is to assess damages." As far back as 1701 Chief Justice Holt said in an *Anonymous* case (2 Salkeld, 644) : "The Court never, or very rarely, grants new trials in actions for words."

In the present case at any rate the question whether the words were defamatory was left to the jury, without objection, and rightly so in my opinion. Remembering to whom the words were spoken, Mr. Henderson, who was so little impressed by them that he offered to put the plaintiff on his waiting list, and Edwards, the defendant's confidential maid, who was the person referred to in the anonymous letter, remembering the whole of the conversation on each of the two occasions, and remembering that the question is not whether one would have come to the same conclusion one's self, I cannot say that the verdict was so unreasonable that it must be wrong and that it ought to be set aside as a verdict of 12 perverse men.

In slander actions the atmosphere created by the witnesses in the Court of first instance is quite different from the atmosphere created in the Court of Appeal by the transcript of the shorthand note. I do not forget that the defendant placed a plea of justification on the record, but that was only alternative to the plea of no slander upon which her advocate strongly and insistently relied.

The Lord Chief Justice when he was asked to grant a stay as to costs said that the question was eminently one for the jury ; and in my view we ought to be slow to set aside the verdict unless the case for doing so is clear and beyond argument. That onus is placed upon the appellant. In my opinion he has failed to discharge it and the appeal should be dismissed with costs.

Mr. Justice Russell.—In this case I take a different view from the two Lords Justices, and having formed a strong opinion, I feel bound to express my reasons for it. The plaintiff Broome, a chauffeur, sued his employer (Mrs. Agar) for damages for slander. The alleged defamatory words were spoken on two occasions; on one occasion to a Mr. Henderson, on another occasion to a Miss Edwards. As to each alleged slander the defendant by her defence denied that she spoke the words, alleged that the words were incapable of bearing any defamatory meaning, and pleaded justification. Further, as regards one occasion she pleaded privilege. The case was tried before the Lord Chief Justice and a special jury. The Lord Chief Justice held that the occasion of the conversation with Henderson was privileged, and left five questions to be answered by the jury : viz. : (1) Were the words complained of spoken by the defendant ? (2) If so, were they defamatory of the plaintiff ? (3) Were they true in substance and in fact? (4) Were the words spoken to Mr. Henderson maliciously ? (5) Damages, if any ? The jury answered "Yes" to the first question and "No" to the second question. The jury did not answer the further questions and judgment was entered for the defendant with costs. The plaintiff appeals, asking for a new trial on the grounds that the jury's answer to the second question was perverse and unreasonable and that there was no evidence to support such a finding. In my opinion the application for a new trial ought to be granted. The jury's answer to the first question establishes this that as between the respective versions given of the two conversations they accepted the evidence of Mr. Henderson and Miss Edwards. There is therefore no doubt as to what it was that the defendant said on each of the two occasions.

After referring to the notes of the evidence of Henderson and Miss Edwards, His Lordship continued : To Henderson, therefore, the defendant stated that the plaintiff had been using her car for private purposes and alleged that fact as one of the circumstances which compelled her to get another man. To Edwards she used words suggesting that Broome went out joy riding in her car and stating that she could do no other in the circumstances than ask Broome to leave her service.

The words in their natural and ordinary meaning are words which accuse the plaintiff of using his employer's car for his private purposes, of course, without her consent ; for, if with her consent, no ground of complaint could arise. Are such words defamatory ? Unless circumstances existed which altered their ordinary meaning, they must, I should have thought, necessarily be defamatory ; they must, I should have thought, necessarily tend to injure the plaintiff in his calling of a chauffeur. I would adopt the language of the Lord Chief Justice in his summing up to the jury, viz., that they are "words which if they are true, would indicate that he had been unfaithful to his employer in one of the first duties of a chauffeur."

Now there is no ambiguity about the words in question. Taken alone, they have no alternative meaning. Apart from any attendant context or circumstances, no jury could, in my opinion,

reasonably find that they were not defamatory of the plaintiff.

Nevertheless, as was said by Lord Blackburn in *Henty's* case (7 App. Cas., 741, at p. 771), "There are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances."

In the present case, accordingly, it would be open to the jury notwithstanding the unambiguous meaning of the words used, to find in view of some outside circumstances or context (as indicated by Lord Blackburn) that the words as used in the present case were not defamatory. Such a finding would be a finding of fact and if founded upon some evidence which could reasonably support it this Court would not interfere, even though its finding would have been the other way. Having, however, carefully examined and considered the notes of the evidence in this case (and nothing turns in this connexion on the demeanour of the witnesses in the box) I can find no trace of any evidence or suggestion justifying the jury in departing from the natural meaning of the words used and finding them not defamatory.

The respondent acted on one or two matters which Lord Justice Sankey has referred to, but though relevant to the question of damages they are in no way relevant to the question whether the words used are defamatory. All the indications in the case show that the words were used seriously and in their natural sense and that the offence charged was no light matter. The defendant pleaded justification as to both slanders and persisted in those pleas throughout the trial. In giving particulars under those pleas she stated that the plaintiff had been guilty of breaches of duty in his service to her and guilty of improper conduct as a chauffeur.

No doubt the question whether the words were defamatory was a question for the jury, but their answer must be such as reasonable men could properly give. Their finding must have some foundation. *Sic volo, sic jubeo,* will not suffice.

There are not a few cases in the books which show that if a jury have found words to be defamatory which in the view of an appellate Court are clearly not defamatory the verdict can and ought to be set aside. *Henty's* case (*supra*) shows this. In that case the jury had in fact disagreed at the trial but upon an application by the defendants that judgment should be entered for them, the defendants obtained that relief because it was held that upon the words of the libel and the evidence given at the trial no jury could have been justified in finding that the defendants had published a libel concerning the plaintiffs (see *per* Lord Selborne, L.C., 7 App. Cas., at p. 750). In other words had the jury found for the plaintiffs their verdict must have been set aside. I see no reason why the same course should not be adopted if a jury finds words not to be defamatory and an appellate Court is satisfied that the words are unambiguous and clearly defamatory and that there is no evidence to justify the jury's finding. This course was adopted and a new trial ordered in *Parmiter v. Coupland* (6 M. and W., 105). That was a case of libel in which the jury had found for the defendants. A rule *nisi* for a new trial was obtained on the grounds (among others) that the Judge ought to have directed the jury that in point of law the publications complained of were libels on the plaintiff, and secondly, that he misdirected the jury by stating to them that there was a distinction as regards publications relative to public and private individuals. A new trial was refused on the ground of misdirection, but the rule was made absolute because in the opinion of the Court the imputations were unquestionably libellous and the verdict unquestionably wrong. Nor can I see any reason why the Court should be less competent or more reluctant to set aside a jury's finding as to defamation in a slander action than in a libel action, where (as here) the words used have been found and their meaning is plain and unambiguous. The findings of fact by a jury in a libel or slander action command no more reverence and are no more infallible than their findings of fact in any other action, and, if the material finding is wholly unsupported by any evidence, then the verdict is one which reasonable men could not properly find. The verdict ought to be set aside and the case tried afresh. It may be that new trials are rarely ordered in cases of slander, but in the present case the plaintiff has not had his claim properly investigated, owing to what I regard as a perverse answer by the jury.

He has suffered an injustice at their hands which this Court can and in my opinion should remedy. I would allow the appeal and order a new trial.

I need hardly add that I differ from the other members of the Court with regret, more particularly because upon the present conflict between common law and equity, equity does not prevail.

[Solicitors—Messrs. Henry F. Johnson and Son; Messrs. Wrensted, Hind, and Roberts.]

Court of Criminal Appeal. (Avory, Horridge, and Salter, JJ.) 1928. Feb. 27.

REX v. HAILWOOD.

REX v. HAILWOOD AND ACKROYD, LIMITED.*

Elections — Corrupt practices — Expenses incurred by unauthorized person — Three candidates—Opposition to one—No invitation to vote for particular candidate—Representation of the People Act, 1918 (7 and 8 Geo. V., c. 64), s. 34 (1).

By s. 34 (1) of the Representation of the People Act, 1918, "A person other than the election agent of a candidate shall not incur any expenses on account of holding public meetings or issuing advertisements, circulars or publications for the purpose of promoting or procuring the election of any candidate at a Parliamentary election, unless he is authorized in writing to do so by such election agent."

Held, that where there are three candidates and a person other than an election agent incurs such expenses without written authority for the purpose of opposing one of the three candidates but does not specifically invite voters to vote for a particular candidate, he nevertheless contravenes the sub-section since "any candidate" must be construed as including "any candidates" and such action must be deemed as having been intended to promote or procure the return of a candidate other than the one opposed.

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

These were appeals against conviction of Mr. Ernest Arthur Hailwood and of Hailwood and Ackroyd, Limited, of Morley, Yorkshire, who were convicted last December at the Central Criminal Court of unlawfully incurring expenses for the purpose of promoting or procuring the election of a candidate at a Parliamentary election contrary to section 34 (1) of the Representation of the People Act, 1918. On conviction both the appellants were fined £10 and ordered to pay the costs of the prosecution.

Mr. Comyns Carr, K.C., and Mr. Walter Frampton appeared for the appellants; Mr. Roland Oliver, K.C., and Mr. Willoughby Williams for the prosecution.

Mr. CARR, in opening the appeal, said that Mr. Hailwood was a Conservative in politics who complained that the Government formed by his own party was not Conservative enough. He said that they had failed to carry out their promises to extend the Safeguarding of Industries Act, 1921, to additional industries and particularly to the glass industry in which he and Hailwood and Ackroyd, Limited, were concerned. He also opposed what was known as the "Flapper Vote." At the by-election at Brixton, S.W., last June, there were three candidates—Mr. Nigel Colman, the Conservative; Mr. Frederick Joseph Laverack, the Liberal; and Mr. James Adams, the Labour candidate. Both the Liberal and the Labour candidates must necessarily have been more distasteful to Mr. Hailwood than was the Conservative candidate. Mr. Hailwood took down some of his company's motor lorries, which were decorated with posters, and he also issued leaflets denouncing the Government.

Section 34 (1) of the Representation of the People Act, 1918, provided:—

"A person other than the election agent of a candidate shall not incur any expenses on account of holding public meetings or issuing advertisements, circulars or publications for the purpose of promoting or procuring the election of any candidate at a Parliamentary election, unless he is authorized in writing to do so by such election agent."

Section 34 (2) provided that any person who acted in contravention of the section should be guilty of a "corrupt practice" within the Corrupt and Illegal Practices Prevention Act, 1883.

Mr. Hailwood undoubtedly invited the electors in various phrases to vote for any candidate except the Conservative, but he carefully abstained from inviting them to vote for any one of the other two candidates. In those circumstances he had not committed any offence under section 34 (1) of the Act of 1918. To render a man liable under that section there must be evidence that he did something which was intended to promote or to procure the election of a specific candidate. Mr. Hailwood had tried to prevent the election of a specific candidate. Where there were three candidates in an election, the fact that a person attacked one of them was not evidence of his promoting or procuring the election of either of the others. An alternative view of the matter was that Mr. Hailwood's design was merely to reduce the Conservative majority as a warning to his party.

MR. JUSTICE AVORY.—A majority may be reduced until it becomes a minority.

Mr. CARR, referring to the figures at the Brixton by-election, said that the Conservative candidate got in with a reduced majority.

The jury, said counsel, had to ascertain Mr. Hailwood's intention and he had said in evidence that he did not desire the election of either the Liberal or the Labour candidate, but only wished to "shake up" the Conservative party. Mr. Justice Talbot, in summing-up, however, failed to direct the jury properly on that point.

Counsel for the prosecution were not called on to argue.

MR. JUSTICE AVORY, in delivering the judgment of the Court, said that section 34 of the Act of 1918 was passed to put a stop to the practice of associations or persons, in order to promote or procure the election of a candidate, incurring expenses which had not been authorized by the agent of that candidate and which would never be included in the agent's return of expenses. The words "any candidate" in the section must be construed in the light of the Interpretation Act, 1889, as including "any candidates." If a person did what the section forbade to promote or to procure the election of any candidates there could be no question that he committed an offence under the section.

If the jury had neglected to find that what had occurred in the present case was done to promote the election of the candidates, or one of them, other than the Conservative candidate, they would have been neglecting their duty. The nature of the posters and leaflets issued by Mr. Hailwood showed that their purpose was to prevent the election of the Conservative candidate. The only possible construction to put on those documents was that they invited the voters to vote for one of the other candidates. There could be no question that Mr. Hailwood must have done what he did intending to promote the election of a candidate other than the Conservative candidate.

The summing-up of the Judge seemed to be more favourable to the defence than it need have been, because he did not tell the jury, as he might have, that it did not matter what was the dominant motive in Mr. Hailwood's mind, but that if what he did would necessarily have the effect of promoting the return of some candidate other than the Conservative candidate he must be taken to have intended that natural consequence.

[Solicitors—Messrs. Gibson and Weldon, for Mr. A. A. Burton, Leeds; Messrs. Lewis and Lewis.]

K.B. Div. (Rowlatt, J.) 1928. Mar. 1.

HAIN STEAMSHIP COMPANY, LIMITED v. BOARD OF TRADE.*

Ship—Collision—War or marine risk—Meaning of "warlike operation."

During the war a steamer belonging to the respondents was requisitioned by the Shipping Controller under a charterparty providing that the Crown should be liable for all consequences of warlike operations but that the owners were to bear the marine risks. After the Armistice the steamer, when still under requisition, was on a voyage with a mercantile cargo of oats and collided at night with another steamer which had been requisitioned by the United States Government and which was taking mines back to America as they were no longer required for the purposes of the war. The collision was caused by the negligent navigation of both

* Reported by W. B. THOMPSON, Esq., Barrister-at-Law.

steamers, and the respondents' steamer was off hire for 99 days as the result of the damage which she suffered.

Held, that as hostilities had ceased the mine-carrying steamer was not engaged in a warlike operation, and the Crown was not liable.

This special case stated by an arbitrator raised once more the old question whether injuries suffered by a requisitioned ship were or were not the consequence of a warlike operation. The arbitrator had held, subject to the opinion of the Court, that the injuries were the consequence of warlike operations, and that the shipowners were entitled to recover damages against the Crown.

The Attorney-General (Sir Douglas Hogg, K.C.) and Mr. Russell Davies appeared for the Crown; Mr. Dunlop, K.C., Mr. Balloch, and Mr. Sanford Cole for the respondent shipowners.

The Attorney-General, in opening, said that in 1917 a steamer, the Trevanion, belonging to the Hain Steamship Company, was requisitioned by the Shipping Controller under the charterparty T.99 which provided in effect that the Crown should be liable for all consequences of warlike operations while the owners continued to take the marine risks. In December, 1918, after the Armistice had been signed, the Trevanion was on a voyage from the United States with a cargo of oats, and a steamer, the Roanoke, which had been requisitioned by the United States Government, was on a voyage from England to the United States with a cargo of mines which, as peace had been declared, were no longer required for carrying on hostilities in European waters. On the night of Christmas Day the steamers came into collision in mid-Atlantic, and the Trevanion was so much damaged that she was off hire for 99 days. The collision was due to the fact that both steamers were being negligently navigated at the time.

The arbitrator considered that he was bound by the decisions in the Geelong case, *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service* (39 *The Times* L.R., 133; [1923] A.C., 191); and the Warilda case, *Attorney-General v. Adelaide Steamship Company, Limited* (39 *The Times* L.R., 333; [1923] A.C., 292), and held that the collision was a consequence of warlike operations, and that therefore the Crown was liable to pay the owners of the Trevanion.

The Board of Trade had succeeded to the Shipping Controller, and the Board now appealed against the award.

The Attorney-General submitted that no case had gone so far as to say that where two ships were in collision, one of them on a warlike operation and the other not; where the collision was due to the negligence of both; and where the ship claiming damages was the one which was not on a warlike operation, the claim could succeed. The burden of proving that a vessel was engaged in a warlike operation was on the claimant; and the Trevanion was carrying an ordinary mercantile cargo of oats and was obviously not on a warlike operation. The only question, therefore, was whether the Roanoke was engaged on a warlike operation. He submitted that she was not, on the authority of the *Commonwealth* case (*supra*). The test was whether the cargo was being taken to some place for the purpose of waging war. If it was not, the ship carrying it was not on a warlike operation. Even if the Roanoke was engaged on a warlike operation, the proximate cause of the collision was not that operation but the negligence, and the collision was not a consequence of a warlike operation.

Mr. Dunlop submitted that the accident was a consequence of a warlike operation. There was no precise test of what was a warlike operation, and each case must be decided on its own facts. The first thing to be considered was what was the status of the ship and the persons in charge of her. The Roanoke was a warship, and was manned by a United States naval crew. One must consider what was the character of the work which the ship was doing at the material time. The existence of a state of war was not essential, but, in fact, the Armistice did not put an end to the state of war. Lord Justice Atkin's observation that almost any movement of a warship in the course of her duties in time of war was a warlike operation had been approved by the House of Lords. The taking of these mines back to America was as much a warlike operation as the original bringing of them to Europe.

The function of the vessel must be considered as a whole. A warlike operation need not be of a combatant character, and the work being done might be only incidental to the fighting. The only difference between this case and those which had been decided was that this collision occurred after the Armistice; but that, he submitted, was quite immaterial. The real test ought to be whether the vessel was engaged in a war errand. If the Roanoke was engaged in a warlike operation, the fact of negligence on the part of one or both of the ships would have no effect.

The Attorney-General replied. The question was not whether the ship had been engaged in a warlike operation, but whether it was engaged in a warlike operation when the accident occurred.

Mr. Justice Rowlatt stated the facts, and said that his judgment must be in favour of the Crown. The Armistice did not put an end to the War, nor did it necessarily put an end to all warlike operations, but so far as this ship was concerned the Armistice did put an end to hostilities. The Roanoke was simply going back to America; she was not engaged in hostilities of any kind, nor was she doing anything to serve the purpose of hostilities. Unless, therefore, it could be said that a warship was always engaged in warlike operations, the case was really unarguable. In fact, a warship was not always engaged in warlike operations, even in time of war.

He therefore gave judgment for the Crown on the ground that the Roanoke was not engaged in a warlike operation, and the question whether the collision was a consequence of a warlike operation did not really arise.

[Solicitors—The Solicitor to the Board of Trade; Messrs. Thomas Cooper and Co.]

Chan. Div. (Astbury, J.) } 1928. Mar. 1.

COX v. NATIONAL UNION OF FOUNDRY WORKERS OF GREAT BRITAIN AND IRELAND.*

Trade Union—Rules—Alleged invalid alteration—Action for injunction—Benefits—No right in member to sue—Internal affairs of union—No power in Court to interfere—Trade Union Act, 1871 (34 and 35 Vict., c. 31), s. 4.

* Reported by E. K. Corrie, Esq., Barrister-at-Law.

In this action Mr. Walter Cox, of Mornington-street, Deptford, a member of the National Union of Foundry Workers of Great Britain and Ireland, asked for a declaration that resolutions passed by the national executive council of the union altering rules 33 and 34 of the rules of the union were *ultra vires,* and injunctions to restrain the union from acting upon these resolutions. Rules 33 and 34 dealt with the benefits to be conferred on members for the purposes of superannuation and funeral expenses.

In 1873 the plaintiff joined the Friendly Society of Iron Founders, which was subsequently amalgamated with the defendant union. The plaintiff worked continuously at his trade until the end of 1921, when he ceased working, being then 66 years old. Under the rule hereinafter mentioned he received a weekly superannuation allowance of 7s. 6d. until January 10, 1927, when, under the resolution of the national executive council, the allowance was reduced to 5s. a week.

By rule 4 (3) of the rules of the union the national executive council was not permitted to make new rules, and no amendment of the rules was to be made except by the vote of members or by the rules revision committee to be set up under rule 44.

By rule 33 provision was made for the payment of superannuation benefit, under which the plaintiff had become entitled to 7s. 6d. a week. That rule could not be altered except by a consent of five-sixths of the members on a vote. By rule 34 it was provided that on the death of a member certain sums as set out in the schedule to the rules should be paid for funeral expenses.

On January 4, 1927, the national executive council passed resolutions that the superannuation allowance under rule 33 and the payments for funeral expenses should be reduced by one-third.

The plaintiff then brought this action for a declaration that the resolutions were *ultra vires,* and injunctions to restrain the carrying out of these resolutions.

The defendant union contended that the resolutions were not intended to alter the rules, but were only a matter of administration, as at present the financial position of the union was such that it could not afford to pay the full superannuation benefit. The defendants also said that the plaintiff was not entitled to bring this action, as under section 4 of the Trade Union Act, 1871, no action could be brought by a member to recover benefits, and that it was held in *McLuskey v. Cole* (38 *The Times* L.R., 20 ; [1922] 1 Ch., 7) that an injunction would not be granted to restrain the enforcement of a resolution when an action could not be brought under section 4. In any event, *Russell v. Amalgamated Society of Carpenters and Joiners* (28 *The Times* L.R., 276 ; [1912] A.C., 421) decided that such an action would not lie against a trade union in its registered name.

Mr. Quass appeared for the plaintiff ; Sir Henry Slesser, K.C., and Mr. Arthur Henderson for the defendants.

The facts were admitted between the parties.

Mr. Henderson called Mr. Robert Tilling, the general secretary of the union, who produced the report to the members of April, 1927, which gave the balance-sheet as at December, 1926. It showed that there was an overdraft at the bank of £27,000, and that there was due on loans from other unions £33,000, and to the General Federation of Trade Unions £10,900. All the securities of the union were pledged to the bank.

Sir Henry Slesser said that, in addition to the liabilities shown in the balance-sheet, the union was being pressed in December, 1926, by the Minister of Labour to put its finances in a better position, as the union had been unable for five years to pay its contribution to the Unemployment Fund, and unless that could be done the unemployment payment to the members of the union would not be made. No doubt it was hard on the plaintiff to lose 2s. 6d. a week, but the reduction was the only means by which the finances could be improved. The number of members who would have been injured by the cessation of unemployment payments was greatly in excess of those who received superannuation allowances. These allowances were paid out of the general funds of the union, which arose from the contributions of members, and no contributions were paid by the superannuated persons. Nor could the unemployed members make their contributions unless they received unemployment benefit.

Mr. Quass said that the plaintiff made no suggestion of *mala fides* against the union. The rules were made under statutory authority and had to provide for the objects of the union and the means of enforcing the rules. The Court had power to construe the rules and to see whether there were proper provisions as to altering them. The defendants did not suggest that they had not sufficient funds to pay the plaintiff the full 7s. 6d. a week, and that being so he was entitled to receive it. If the declaration and injunction asked for were granted the council of the union would take the proper steps to alter the rules. He submitted that the plaintiff was entitled to bring the action.

Mr. Justce Astbury, in giving judgment, reviewed the circumstances, and said that it was no doubt a hard case as far as the plaintiff and other old members were concerned. The resolutions were temporary while the finances of the union did not admit of payments in full, and it was to be hoped that the full payments would be resumed. The council had not purported to alter the rules. In December, 1926, the union was in a serious financial position, and negotiations had taken place between the Minister of Labour and the union in respect of the non-payment of the unemployment contribution. All this was shown in the January report to the members.

Matters in the foundry trade were very bad and the number of unemployed members was very large. If unemployment benefits were not paid there would be no contributions and the union must come to an end. The council had, by resolution, increased the amount of contribution, which they were entitled to do under the rules. It was better for the plaintiff to receive 5s. a week than nothing at all.

In his (his Lordship's) opinion the resolutions were not alterations of the rules, the temporary arrangement made by them was not *ultra vires,* and the Court had no right to interfere with the internal affairs of the union (*MacDougall v. Gardiner,* 1 Ch.D., 13). In any event, the plaintiff could not have obtained relief in this action owing to section 4 of the Trade Union Act, 1871. It was admitted that the plaintiff could not sue for his benefits. If the effect of the injunction asked for were not to obtain the benefits for the plaintiff it would be useless. On both grounds the action failed, and must be dismissed, with costs.

[Solicitors—Mr. L. Silkin ; Messrs. Pattinson and Brewer.]

Chan. Div. (Tomlin, J.) 1928. Mar. 1.

A. AND C. BLACK, LIMITED, v. CLAUDE STACEY, LIMITED.*

Copyright—Work of reference—Biographies—Supply of information—Meaning of "author"—Copyright Act, 1911 (1 and 2 Geo. V., c. 46), s. 5.

Where the compiler of a biographical book of reference receives from the biographees information to be used as material from which the book may be compiled, the persons supplying the information are not, for the purposes of the Copyright Act, 1911, the authors of the paragraphs containing the information.

This was an action in which the plaintiffs, A. and C. Black, Limited, of Soho-square, W.1, suing as the owners of *Who's Who,* alleged that the defendants, Claude Stacey, Limited, of Chancery-lane, W.C., had infringed their copyright therein by publishing a compilation entitled *Men of the West,* which contained a large number of biographies, being reproductions, in whole or in part, of biographies contained in *Who's Who* for 1925 and 1926. They claimed an injunction to restrain the defendants from publishing *Men of the West* or from otherwise infringing their alleged copyright in *Who's Who,* delivery up of all materials intended to be used for such publication, and damages for alleged infringement of copyright and for alleged conversion of infringed copies.

In and since the year 1897 the plaintiffs had sent out a printed *questionnaire* to all whose names appeared in *Who's Who,* and when once an entry had appeared in that book it was kept up to date by sending out for correction to each person concerned a print of the entry referring to him in the current edition.

It was the practice also of the defendants to send out a *questionnaire,* but in cases where it was brought to their notice that any particular information for which they asked already appeared in *Who's Who,* they took the entry from *Who's Who* and sent it to the person concerned, who corrected it.

The defendants contended that the facts stated in the biographies in *Who's Who* were not compiled by the plaintiffs, but were autobiographies written in each case by the person concerned, without any consideration being given by the plaintiffs; and that the plaintiffs published them with the licence of such person, who, in each case, was the author of such autobiography and the owner of the copyright therein. They also contended that any reproduction made by them from *Who's Who* was, in each case, made with the licence of the person concerned.

Mr. Macgillivray appeared for the plaintiffs; Mr. W. Arnold Jolly for the defendants.

MR. MACGILLIVRAY referred to persons whose names appeared in *Who's Who* as "biographees."

MR. JUSTICE TOMLIN.—Is that a word recognized by the Oxford Dictionary?

MR. JOLLY.—Yes, my Lord.

During Mr. Macgillivray's argument, Mr. JOLLY said that reproductions from *Who's Who* were made only at the direction of biographees concerned.

MR. JUSTICE TOMLIN.—Are you saying, Mr. Jolly, that persons who take what they may not take can say in defence that they did so at the direction of others? I should have thought that it had been established at a very early stage of human history that that is a bad defence.

Mr. JOLLY.—I hope to show your Lordship that the copyright in the entries in *Who's Who* is not in the plaintiffs, but is in the particular biographee in each case.

Mr. Edward Black, managing director of the plaintiff company since 1914, gave evidence that the firm of A. and C. Black, Limited, acquired the copyright in Simpkin and Co.'s *Who's Who* in 1896, and brought out an edition in 1897, that edition being prepared by sending out *questionnaires.* Previous editions had contained no biographies, only lists of names. The witness identified a form of *questionnaire* filled up by Mr. Harold Spender in 1901 as being, in substance, the form of *questionnaire* sent out by the plaintiffs from 1897. When returned, the forms were edited. Proofs of reprints as edited were sent to biographees. In all cases biographees were given the opportunity of supplying further information. All editing was done by employees of the company, and under the direct supervision of the witness.

In cross-examination, the witness admitted that all information in such publications as *Who's Who in Art, Who's Who in Literature* and other publications had been compiled by reference to *Who's Who,* and that the plaintiff company had never objected to their being so compiled. The plaintiff company did not alter the substance of facts given by biographees.

Mr. John Douglas Newth, employed by the plaintiff company as a member of their literary staff for the last two years, said that he had examined *Men of the West* and had compared it with *Who's Who* for 1924. In 87 cases he had found that the entries were, in substance, the same. Out of 633 entries in *Men of the West,* 353 were to be found in *Who's Who* for 1924.

Mr. MACGILLIVRAY submitted that there was a clear case of infringement of copyright within the authorities. This was nothing more than a "directory" case. The collection was merely one of items of information, and anyone wishing to make a similar compilation must go about it in his own way (*Kelly v. Morris,* L.R., 1 Eq., 697). He must go to the source to get the information. Having compiled it from his own information, he could check it with other compilations, and, if he found discrepancies, must submit them to the person who gave the information. See also *Morris v. Ashbee* (L.R., 7 Eq., 34); *Morris v. Wright* (L.R., 5 Ch., 279); *Cox v. Land and Water Journal Company* (L.R., 9 Eq., 324); *Weatherby and Sons v. International Horse Agency and Exchange, Ltd.* (26 *The Times* L.R., 527; [1910] 2 Ch., 297); *H. Blacklock and Co., Ltd. v. C. Arthur Pearson, Ltd.* (31 *The Times* L.R., 526; [1915] 2 Ch., 376).

The mere collection of information was the subject of copyright in a case of compilation.

The defendants then proceeded to call their evidence.

Mr. George Haynes Stacey, the managing director of the defendant company, said that the compilation of *Men of the West* was begun in or about August or September, 1924. Copies of a prospectus were sent to local celebrities, and their names were taken from all Kelly's directories for the West of England. The names were arranged in lists according to counties. There were between 18,000 and 20,000 names, all of which were indexed. Between 70 and 80 publications were collected, and from these all references to all

* Reported by K. R. A. HART, Esq., Barrister-at-Law.

men associated with the West of England were cut out. From the cuttings rough biographies were made, which were sent to the biographees to be brought up to date. They were then edited and fair copies were sent to the biographees, who sometimes received the entries seven or eight times.

MR. JUSTICE TOMLIN.—The men of the West must be a very patient lot.

The witness said that *questionnaires* were sent only to those whose names, so far as he could gather, did not appear in any other biographical work. Between 10,000 and 12,000 were sent out.

The witness said that, in taking facts from *Who's Who* he did so under the impression that such facts were public property. He did not, in all instances, prepare the biographical sketches, but he edited them when received. It never occurred to him that any person owned copyright in any of the entries in *Who's Who*. All persons to whom requests for information about themselves were sent told him to refer to the usual books of reference.

There was one case in which a *questionnaire* sent out by the defendants had been answered. That *questionnaire*, when filled in, was handed over to the defendants' staff to compile a biographical sketch from it, and that sketch when compiled was submitted for approval.

In cross-examination the witness said that the rough draft was compiled from the completed *questionnaire* and not from *Who's Who*.

The witness did not admit that any information contained in the filled-in *questionnaire* and not contained in *Who's Who* was omitted from *Men of the West* because it was not in *Who's Who*. Any such omissions were merely clerical errors.

Mr. John Thomas Alden, engaged as assistant editor in the compilation of *Men of the West*, gave evidence on behalf of the defendants. He said that entries were cut out from various publications and were pasted on slips. Cuttings from different publications about the same person were all pasted on the same slip, which would go to the typing department after rectification by Mr. Stacey. The witness interviewed biographees to obtain information. The defendants also employed other persons to interview biographees, and Mr. Stacey interviewed some of them himself, the witness accompanying him on occasions.

Mr. JOLLY, for the defendants, said that, although the plaintiffs might have some copyright in *Who's Who* as a whole, they had none in any individual biography. The analogy of a directory was completely misleading, as a directory was made by house-to-house collections.

MR. JUSTICE TOMLIN.—That is not in accordance with one's personal experience of what is left on the doorstep. They leave slips to be filled up.

Mr. JOLLY.—That may be a modern practice.

MR. JUSTICE TOMLIN.—I am dealing with modern times. I am not going back to the Middle Ages.

Mr. JOLLY.—I am going back to *Kelly v. Morris* (*supra*) and similar cases. If I write the information for the compiler's representative, who interviews me on my doorstep, the copyright is in me.

MR. JUSTICE TOMLIN.—And if my parlourmaid interviews him on the doorstep and, being particularly polite, says, "I will write the information for you," then——

Mr. JOLLY.—The copyright is in the parlourmaid.

Counsel referred to section 5 of the Copyright Act, 1911. The person who furnished and wrote the information was the author.

MR. JUSTICE TOMLIN.—There must be an element of common sense used here. According to you, there are 600 owners of copyright in *Who's Who*. If you are right, it means that the publisher has no right whatever to make any alteration in what is submitted to him by a biographee.

Mr. JOLLY.—All that the *questionnaires* of the type which have been discussed in this case do is to bring certain points to the mind of the biographee (see *Macmillan and Co., Limited v. Cooper*, 40 *The Times* L.R., 186).

MR. JUSTICE TOMLIN.—The only point here is whether, when a man alters things in certain circumstances, he has a right to do so under the Copyright Act, 1911. The information was given for the purpose of compilation. The person who gives such information is not an author. If a man comes to my house and asks me when I was born and I tell him, the fact of my having given him the information, whether I write it or say it, does not make me an author within the meaning of the Copyright Act, 1911.

Mr. JOLLY said that the case against the defendants was merely based on the fact that Mr. Stacey preferred to use the exact language in *Who's Who* rather than that of the biographee in the *questionnaire*. But the alleged copyright must depend either on the arrangement of the facts or on the language in which they were expressed. The defendants had used neither the arrangement nor the expressions employed in *Who's Who*. It was, however, impossible for the defendants to escape the fact that entries in *Who's Who* were used by them as a basis. Suppose, however, that *Who's Who* applied to a poet for details of his career and he wrote a description of his career in the form of a sonnet, your Lordship, according to my friend, would have to hold that the compilers of *Who's Who* were the authors of the sonnet.

MR. JUSTICE TOMLIN.—I shall not consider that point until an edition of *Who's Who* appears in verse.

Mr. MACGILLIVRAY, in reply, said that the question of authorship of separate entries was decided in *James Nisbet and Co., Limited v. The Golf Agency* (23 *The Times* L.R., 370). In the present case copyright was claimed, not for any literary expression, but for a compilation of information.

MR. JUSTICE TOMLIN.—You are only dealing with a certain number of limited cases, and you do not want to destroy the book. You do not want delivery up of the whole of the book?

Mr. MACGILLIVRAY.—No; but I am entitled to delivery up of that part of the book which infringes my copyright, *Byrne v. Statist Company, Limited* (30 *The Times* L.R., 254; [1914] 1 K.B., 622).

MR. JUSTICE TOMLIN, in giving judgment, said that having heard the witnesses and having carefully examined 15 entries, he was satisfied that the 15 cases were the result of a process in which the defendants had made a use of the entries in *Who's Who* which they were not entitled to make. They had at first, very properly, sent out *questionnaires*, but were discouraged from that practice by being continually referred to *Who's Who*. From the evidence, it was plain that they took the information in *Who's Who* and, with minor alterations, made use of it. In some cases it was quite plain that the extract from *Who's Who* had been used. One man filled in a *questionnaire* in language quite different from that in *Who's Who*, and the defendants did not use the *questionnaire* as filled in, but the entry in *Who's Who*. It was impossible not to come to the conclusion that the entries in this and in all the 15 cases in *Men of the West* was based on those in *Who's Who*.

He did not propose at the present stage to shut out the defendants from saying that this was not true in regard to all the 87 entries. The compiler of such a book as *Who's Who* was given information only as material from which the book might be compiled. Those who supplied the information were not the authors of the paragraphs containing it for the purposes of the Copyright Act, 1911.

The case was covered by *James Nisbet and Co. v. The Golf Agency* (23 *The Times* L.R., 370). The defence, therefore, failed and the action succeeded, the plaintiffs being entitled to an injunction in the terms asked for, but limited to the books containing passages taken, or only colourably altered, from *Who's Who*. They were also entitled to delivery up of copies of *Men of the West* containing infringing passages. There would be an inquiry as to damages. The Court must not be taken to be saying that the plaintiffs were entitled to delivery up of the whole of the publication known as *Men of the West*.

[Solicitors — Messrs. Field, Roscoe and Co.; Messrs. Milner and Bickford.]

K.B. Div. (Rowlatt, J.) 1928. Mar. 5.

HANSFORD v. LONDON EXPRESS NEWSPAPER, LIMITED.*

Insurance (Accident) — Death — Exception — Assured not to be in charge of any vehicle — Bicycle—Whether a vehicle.

The Court held that a bicycle was a "vehicle" within the meaning of that word in an accident insurance policy containing the condition that at the time of the accident the assured should not be in charge of any vehicle.

This was a special case stated by an arbitrator in which the question to be decided was whether a bicycle was a "vehicle" within the meaning of a clause in the conditions of a newspaper insurance scheme.

Mr. Tristram Beresford appeared for the claimant; Mr. Malcolm Hilbery for the respondents.

The claimant was administratrix of the estate of one John Ernest Hansford, deceased, and claimed to be entitled as his legal personal representative to an accident benefit under the *Daily Express* Great Free Insurance Scheme, by which registered readers of the *Daily Express* were insured against death by accident. In the arbitration the respondents admitted:—

(*a*) The claimant was the administratrix of the deceased man, who died on December 13, 1926. (*b*) On that date, about 5.15 p.m., the deceased man was walking, pushing his bicycle along the Wickham-road, Shirley, Surrey, and returning from his work to his home, when he was run over from behind by a motor-lorry and thereby sustained personal injuries from which he died on the same date. The bicycle had a light on it at the time of the accident, but the lamp was not lit. (*c*) At the time of the accident the deceased man was a registered reader of the *Daily Express*, and, as such, was entitled to the benefits of an insurance scheme known as the *Daily Express* Free Accident Insurance in accordance with the terms and conditions indorsed on the registration certificate dated November 20, 1924. (*d*) All requirements as to claim within the correct period and as to proof of identity had been complied with.

The material conditions of the insurance scheme were as follows:—

"Accidents of Travel and Lifts.

"(2) £1,000 if the reader shall be killed solely and directly by accident (*a*) to a passenger steamer or to a public omnibus, tramway-car, cab, carrier's cart, charabanc, or to any road vehicle. . . .

"Accidents in the Streets.

"(6) £250 in case of death of the reader if he or she shall while a pedestrian (a disabled ex-Service man in a self-propelled vehicle shall be deemed to be a pedestrian) in a thoroughfare open for use by the public be killed by accidental impact with a moving vehicle. . . .

"(7) £3 per week . . . should such accident render the reader temporarily and totally unable to follow his or her usual vocation. Provided as regards (6) and (7) that the reader be not at the time of the accident in charge of any vehicle or engaged in loading or unloading or attending to any vehicle. . . .

"(8) £250 if the reader shall be killed by an accident happening to a private horse-drawn vehicle or private motor-car or a sidecar attachment to a motor-cycle in which he or she is being driven solely for pleasure, or provided he or she is the owner thereof whilst driving such vehicle or motor-car solely for pleasure. . . . Provided that such motor-car or motor-cycle is being driven by a duly licensed driver.

"Cycling and Motor-Cycling Accidents.

"(9) £250 in case of death of the reader if he or she shall be accidentally killed while riding a bicycle, tricycle, or motor-cycle solely for pleasure, but including journeys to and from the reader's usual place of business." . . .

On the back of the policy were a number of conditions, including one as follows:—

"No compensation shall be payable for any accident happening while the reader is riding upon a luggage or pillion carrier of a cycle or motor-cycle or while a reader is entering or attempting to enter or leaving or attempting to leave any vehicle."

The arbitrator found as facts:—

(1) That the deceased man worked at a place about two miles from his home;

(2) that his bicycle was out of order on the evening of the accident;

(3) that he so informed a fellow workman when starting for home about 5 p.m., and that when he so informed his fellow workman he was wheeling his bicycle;

(4) that the time when and the place where the accident occurred were consistent with his having walked the whole way from his work.

It was contended for the claimant that the deceased man was at the time of the accident "riding a bicycle" within the meaning of clause 9, although at the moment he was wheeling the bicycle; and, alternatively, that he was a pedestrian within the meaning of clause 6, and not "in charge of any vehicle" within the meaning of clause 7.

It was contended for the respondents that the deceased was not "riding a bicycle" within the meaning of clause 9 and that he was a pedestrian who was "in charge of a vehicle" within the meaning of clause 7.

The arbitrator found (1) that the deceased man at the time of the accident was not "riding a bicycle" within the meaning of clause 9; (2) that he was at such time a "pedestrian" within the

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

meaning of clause 6 ; and (3) that at such time he was "in charge of a vehicle" within the meaning of clause 7.

The question for the opinion of the Court was whether a bicycle was a "vehicle" within the meaning of clause 7 of the conditions.

In the course of the argument *Harper v. Associated Newspapers, Limited* (43 *The Times* L.R., 331) was referred to.

MR. JUSTICE ROWLATT, in giving judgment, said that the only question for the Court was whether a bicycle was a "vehicle" within the meaning of that word in clause 7. Mr. Beresford contended that it was not, though he admitted that, apart from that particular clause and in general speech, it might well be so. The insurance was not a general scheme of insurance against accidents, but was a group of insurances against particular kinds of accidents occurring in particular circumstances. Many accidents were not covered. Reading the provisions of the policy together he could not see any reason for putting a limitation on the meaning of the word "vehicle," and he held that the word included a bicycle. The award was, therefore, right, and the appeal must be dismissed.

[Solicitors—Messrs. Leonard Bingham and Sharp ; Messrs. Dennes, Lamb, and Pearce Gould.]

Court of Appeal.
(Scrutton and Sankey, L.JJ., and Russell, J.)
1928. Feb. 16.

BROOKS AND OTHERS v. LIFFEN.*

Landlord and Tenant—Restrictions—Decontrol—Dwelling-house—Rent less than two-thirds of rateable value—Tenant in occupation on July 31, 1923—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 12 (7)—Rent and Mortgage Interest Restrictions Act, 1923 (13 and 14 Geo. V., c. 32), s. 2 (1).

A tenant of a dwelling-house under a 98 years' lease at a rent which was less than two-thirds of the rateable value of the house was in possession of the house at the passing of the Rent and Mortgage Interest Restrictions Act, 1923.

Held, that the tenant was not to be deemed the landlord within the meaning of s. 2 (1) of the Act of 1923, and as the true landlords were never in possession the house remained one to which the Act of 1920 applied.

Decision of the Divisional Court (44 *The Times* L.R., 94 ; [1928] 1 K.B., 441) affirmed.

This was an appeal by the plaintiffs from a decision of the Divisional Court (44 *The Times* L.R., 94 ; [1928] 1 K.B., 441) affirming a decision of Judge Tobin at Westminster County Court.

The plaintiffs' claim was for possession of a house known as 15, Gillingham-street, Pimlico, S.W., of which they owned the freehold. The facts were agreed between the parties.

In 1904 Mr. Liffen, the defendant, became the assignee of a 98 years' lease of the premises which expired in June, 1924, and he entered into possession of the premises under that assignment. The net rateable value of the premises at all material times had been £38 a year. The rent reserved under the lease was £5 and was, therefore, considerably less than two-thirds of the rateable value of the house. (See section 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which is set out *infra.*) On July 31, 1923, the date of the passing of the Rent and Mortgage Interest Restrictions Act, 1923, Mr. Liffen was still in actual occupation of the premises. On June 4, 1924, the plaintiffs wrote to him pointing out that the long lease was coming to an end and offering to allow him to remain in the house as a quarterly tenant at a yearly rent of £56 5s. Mr. Liffen accepted that and he remained as quarterly tenant on these terms after the expiration of the long lease. In November, 1926, however, an admittedly proper notice to quit was served on him by the plaintiffs determining the quarterly tenancy as from March 25, 1927. Mr. Liffen refused to leave the premises. The present proceedings were started by Messrs. Brooks in the County Court to recover possession of the house, and Mr. Liffen's defence to the claim was that he was protected by the Rent Restriction Acts. The County Court Judge held that the defendant was protected by the Rent Restriction Acts.

The plaintiffs appealed.

The Divisional Court held that although section 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provided that where the rent of a dwelling-house was less than two-thirds of its rateable value the Act should apply to the dwelling-house as if no such tenancy existed, the tenant was not, as against the freeholders, to be deemed to be the landlord of the house for the purposes of section 2 (1) of the Act of 1923 so as to cause the house to become decontrolled.

The plaintiffs again appealed.

Mr. Bensley Wells appeared for the appellants ; Mr. Ronald Walker, for the respondent, was not called upon.

LORD JUSTICE SCRUTTON said that this case had been argued with great ingenuity and with a clearness which showed the Court that counsel for the appellants was wrong in his contentions. The facts giving rise to the appeal were quite simple. His Lordship then proceeded to state the facts, and referred to section 2, subsection 1, of the Rent and Mortgage Interest Restrictions Act, 1923, which provided : "Where the landlord of a dwelling-house to which the principal Act [the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920] applies is in possession of the whole of the dwelling-house at the passing of this Act [July 31, 1923], or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house. . . ."

The principal object of that section was to exclude dwelling-houses from the application of the principal Act in certain cases. Now there were two classes of cases to be considered. The first was that of very long leases in which the rent was out of proportion to the value when the lease should expire. It was not intended to fetter the landlord with a standard rent much below the value of the house. The second class arose in this way. It had to be borne in mind that after 1914 for compassionate reasons tenancies were granted at very low rentals, and when these expired it was not intended to bind the landlord with the

* Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.

rent then paid as the statutory rent. It was therefore provided by section 12, subsection 7, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, that: "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . . and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed." And three years later section 2, subsection 1, of the Act of 1923 provided as set out above. Coupled with that it was provided by subsection 3 of section 2: "For the purposes of this section the expression 'possession' shall be construed as meaning 'actual possession,' and a landlord shall not be deemed to have come into possession by reason only of a change of tenancy made with his consent." This Court had had to consider that section in a recent case, and they held that it meant what it said. It had been argued here on behalf of the appellant that the effect of that section was to wipe out section 12, subsection 7, of the earlier Act, and it was said: "True, here is a tenant, but really he is a landlord and being such is in possession of the whole of the dwelling-house, and the house was decontrolled." That turned on the definition clause, viz., section 12, subsection 1 (*g*), of the Act of 1920, which provided: "The expression 'landlord' also includes in relation to any dwelling-house any person other than the tenant, who is or would but for this Act be entitled to possession of the dwelling-house."

If he (the Lord Justice) understood the learned counsel's argument correctly, it was this. He said: "The defendant is a person who is entitled to possession or would but for this Act be entitled to possession. You cannot look at the tenancy. Somehow or other the effect of the definition clause is to turn him into a landlord in possession against his own interest." That argument seemed to him to be much too ingenious. He did not think that that was the intention of section 2, subsection 1, of the Act of 1923. The object of that section was to deal with the real landlord or owner, and he was unable to read section 12, subsection 1 (*g*), of the Act of 1920 as making the tenant the landlord for this purpose. Then it was said that this must refer to subletting. He did not propose to consider that question, and he also desired to reserve for future consideration the question whether *Finey v. Gougoltz* (42 *The Times* L.R., 501; [1926] 2 K.B., 322) had been rightly decided.

The present case, at any rate, was not one of subletting. The true landlord was never in possession within the meaning of the Act, therefore the house remained one to which the Act applied.

Lord Justice Sankey said that he agreed. The question to be considered was, whether this house became decontrolled, and whether, apart from the Rent Restriction Acts, the plaintiffs were in fact landlords and the defendant was in fact tenant. Counsel in his ingenious argument had referred to section 2, subsection 1, of the Act of 1923, and to section 12, subsection 7 (*f*) and (*g*), of the Act of 1920.

Dealing with the first-named section, it was said that although the word "landlord" was used there, and quite apart from the Acts would refer to the plaintiffs, yet by the true construction of that section the tenant in fact had become in law the landlord and therefore section 2, subsection 1, applied, and in the circumstances the house had become decontrolled. And it was further said that as the rent payable was less than two-thirds of the rateable value the Act applied as if no such tenancy had ever existed, and that as the result of section 12, subsection 1 (*g*), of the Act of 1920 the defendant was in reality landlord and not tenant. But he (the Lord Justice) asked, "Did the Act say so?" In support of his contention counsel had referred to section 12, subsection 1 (*g*), and he had submitted that the defendant would, but for this Act, be entitled to possession of the dwelling-house; that implied actual possession, and the defendant was in fact in actual possession.

He (the Lord Justice) thought there were two ways of meeting this argument. In the first place, there was the question to be answered whether the defendant came within the definition of a "landlord" and, in the second place, what was the real meaning of "landlord of a dwelling-house" in section 2, subsection 1, of the Act of 1923? In his view the learned counsel failed on both points.

As to the first point, he had contended that you must look at the tenancy in order to see whether the defendant was entitled to possession of the dwelling-house. He (the Lord Justice) did not think it was possible to rely on subclauses (*f*) and (*g*) both to approbate and reprobate that the tenant was not the landlord.

In the Court below Mr. Justice Salter had relied rather on section 2 of the Act of 1923. He said this: "The word 'landlord' must be loosely used in that subsection because, strictly speaking, there cannot be a landlord without a tenant and a tenure, and the subsection deal with a case where there is neither tenant nor tenure. 'Landlord' clearly must mean nothing more than 'owner.'" He (the Lord Justice) agreed with that and with what had been said by Lord Justice Scrutton, that section 2 was dealing with an actual owner and not with the tenant of an actual owner.

Mr. Justice Russell agreed.

[Solicitors—Messrs. Stephenson, Harwood, and Tatham; Mr. H. A. Phillips.]

K.B. Div. (Rowlatt, J.) 1928. Mar. 6.

MILLS v. JONES.*

Revenue—Income-tax—Award by Royal Commission—Government user of patented invention—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. D.

The Court held that income-tax was payable on certain sums awarded by the Royal Commission on Awards to Inventors, it appearing that the sums in question were not a capital payment made for the Crown's acquisition of a patented invention but were sums paid for the user thereof.

This was an appeal by Sir William Mills, the patentee of the Mills bomb, against a decision of the General Commissioners of Income-Tax, who had decided that the sum of £27,750 received by him from the Government for the use of Mills bombs during the war was chargeable to income-tax as being

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

"annual profits or gains" within Schedule D of the Income Tax Act, 1918.

According to the case stated by the General Commisioners Sir William Mills effected certain improvements in a hand grenade known as the Roland bomb, which had been invented in Belgium. Those improvements were the subject-matter of patents taken out by Sir William Mills. The Government used Sir William Mills's inventions and authorized the manufacture of 75,131,962 Mills bombs during the war.

In consequence of the fact that the patents taken out by Sir William Mills were in respect of improvements on the Roland bomb, a number of persons claimed to have a right to a share in any payment made by the Government in respect of the Mills bomb. To avoid confusion before the Royal Commission on Awards to Inventors and a conflict of interests a deed was entered into by which Lieutenant-Colonel William Stephen Tunbridge was to make a claim before the Commission on behalf of M. Léon Roland, M. Jules de Lamine, the Compagnie Belge des Munitions Militaires, Société Anonyme, M. Albert Dewandre, all resident in Belgium, and also on behalf of Sir William Mills.

The Commission heard the claim in January, 1920, and on March 11, 1921, an award was made of £37,000 in respect of all user—past, present, and future—by the Government of Mills bombs, including user by way of selling for use, licensing, or otherwise dealing with them. Out of that £37,000 Sir William Mills received £27,750, of which £24,000 was paid to him on March 30, 1921, and £3,750 on August 3, 1921, and Lieutenant-Colonel Tunbridge, on behalf of the Belgian applicants, received £9,250. No deduction in respect of income-tax was made from those sums on payment. No assessment was made on Sir William Mills in respect of the money received by him until July, 1926, when the inspector of taxes surcharged him in £24,000 for the year ending April 5, 1921, and in £3,750 for the year ending April 5, 1922.

Sir William Mills appealed to the General Commissioners against those surcharges. He contended that the payments of £24,000 and £3,750 were of a capital nature made for the acquisition by the Crown of his rights for a lump sum. On behalf of the Crown, it was contended that the sums in question were paid for the user of the patents and were "annual profits or gains" chargeable under Schedule D of the Income Tax Act, 1918, and that, although the award referred to future user, the possibility of future user was so remote that the whole sum awarded should be taken to have been paid in respect of past user.

The General Commissioners held that the sums awarded were "annual profits or gains" chargeable to income-tax under Schedule D, and they confirmed the certificates of surcharge.

Sir William Mills appealed against their decision.

Mr. Jowitt, K.C., and Mr. J. F. Eales appeared for the appellant; the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills for the Crown. Mr. Arthur Henderson held a watching brief for a party interested.

Mr. Justice Rowlatt, in giving judgment, said that in *Constantinesco v. The King* (43 *The Times* L.R., 727) there was no statement in the award that it was in respect of all user, past, present, and future, including user by way of selling for use, licensing, or otherwise dealing with the subject of the award. Otherwise, however, that case was the same as the present. In *Constantinesco v. The King* (*supra*) the claim was made on a strict royalty basis, as for a valid patent. In the present case the claim was put forward on a royalty basis. The question for decision, shortly, was whether the sums received by Sir William Mills had been given in respect of the user of something worthy of being treated as the subject of compensation.

It rather appeared from reading the award in the present case that it could not be said that it was merely in respect of past user and not also in respect of the purchase of the patents for the future. That, however, was too meticulous a way of looking at it. The Commission had no power to assess the Government to pay for future user. But a great many of the bombs had been made, and a certain number were in stock, and it was suggested during the hearing by the Commission that no addition would have to be made to the enormous figures which had been mentioned, and that the parties should consent to making an end of the matter once and for all. That the parties did.

The reference to future user was inserted in the award to make it quite clear that it was not anticipated that there would be any more user or any further claim. It had, however, loomed so large in the award as to give rise to an argument that the whole case ought to be regarded as being on a different basis. He was unable so to regard it. The matter was governed by *Constantinesco v. The King* (*supra*), although it was not so simple a case.

[Solicitors—Messrs. Nash, Field, and Co., for Messrs. Docker, Hosgood, and Co., Birmingham; the Solicitor of Inland Revenue; Messrs. Kenneth Brown, Baker, Baker.]

House of Lords.
(Viscount Sumner, Lord Warrington of Clyffe, and Lord Atkin.)
1928. Mar. 6.

JOSEF INWALD AKTIEN GESELLSCHAFT v. PFEIFFER AND ANOTHER.*

Treaty of Peace—Debt incurred before outbreak of war—Austrian creditor—Action by creditor incompetent—Treaty of Peace Order, Art. 1 (x) (*ee*).

The defendant, a Norwegian subject, living in England, incurred a debt to the plaintiffs, an Austrian company, before the outbreak of war. After the Treaty of Peace the plaintiffs sued the defendant for the amount. The Judge in chambers made an order striking out the claim, on the ground that the only right to sue for the debt was in the Administrator of Austrian Property.

Held, that as the Treaty of Peace Order made the debt payable to the Administrator and transferred to him all the rights of the creditors the plaintiffs had no right to bring the action.

Decision of the Court of Appeal (43 *The Times* L.R., 399) affirmed.

This was an appeal from an order of the Court of Appeal, Lord Hanworth and Lord Justice Scrutton, (43 *The Times* L.R., 399), affirming an order of Mr. Justice Shearman in Chambers.

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* Reported by H. B. Hemming, Esq., Barrister-at-Law.

The appellants were a company incorporated in accordance with the laws of the former Austrian Empire. The respondent Pfeiffer was a Norwegian subject, resident and carrying on business in England.

By a specially indorsed writ, dated November 10, 1926, the appellants claimed from Pfeiffer £494 9s. 2d., the aggregate of sums alleged to be due for goods sold and delivered to him between May and July, 1914.

The Administrator of Austrian Property was also joined as a defendant to the action in respect of any interest that he might have by way of charge on the said indebtedness.

The respondent Pfeiffer contended that since the coming into force of the Treaty of Peace between Great Britain and Austria, and the passing of the Order in Council, which empowered the Administrator of Austrian Property, for the purpose of enforcing a general charge on enemy property, to recover debts due to Austrian Nationals, the Administrator was the only person entitled to sue, and he applied that the writ should be struck out.

The appellants had previously applied to the Administrator to take the necessary proceedings to recover the debt, but the Administrator refused to do so, except on receipt of an indemnity, the conditions of which were so onerous that the appellants refused to accept them.

By the Treaty of Peace, Art. 249, and the Order in Council giving effect thereto, all debts due to Austrians from people in England were charged in favour of the Administrator of Austrian Property to apply the proceeds to paying claims of British subjects against enemy countries.

Master Jelf set aside the proceedings, and his order was affirmed by Mr. Justice Shearman.

In the Court of Appeal, the Master of the Rolls was of opinion that the effect of the Order in Council was to transfer to the Administrator of Austrian Property the right to enforce the debt, and he was to be deemed to stand in the shoes of the creditor. Lord Justice Scrutton was of opinion that there were in the Order in Council no clear words which prevented a man who had a beneficial interest in property which was charged from seeking to establish that he had such property, but he did not formally dissent, and accordingly the order of Mr. Justice Shearman was affirmed.

Sir Walter Greaves-Lord, K.C., and Mr. Scobell Armstrong appeared for the appellants; Mr. Aronson for the respondent Pfeiffer; and the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. H. M. Giveen for the Administrator of Austrian Property.

Counsel for the respondents were not called upon.

Lord Sumner, after referring to Article 249 of the Treaty of Peace and Article 1 (x) (*ee*) of the Order in Council, said that in the Court of Appeal the Master of the Rolls held that, under the latter provision, the power to sue was no longer in the former creditor, but had been transferred to the Administrator in such a way that the debt was for the time being a debt due to the Administrator and to him alone, and that, therefore, an action by the former creditor was incompetent. He (Lord Sumner) did not see how it could be seriously contended that, if the Administrator had the debt placed by law in such a position that he had all the powers of the creditor, any one else could sue as creditor. Nor was that difficulty got over by joining the Administrator as a defendant. It was said that all that was given to the Administrator was a charge, and a charge for a particular purpose, and that it followed, therefore, that if and when all the payments for which the charge was imposed had been made, the interest of the Administrator ceased and that the title of the original owner was not divested, but remained, subject to the charge. That argument appealed to Lord Justice Scrutton. He said that if an instrument was intended to take away from a man property that belonged to him it should do so in express terms. He (Lord Sumner) thought that the answer of the Master of the Rolls to that argument was satisfactory. It was not to be taken that any doctrine corresponding to the mortgagor's equity of redemption was contemplated by the framers of the Treaty. It was not reasonable to suppose that the peculiarly English doctrine of the legal and equitable estate and the rights arising therefrom was in the minds of the parties. He had no hesitation in saying that the position of the appellants was such that they could not bring this action at all, and that the writ must be struck out.

Lord Warrington of Clyffe and Lord Atkin gave judgment to the same effect.

[Solicitors—Messrs. Cardew Smith and Ross; Messrs. Neve, Beck, Son and Co.; the Solicitor to the Clearing House.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) } 1928. Feb. 15.

IN THE ESTATE OF GATES, DECEASED.*

Probate—Will—Construction—"I leave all my money to X"—Personal and real estate—Costs.

In the case of a will the operative part of which consisted solely of the words "I leave all my money to Alfred George Cabell" it was held that the bulk of the deceased's estate passed to Cabell, *i.e.*, cash in the house, a credit on current account at the bank, stocks and shares, and £800 outstanding on mortgage, but that the equity of redemption in certain freehold houses and the furniture in the deceased's house passed to the next-of-kin.

There was no executor named in the will, and as the deceased had died since January 1, 1926, leaving his property not wholly disposed of, the persons entitled under an intestacy took, in accordance with the Probate Rules (Non-Contentious Business), rule 119, a grant of administration with the will annexed, in priority to the legatee, Cabell.

An order was made that the costs of both parties on a motion by the legatee for a grant of administration with the will annexed should be included in the costs of the administration and be discharged rateably out of all the deceased's assets.

This was a motion by Alfred George Cabell, a dairy worker, of Ludbourne-road, Sherborne, Dorset, claiming, as universal legatee and devisee, a grant of letters

* Reported by William Latey, Esq., Barrister-at-Law.

of administration with the will annexed of the estate of the late Alfred Gates, formerly chairman of the West Surrey Central Dairy Company (called the testator in his report). The testator died on April 21, 1927, aged 73, a widower without children, leaving a duly executed will which read: "I leave all my money to Alfred George Cabell." The respondents, the next of kin, claimed that Cabell was entitled only to the cash left by the testator in his house and to the amount standing to his credit on current account at the bank; they asked for a grant of administration with the will annexed.

Mr. Owen Thompson, K.C., Mr. Clifford Mortimer, and Mr. William Latey appeared for the applicant; Mr. Spens, K.C., and Mr. G. C. Tyndale for the respondents.

Mr. THOMPSON, in bringing the motion before the Court, said that the opposition to the grant was made by relatives of the testator on the question of the construction of the will. The applicant was the personal attendant of the testator during the last few years of his life. The estate comprised: (1) £1,780 in war loan, stocks, and shares; (2) £800 lent on mortgage; (3) £200 worth of furniture; (4) the equity of redemption of three freehold cottages worth about £600 plus the rent accruing thereon and the right to receive £450 secured thereon by mortgage; (5) £4 in cash at the testator's house; and (6) £1,599 standing to the credit of the testator's current account at his bank. The questions at issue were: (1) Did the words "all my money" include all the realty and personalty? (2) Were the words confined to the personalty? (3) Did they mean only the cash in the house and the bank credit?

Mr. SPENS said that this was the first case in which the meaning of the word "money" in a will had arisen for interpretation since the passing of the new Real Property Acts.

In all the cases in which the Courts had held that the word "money" could be given the broader meaning there was some special context in the will, or a context could be found from the surrounding circumstances, which were well recognized as admissible to help the Court to construe the will. In one case the Court held that under £20 was all that could be brought within the strict legal meaning of "money," and in another case £200 out of a fortune between £14,000 and £15,000. Helped by the fact that it would be strange for a person to make a somewhat elaborate settlement of such a minute portion of his whole estate, the Court was enabled to say that in those particular cases it could not have been the intention of the testator to die intestate as to the great bulk of the property and only to dispose of and to settle elaborately on his relatives a tiny quantum.

He referred to Vice-Chancellor Page-Wood's statement in 1858 of the principle in *Langdale v. Whitfield* (4 K. and J., 426, at p. 432) that in the absence of anything in the will to indicate a different intention the word "moneys" would be confined to ready money actually in hand, and to the statement in *Parker v. Marchant* (1 Phillips, 356) that "ready money" included cash at a banker's on current account. There was a definite recognized legal meaning of the word "money," and the Court must give a certain meaning to it if there was nothing but that word in a will. The Courts had constantly struggled not to give that strict legal meaning to the word, and fastened on the smallest context in the document itself so as to give some broader meaning to it, so as, for instance, to include, in addition to the money in hand and on current account at the bank or immediately due (which in his submission was the present legal meaning of "money"), a mortgage debt, Government stock or other securities, or even the whole personal estate. If the Court found in the present case that there were certain assets coming within the strict legal meaning of the word "money" and that he could give an intelligent meaning to every word in the will by submitting that "all my money" meant the £4 in the house and the £1,599 in the bank, then the Court was bound by those facts, however unwillingly, to say: "Here is a layman making a will. He may have meant something different, but he has, in fact, used a word to which the law attaches a certain meaning."

There was a paragraph in Mr. Cabell's affidavit which was clearly admissible for the purposes of the argument. It said: "I am 27 years of age and was in the employment of the West Surrey Dairy Company for ten years until I received notice on April 6, 1927. About two and a half years ago Mr. Alfred Gates, who was then manager of the Sherborne branch of the Dairy Company, fell down the office stairs and broke a tendon in his knee. After that I had to help him in walking and he formed the habit of taking me with him everywhere he went, and also got me to do jobs for him in my spare time. I looked after his clothes, helped him to dress in the mornings, helped in the house, and did his gardening and went on errands. Mr. Gates did not pay me wages for this personal service, but it was his custom to give me money presents from time to time. After he had had his second stroke, I attended him night and day until a trained nurse from London was obtained."

Counsel referred to *Larner v. Larner* (3 Drew., 704), in which the will contained no express residuary gift. Therefore it did not come within the decision of *Rogers v. Thomas* (2 Keen, 8) by which if there were anything in the nature of a direction to pay debts and funeral testamentary expenses, and then there was a bequest of "the rest of my money," or "the remainder of my money," it was well recognized that "money" covered the general personal estate and did not mean the general residue. In his judgment in *Larner v. Larner* (*supra*) Vice-Chancellor Kindersley said:—

There is a well-settled rule that, in the absence of anything in the will to indicate a clear intention to the contrary, a gift of 'all my money' must be taken to mean 'money' in the strict sense, and nothing else; you cannot, in the absence of anything in the will showing a different intention, conclude that the testator meant to give more than 'money.'"

In *Byrom v. Brandreth* (L.R., 16 Eq., 475) it was held that a testamentary gift by a testatrix of "any money of which I may die possessed" included cash in the house and money at the banker's, and any money, of which at the time of her death, she might have claimed immediate payment, but not the apportioned part of an annuity, or interest payable to her which had accrued from the last stated day of payment to her death, nor a legacy due to her which had not been acknowledged as at her disposal.

In *In re Taylor—Taylor v. Tweedie* (38 *The Times* L.R., 850; [1923] 1 Ch., 99) it was held that there was a context in the will sufficient to prevent the word "money" having its strict sense. In the Court of Appeal Lord Sterndale, Master of the Rolls, said: "I believe she wished to dispose of all her estate, and not to die intestate as to any part, and

that she thought she had done so when she used the word 'money.'"

Mr. THOMPSON said that he did not concede that "money" in the present case did not include the real estate, but he was content to argue that it should include all the personal estate. There was no trace of its ever having been suggested that "money" included more than the personalty except in the judgment of Lord Justice Younger in *In re Taylor —Taylor v. Tweedie* (*supra*), in which he suggested that "brass" or "all my money" might include the real and personal estate. Since the passing of the Law of Property Act, 1922, he might argue that, the heir having been abolished and distribution between all the children being equal, the Court of Chancery would not be jealous to see that there were words expressly excluding the heir.

There was no context to this will except what could be implied by the facts that it was made within a month of death and there was a variety of property disposable. He was rather assisted in his plea by the word "all." In *Prichard v. Prichard* (L.R., 11 Eq., 232) the testator used the words "principal money," and it was held that all the personal property passed, including leaseholds, but not the realty.

In *In re Cadogan* (25 Ch.D., 154) it was held that in construing a will no absolute technical meaning should be given to such a word as "money," the meaning of which must depend upon the context, if any, and surrounding circumstances such as the Court could take into consideration. The word "money" passed all the personal estate of the testatrix, including cash, securities, leaseholds, furniture, and effects.

Mr. THOMPSON proceeded to discuss *In re Buller* (74 L.T., 406) and *In the Goods of Bramley* ([1902] P., 106), in which the testator gave a pecuniary legacy of £100 and left "the rest of my money" to six named persons. It was held that the latter bequest covered all the residue, which was personal estate worth about £1,000. He read the judgment of Mr. Justice Sargant in *In re Skillen* ([1916] 1 Ch., 518).

He referred to *In re Gliddon* ([1917] 1 Ch., 174) and *In re Woolley* ([1918] 1 Ch., 33). In conclusion he said that the present case was not governed by any authority owing to the lack of context, except that, in addition to the surrounding circumstances already stated, the will was made on a half-sheet of notepaper. He submitted that the will passed all that the testator died possessed of.

Mr. CLIFFORD MORTIMER said with regard to the question of practice that this point of construction regulated the rights of the parties to a grant of administration. If it were held that the word "money" merely passed the money in the house and at the bank Mr. Cabell would then be merely in the position of a legatee, and the persons entitled on an intestacy would be entitled to administration. If the will passed everything, realty included, to Mr. Cabell he would be entitled to administration.

After further argument by Mr. Spens the President reserved judgment.

LORD MERRIVALE delivered a considered judgment as follows:—

The testator died on April 21, 1927, leaving a brother and sisters and ten children of deceased brothers surviving him. A will duly executed by him on March 21, 1927, was in force at his death, and consisted so far as the operative part is concerned of these words only, "I leave all my money to Alfred George Cabell."

The testator's estate at his death comprised £4 in money in the house, a sum of £1,599 standing to his credit on current account at his bankers, £800 outstanding on mortgage with some arrears of interest, £500 nominal of 5 per cent. War Loan, some stocks and shares in joint stock companies of the value at par of £1,280, with dividends accruing, furniture of the estimated value of £200, the equity of redemption of three freehold cottages valued as freehold at £600, and (by the combined operation of a marriage settlement and a bequest under the will of his deceased wife) the right to receive a sum of £450 secured thereon by mortgage.

From the time of a serious accident two and a half years before the testator's death, and in particular during a long illness upon which his death ensued, the applicant appears to have rendered continuous services to the testator, and to have earned his gratitude. During the illness none of the relatives of the deceased is said to have been in touch with him.

The will in question was written at the testator's request by an inmate of his house at a period during his last illness when, as it seems, he thought he was about to die. The writer supplied the words used, and they were not discussed by the testator. The material words of the instructions that he gave are these: "I want Cabell to have all my money," and a further statement after some discussion or suggestion that he should make bequests to members of his family: "No, I want Cabell to have it all." In the argument before me no weight—probably rightly—was attached to these oral statements. It was common ground that the will must be construed according to the meaning of the words used therein, with proper regard to the situation of the testator and the nature of his assets.

The motion of the applicant is resisted on behalf of the next-of-kin on the grounds of necessary strictness in the construction of testamentary instruments, as applied in the decision of the Court of Appeal in Chancery in *Lowe v. Thomas* (5 De G., M. and G., 315). They are embodied in a text from the Digest in the judgment of Lord Justice Knight Bruce in that case and in these words of like effect in the judgment of Lord Justice Turner: "It is necessary to adhere to the proper and correct sense of the words used in the will, where there is no context to give a different effect to them." By way of illustration of the application of the rule counsel referred to numerous authorities, covering a long period of time and a great variety of wills, and more particularly to judgments such as that of Vice-Chancellor Selborne in *Byrom v. Brandreth* (L.R., 16 Eq., 475), that of Lord Justice Kay in *In re Cadogan* (25 Ch.D., 154), that of Lord Justice Stirling in *In re Buller* (74 L.T., 406), that of Lord St. Helier, President, in *In the Goods of Bramley* ([1902] P., 106), that of Lord Justice Sargant in *In re Skillen* ([1916] 1 Ch., 518), that of Lord Blanesburgh in *In re Gliddon* ([1917] 1 Ch., 174), that of Mr. Justice Eve in *In re Woolley* ([1918] 1 Ch., 33), and the judgments of the Court of Appeal in *In re Taylor—Taylor v. Tweedie* (38 *The Times* L.R., 850; [1923] 1 Ch., 99).

In each of the cases cited before me the Court in which the true construction of the language used by the various testators was to be determined came to its conclusion as to the meaning of the words used in the instrument before it with some assistance from the context of the will. Here the sentence presented for construction has no context. The problem

to be solved however is the same : What is the true meaning of the words used by the testator ? An elementary consideration which is strongly emphasized by comparison of the older judgments with some of those more recent in date is that the meanings of words become modified from time to time in course of use. Another is that a word or words capable of or used to express one meaning with regard to one subject-matter or one set of circumstances may have a different meaning when applied to a different matter or in other circumstances.

My predecessor, Lord St. Helier, adopted in *In the Goods of Bramley* (*supra*) the declaration of Mr. Justice Kay in *In re Cadogan* (*supra*) : " There should be no absolute technical meaning given to such a word as 'money' in a will, but its meaning in every case must depend upon the context, if there is any, which can explain it, and upon those surrounding circumstances which the Court is bound to take into consideration in determining the construction."

It was not suggested on behalf of the next-of-kin in the argument before me that the testator's will operated only upon the small sum in notes or specie found among the testator's effects on his death. Counsel conceded that the balance on current account at the bank must be held to pass. The current and proper sense of the word " money " (I quote from *Lowe v. Thomas, supra*) in this will would extend, if the argument be sound, to choses in action. If " money " in this will may include a debt due on demand from a banker, may it not include a debt accruing due at a fixed date from the State, or some outstanding debt on a mortgage ? May the word " all " extend it, as it was extended in some of the cases, so that the testator's bequest of all his money operates to include investments in stocks and shares ? As everyone knows, men often speak of their " money " when they describe all their assets or resources.

I was reminded during the argument of the statutes, including the Land Transfer Act, 1897, and the Administration of Estates Act, 1925, which have enlarged the effect of the appointment of a legal personal representative so as to vest in the legal personal representative of a deceased person real estate which was " vested in him without a right in any other person to take by survivorship," or " for an interest not ceasing on his death," and of the familiar presumption that " when a testator has executed a will in solemn form he did not intend . . . to die intestate "—I quote Lord Esher, M.R., in *In re Harrison* (30 Ch.D., 390)—and of another presumption arising out of the old law of wills that, without clear words, a will is not to be construed to disinherit the heir-at-law. The modern enactments in relation to the devolution of real property on the death of the owner seem to have little bearing on the immediate question of the construction of this will, nor do the several presumptions give any effective help.

Assuming the testator to have intended to die testate and to leave nothing undisposed of, I am left to determine what he has actually done by the words in which his will is expressed. I cannot find in them and the state of the assets and other relevant circumstances any indication that the testator used the word " money " to include either furniture or real estate. A gift of " all " would have passed them both, but the comprehensiveness of that term is, it seems to me, necessarily limited by the subject-matter, the testator's " money." The furniture and the cottages may well have been unthought of by the testator, and, at any rate, they are not designated by the language employed by his amanuensis. The conclusion at which I have arrived is that the will disposes of all the testator's estate except the equity of redemption of the cottages and the furniture.

When I mentioned as possible the view of the will which I have expressed counsel for the applicant pressed upon me that if this view should be taken he would be entitled as matters stand to a grant of administration with the will annexed. Under Rule 119 of the Probate Rules for Non-Contentious Business which are now in force, where a deceased person has died since January 1, 1926, leaving a will whereby the estate is not wholly disposed of, the persons entitled under an intestacy take a grant of administration with the will annexed in priority to legatees or devisees. The applicant's motion therefore fails. The costs will come out of the assets.

Mr. CLIFFORD MORTIMER asked that costs should be allowed as between solicitor and client.

THE PRESIDENT.—In cases of this kind where costs are to be paid by an estate, I think it is a wholesome practice that they should be properly paid. I do not think it is the intention of the present procedure that a litigant who properly comes to the Court should be penalized in any amount.

Mr. SPENS.—Your Lordship's decision makes the applicant the legatee of the assets which your Lordship has held to come under the word " money." That, of course, leaves property undisposed of and that is really the residual estate which will bear the costs.

The PRESIDENT.—That is quite true, and that is the aspect of the matter which has given me some concern, because it is impossible not to see that a substantial burden will fall in the first instance on the person entitled to administration.

I do not think the little residue which may ultimately come to the next-of-kin ought to be taxed with the whole burden of the costs here. I think that they should be converted into costs of the administration and that they should be discharged rateably out of all the assets.

Mr. CLIFFORD MORTIMER.—I quite appreciate that it works out hardly upon them, but the administration expenses and the duties of course would in the first instance, apart from any order of this Court, fall upon them. I know of no authority by which the general expenses of administration would not follow the usual incidence of the law, apart from the costs of this motion.

THE PRESIDENT.—It may under the present conditions and the statutes and other provisions to which both of you called my attention be a somewhat complex matter, but at any rate I intend so far as I can that the parties shall start fair, and what I propose to do is to direct that the costs of this motion be taxed as between solicitor and client upon a fair taxation by the Registrar so as to cover costs properly incurred, and that they be provided by the administrator who will take administration—I do not know who at present—out of the testator's assets rateably. What I have assumed is that the next-of-kin will agree upon a proper administrator and that administration will go in common form. If any difficulty arises it may be mentioned to save expenses as upon the motion.

[Solicitors—Messrs. Bartlett and Gregory, for Messrs. Bartlett and Sons, Sherborne ; Messrs. Reynolds, Sons, and Gorst.]

Court of Appeal.
(Scrutton and Atkin, L.JJ., and Eve, J.)
1928. Feb. 21.

LYNDE v. NASH.*

Company—Prospectus—Offer of shares to the public—Issue to the public—Invitation—Document signed by directors — Strictly private and confidential—Companies (Consolidation) Act, 1908 (8 Edw. VII., c. 69), ss. 81 (1) (*e*), 285.

The plaintiff had invested £3,000 in a company of which the defendant was the principal promoter and managing director, having been induced to do so by statements contained in two documents drafted by the defendant, one being signed by the defendant and his co-directors, of which about 20 to 30 copies were typed for circulation by the directors among their friends with the object of raising additional capital, and the other being a letter, on the company's notepaper on which the names of the directors appeared, sent by the defendant to a co-director. The letter was marked private and confidential. The plaintiff, who was an utter stranger to the company and unknown to any of its directors, received a copy of the documents through a friend of one of the directors of the company to whom the documents had been sent with the knowledge of the defendant and other directors of the company with the object of raising capital from wealthy clients or from fathers who had a son to place.

In an action by the plaintiff, claiming damages for a breach of the requirements of section 81 (1) (*e*), of the Companies (Consolidation) Act, 1908, in that the documents omitted to state the number and amount of shares which within the two preceding years had been issued as fully paid otherwise than in cash, these two documents were found by the jury on the evidence to constitute an offer of shares made by the company to the public. This finding was not challenged ; but to the question whether the documents were in fact issued to the public, the jury answered, "There is no proof of this." They also found that the plaintiff had suffered damage because the documents had omitted to state that a number of the shares had been issued as fully paid up otherwise than in cash within the two preceding years.

Held (Scrutton, L.J., dissenting), that the plaintiff was a member of the public, and it had been proved that the documents, which had been settled and approved by the directors of the company, who were making desperate efforts to raise capital, were reproduced for the purpose of reaching a limited section of the public, and that the documents, which ultimately reached the hands of the plaintiff, a stranger, were issued by or on behalf of the company or by or on behalf of a person who was or had been engaged or interested in the formation of the company within the meaning of section 81 of the Companies (Consolidation) Act, 1908, and as the plaintiff had proved that he had suffered damage by reason of the omission of the documents to state the information required by subs. (1) (*e*) of that section the plaintiff was entitled to recover damages against the defendant.

This was an appeal by the plaintiff from a judgment of Mr. Justice Salter, after trial of an action with a jury.

The facts are fully stated in the judgments.

Mr. du Parcq, K.C., and Mr. Walter Monckton appeared for the appellant ; and Mr. J. G. Hurst, K.C., and Mr. Maurice Healy for the respondent.

The following considered judgments were read :—

Lord Justice Scrutton.—Mr. Lynde, in September, 1921, invested £3,000 in ordinary shares of the British and Foreign Industrials, Limited. As part of the consideration for his investment, he became a director and a paid officer of the company. He remained a director and officer of that and another company, which bought part of the original business, till April, 1924, when he was dismissed without notice, and, as has been held in another action, wrongfully dismissed.

He then looked at the documents which had formed part of the original inducement to him to invest. Coming to the conclusion that some statements in them were untrue and fraudulent, in 1926 he brought an action for damages against the person (Mr. Nash) principally concerned in the company, who had signed these documents, for damages for deceit and for breaches of the Companies (Consolidation) Act, 1908, in the issue of a "prospectus."

The jury found that the statements were untrue and that Lynde relied on them, but that they were not fraudulent. The action for deceit, therefore, failed.

On that part of the action which rested on a breach of the statutory provisions with regard to a prospectus, it was clear that neither document, if a "prospectus" as defined by the statute, stated the particulars required by section 81, subsection (1) (*e*), of the Act of 1908, among others, the amount of shares issued in the preceding two years as fully paid up otherwise than in cash, and the questions argued were :—(1) Whether the documents seen by the plaintiff were, on the face of them, an offer of shares to the public. This was left to the jury, who said they were, and Mr. Justice Salter agreed. (2) Whether the documents were, in fact, issued to the public, to which the jury replied, "there is no proof of this." (3) Did the plaintiff sustain damage by the omission ? This, as the number of shares issued was stated correctly, means, did he rely, in taking the shares, on the assumption that all the shares were issued for cash, or on the omission to state that some were not ? The jury found that the plaintiff did sustain damage by the omission.

The learned Judge had at first been disposed to think that if the document was on the face of it an offer to the public it was immaterial whether in fact it was issued to the public ; but after hearing further argument he changed his view and held that the plaintiff must prove that the document was issued

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

to the public, and as he failed to satisfy the jury of this he failed in his action.

The plaintiff thereupon appealed, and asked either for judgment on the ground that issue to the public was immaterial, or for a new trial on the ground that the Judge had misdirected the jury on the question of issue. This renders it necessary to consider in more detail the documents relied on, and what was done with them.

The company was a private company which, by its articles of association, was prohibited from issuing any invitation to the public to subscribe for shares. The company had an authorized capital of £50,000, of which £40,300 had been issued in ordinary shares. It could increase its capital in general meeting, and it could make the new capital preferred, ordinary, or deferred shares. It had not at the time in question increased its capital or issued any preference shares. Its directors were considering whether at least £30,000 more capital should be raised—£20,000 in preference shares and £10,000 in ordinary shares, one ordinary share for each two preference shares.

Apparently, Mr. Nash, the managing director and promoter, drafted two documents, one called B, dated September 26, 1921, but apparently originally prepared and sent on September 12, addressed to a fellow director, Mr. Eshelby, signed J. G. Nash, and headed "strictly private and confidential," containing detailed statements with regard to the position of the company, "Figures how we stand as at August 31, 1921," and containing the statement "Issued Capital £40,000, and Patents £30,000." The other document, marked A, undated and headed with the name of the company, is addressed, "Gentlemen," and its first two paragraphs are :—

"In order to meet the rapid development requirements of the company, it is now necessary to increase the nominal capital from £50,000 to £100,000. It is proposed to issue 20,000 7½ per cent. participating cumulative preference shares of £1 each at par, participating up to 10 per cent. after 10 per cent. has been paid on the ordinary shares. These shares will also be preferred as to capital. There are no debentures, mortgages, or bankers' loans against the company. Every two preference shares allotted will give the applicant an option to take one ordinary share of £1 at par. The position of this company, its properties and its options, are briefly and conservatively described below."

Mr. Eshelby at the time described it as "General scheme for increase of capital as laid before the board of directors together with general particulars." This perhaps explains the original heading "Gentlemen." There is no entry of a minute approving it, but the four directors seem to have signed it, and then "Gentlemen" could not refer to the directors, but to the persons to whom it was shown. Between 20 and 30 typed copies were made, and it appears to have been understood that each director might approach such friends as he thought suitable, with the documents as a basis for discussion. Application forms for preference and ordinary shares were attached, but the company had at that time no power to issue £20,000 preference shares or £10,000 ordinary shares.

On September 26 Eshelby sent the documents to Mr. Alcock, a solicitor, for confidential information and use—to show to wealthy clients, or to fathers who wanted to place a son, and said, "conditions could be accommodated to suit your clients." Alcock, on October 4, sent the documents to Major Wrigley, whom he addresses by his Christian name, to show his brother-in-law, Mr. Lynde. There is no evidence that the document went to any other persons, or that any shares other than Mr. Lynde's shares were allotted. Mr. Lynde made a number of inquiries, including sending someone to Somerset House, who did not report what would be on the file there, namely, that £30,000 shares were issued not for cash. Ultimately, Mr. Lynde, by letter, not on the application form, agreed to take £3,000 ordinary shares, on the terms that he was appointed a director and given an active position at a salary of £400 a year.

The question then is, on these facts, the jury having to determine facts and inferences from facts, has any offence against the Companies (Consolidation) Act, 1908, been committed, which has caused damage to the plaintiff ?

Section 81 of the Act of 1908 enacts :—"(1) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company must state . . . (*e*) the number and amount of shares . . . which within the two preceding years have been issued . . . as fully or partly paid up otherwise than in cash . . . and in either case the consideration for which those shares . . . have been issued. . . ."

By section 285, "'Prospectus' means any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company."

The result appears to me to make it necessary to show that the document containing the misstatement or omission is (1) an offer to the public to take shares, and (2) issued to the public. In my opinion, a document couched in such general terms that if issued to the public it would be an invitation to take shares does not become a document issued to the public if it is never shown at all, or is only shown to one man in such conditions that it cannot be said to be "issued to the public." Directors, especially of a private company, may easily show an invitation to take shares to one or two friends without any intention of ever making a public offer. On the other hand, they may easily send it to so many people, though of a limited class, that it becomes an offer to the public. In *In re South of England Natural Gas and Petroleum Company, Limited* ([1911] 1 Ch., 573), where some 3,000 copies of a prospectus marked "for private circulation only" were printed and issued to shareholders of gas companies in which the promoter was interested, Mr. Justice Swinfen Eady held that the prospectus was "issued to the public." On the other hand, in *Sherwell v. Combined Incandescent Mantles Syndicate, Limited* (23 *The Times* L.R., 482), where some of the directors, without the authority of the company, sent a prospectus marked "strictly private and confidential, not for publication," to some of their friends, Mr. Justice Warrington said that no action lay against the company, but also said that "whether capital had been offered to the public was a pure question of fact" and that an offer of shares to the public meant an offer of shares to anyone who should choose to come in. I agree with this ; it seems to me to be a question of degree whether there is a sufficiently general offering to make it a public offer, or such a limited selected distribution as to make it private negotiation.

One may consider the whole circumstances, that the company was a private company which could not under its articles legally make an offer to the public ; that the document complied with none of the requirements with which an offer to the public should comply under sections 80 and 81 of the Act of

1908 ; that it was only proved to have been shown to one person as a possible investor, though, no doubt, the directors contemplated that Alcock might show it to others ; the number of copies typed, the lack of evidence of other issues, and so on.

But it remains, in my view, a question of fact for the jury. I think the Judge was entitled to leave to them both questions. As to the question whether the document was an offer to the public, Lord Justice Mathew constantly left this class of question to a commercial jury, with satisfactory results. I think they might have found either way ; and I cannot interfere with their verdict.

On the further question whether the document was issued to the public, I cannot say that the jury must find on the evidence of one document being issued that it was issued to the public. The learned Judge directed the jury that it was a question of degree what "issued" meant, and I agree with him. The alleged misdirection is, I gather, in leaving the question to them at all, or in not directing them that, if they thought the document, on the face of it, an offer to the public, one shown in whatever circumstances would do. I cannot agree with this, and prefer the learned Judge's later view of the law. In my opinion, there was evidence on which the jury could make their finding, and there was no misdirection.

The appeal should, in my opinion, be dismissed, with the usual consequences, but as my brethren take an opposite view the appeal will be allowed, and judgment entered for the plaintiff in the terms stated by Lord Justice Atkin.

Lord Justice Atkin.—The defendant company was registered on October 28, 1920, as a private company with a nominal capital of £50,000 in £1 shares. It was formed to take over the undertaking of another company, John Nash Royston and Co., Limited, and of its capital 10,300 shares were issued for cash and 30,000 were issued as to 22,500 to Nash and 7,500 to Royston, presumably by direction of the vendors, for goodwill, patents, and patent rights. The company possessed the patent rights of an extending dining table and possessed works at Liverpool where the table was manufactured ; it possessed the patent rights in an electrical condenser, some of the foreign rights in which it had disposed of ; and it also possessed the patent rights in a stair carpet protector. In 1921 the company apparently needed further capital, and a document was prepared by Mr. Nash, the managing director, and signed by all four of the directors, which is the document marked A. A further document, marked B, was also prepared by Mr. Nash and addressed to another director, Mr. Eshelby, and dated September 26, 1921. It gives more detailed information than the other document above-mentioned, with regard to the business of the company. The first-mentioned document contains a statement that it is proposed to issue 20,000 7½ per cent. participating preference shares and that for every two preference shares allotted the applicant will have the option to take one ordinary share of £1 at par, and the document contains an application form for both preference and ordinary shares addressed to the directors. It does not appear that at any material time the directors had passed any resolution to create preference shares, but they had powers under the articles at any time to do so. The two documents, which it was argued at the trial were to be read together and treated as one, came into the possession of the plaintiff in circumstances the legal effect of which is the question in this action.

The plaintiff had business connexions in India, which he was proposing to discontinue, and he was minded to invest part of his capital in an appropriate business venture in this country. He was attracted by the prospects held out by the documents, which are undoubtedly alluring, and in October applied for and was allotted 3,000 ordinary shares on the terms that when he returned from India next year he was to be appointed a director, with an active position at a salary of not less than £400 a year. These terms were carried out. The plaintiff became a director with a salaried post, and later, in 1922, applied for and was allotted 500 additional ordinary shares. Unfortunately, early in 1923, the company, being short of cash, had to part with its table business to a new company, John Nash, Limited, which had command of more capital. The plaintiff transferred his services to that company, which apparently continued to be managed by Mr. Nash.

In 1924 there was friction between the plaintiff and Mr. Nash. The plaintiff was dismissed. He brought an action for wrongful dismissal against the company, in which he was successful. Afterwards, when that action was over, he brought the present action against Mr. Nash. His claim was twofold. He claimed that he was induced to apply for shares in the company by fraudulent misrepresentations contained in the documents A and B already mentioned, for which he said Mr. Nash was responsible. He also said that, apart from fraud, the two documents constituted a prospectus within the meaning of the Companies (Consolidation) Act, 1908, section 81 : that it had been issued by Mr. Nash ; and that it omitted the information required by section 81, subsection (1) (*e*), namely, the number and amount of shares which had been issued as fully paid up otherwise than in cash ; and he claimed damages.

The action was tried before Mr. Justice Salter and a special jury. With regard to fraud, the jury found that the statements complained of were untrue and that the plaintiff had been induced by them to invest his money. But they found that the statements had not been made fraudulently by Mr. Nash. These findings put an end to the claim for fraud, and we are left to deal with the further or alternative claim based on section 81 of the Act of 1908.

On this part of the case the plaintiff had to establish that the documents together constituted a prospectus, that the prospectus had been issued by Mr. Nash, and that the plaintiff had suffered damage by the alleged statutory omission.

The definition of prospectus is contained in section 285 of the Act of 1908. Prospectus "means any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company." In dealing with this matter the Judge was treating a subject-matter which is outside the ordinary experience of jury trials, and he must have felt some embarrassment. He had to leave any disputed question of fact to the jury, and he left to them the question whether documents A and B together were an offer of shares issued by the company to the public. The jury answered the question, "Yes" ; and they further found that the plaintiff had sustained damage by reason of the omission to state the issue of shares as fully paid, and that the damages were £2,000. The Judge, however, at the instance of the defendant, left to the jury a further question. Were A and B issued to the public ? On this the Judge told the jury that there was no evidence that any human eye outside the directors' room ever saw A and B except Alcock, Wrigley, and the plaintiff.

"Upon that you have to say whether either document, in your view, was issued to the public. It is a question of degree no doubt what 'issued to the public' means, but upon these facts I should rather doubt myself whether you would say that the plaintiff had satisfied you that either document was ever issued to the public." On that direction, it is perhaps not surprising that the jury answered that question by saying "There is no proof of this." On this finding the learned Judge, on consideration, entered judgment for the defendant.

It appears to me that in dealing with the construction of a statute one avoids danger by sticking as closely as possible to the actual words. The words "issue to the public" are not to be found in the section. The two relevant questions appear to be, was there a "prospectus," and, if so, was it issued. The section, read with section 80, appears plainly to contemplate the existence of a document—a prospectus—before issue. A copy of it has to be filed before issue. If issued, it must contain certain particulars. To be a prospectus the document must contain an offer to the public for subscription. Presumably the words of the document must be accompanied by a genuine intention to offer to the public. Otherwise an invitation only intended for a single individual might, if couched in general language, become a prospectus. This admits of questions of fact apart from what would otherwise be a matter of construction. But, when one is satisfied that the document contains an offer to the public, the only other requisite is that it should be issued. I see no reason for implying or adding the requirement of "issuing to the public," nor is it easy to ascertain how that fact is proved. An offer to the public is issued, I should suppose, when it is delivered by the issuer with the intention of effectuating the offer; in other words, when it is delivered as the document, it is an offer to the public. It would not be so issued if it were handed over merely as a precedent, good or bad, or a curiosity, or as a draft, or for the special and sole information of the person to whom it is delivered. On the other hand, if it is intended that in the hands of the person to whom it is delivered it shall serve the purpose of inviting anyone who may peruse it to subscribe, it appears to me to be issued. It can hardly be contended that the issue of a prospectus must be to a class co-extensive with those who are invited, that if you invite all the public you must issue to all the public. I am satisfied that the remedial nature of the legislation which, in this form, dates from the Act of 1900, would be greatly impaired by the view accepted in the Court below. A Judge may be allowed to know that grave public disadvantages have attended, on some occasions, the activities of so-called "share pushers," gentlemen who canvass numbers of the public to apply for or buy worthless shares. Such an agent, armed with one copy of a general offer to the public, defying all the statutory requirements, might succeed in raising the capital he required from even one, or certainly a few victims. Are they not within this statutory protection? Or could the statute be evaded by dribbling out the prospectus in small quantities to one limited class after another; and would the first issue be unprotected until the volume reached the dimensions of a public issue? I cannot think so.

The real difficulty in this case, in my opinion, arose on the question whether this was a prospectus or not. I think it may well have been contended, as I have no doubt it was, before the jury that the circumstances of this case, and the forms of the documents, especially the second document (document B) indicate that there never was an intention to offer the shares to any number of the public, but only to such favoured few as might be selected by the directors as suitable shareholders. On the other hand, the extent of the offer and the form of application and other circumstances afford evidence from which the jury might, in my view, have found that the documents did make an offer to the public. This finding was not attacked before us, and must stand. On this footing, it appears to me that there was no dispute that the document was issued in the sense I have described above. It was sent to the solicitor, Mr. Alcock, to serve as an invitation to any number of the public whom he might think likely to be interested. It appears to me, therefore, that there was no question to be left to the jury on the matter of "issue"; and that on the answers to the questions that were properly left the plaintiff is entitled to succeed. It was not disputed before us that the effect of the section is that though it contains no sanction for the prohibition, yet a person injured by the omission is entitled to damages, and this I think is the true view. It appears to have been the view of Mr. Justice Swinfen Eady in *In re South of England Natural Gas and Petroleum Company, Limited* ([1911] 1 Ch., 573).

There are no authorities which govern this case, and I do not, for my part, derive much assistance from cases upon other sections or different sections of the former Companies Acts. It may well be that the issue of a document to only a limited number of persons may be evidence of an intention not to offer shares to the public but to offer them to some class of a more restricted denomination, for example, evidence that the document is not a "prospectus." But, as I have said, the prospectus point is determined for us here by the unchallenged finding of the jury.

In these circumstances, the appeal should be allowed with costs, and judgment entered for the plaintiff for £2,000, with costs. As the trial was by jury, the defendant would in any event obtain his costs of the issues of fraudulent misrepresentation, but it may be as well to add that he should have these costs with a set-off.

MR. JUSTICE EVE.—On October 28, 1920, the British and Foreign Industrials, Limited, was registered under the Companies Acts, 1908 to 1917, with the primary object of acquiring as a going concern and upon the terms of an agreement, then already prepared, the business theretofore carried on by John Nash Royston and Co., Limited.

The capital was £50,000 divided into £1 shares, and by clause 5 of the Memorandum it was provided (*inter alia*) that any of the shares for the time being unissued, and any new shares from time to time created, might be issued as preference shares in respect of dividend or repayment of capital or both. By clause 3 the company was declared to be a private company and accordingly it was thereby provided that no invitation should be made to the public to subscribe for any shares of the company.

By the month of September, 1921, the company had issued 40,300 of its shares, of which 30,000 had been issued as fully paid up by way of consideration for certain patents and other assets, and the balance of 10,300 had been paid for in cash.

At the date just mentioned, the company was in want of funds for the further development of its business and contemplated an increase of capital and the issue of further shares—preference or ordinary as circumstances might demand. Oblivious of, or ignoring the provisions of, clause 3, the directors, or

some one or more of them, thereupon drew up two documents, which, read together as one, the jury in this case have—in my opinion—rightly pronounced to be an offer of shares to the public, or, in other words, an invitation to the public to subscribe for shares.

The one document is signed by the four directors of the company; it begins by stating that "in order to meet the rapid development requirements of the company, it is now necessary to increase the nominal capital from £50,000 to £100,000," and goes on to say that "it is proposed to issue 20,000 7½ per cent. participating cumulative preference shares of £1 each at par" and that "every two preference shares allotted will give the applicant an option to take one ordinary share of £1 at par." Then follows what is called a brief and conservative description of the company, its properties, and its options. It concludes by pointing out that the company, without the aid of additional capital, will be making a yearly net profit of more than £20,000—more than twelve times the amount required to pay the preference share dividend on the then present issue, and that with the new capital available an increase of the annual net profit to £50,000 within the next two years would be a conservative estimate. Attached to this document is a form of application for preference shares addressed to the directors of the company. Except that it contains no reference to the prospectus, it is in the ordinary form.

The second document is a letter dated September 26, 1921, written on the company's paper, at the head of which appear the names of the four directors, by Mr. John Nash, one of the four, to Mr. A. D. Eshelby, another of the four. It is marked "strictly private and confidential," and after a full statement of assets and liabilities as on August 31, 1921, the writer goes on to point out the nature of the assets in some detail and the purposes for which the additional capital of £30,000 is required and concludes, "I shall be very happy to discuss the proposition in all its details with anyone who is really interested." Enclosed with the letter was a list of the customers with whom accounts were open on August 31 and attached was a form of application for ordinary shares in the same terms—*mutatis mutandis*—as the one for preference shares attached to the first document.

These documents were composed by the defendant, Mr. John Nash, the first was, as I have said, signed by him and his three co-directors; several copies—certainly a dozen, possibly 20 to 30—were typed and one, at least, of these was handed or sent to Mr. A. D. Eshelby—also a director—not with a view to his showing it to any particular individual, but to assist him in his quest for some person or persons willing to find the additional capital. It appears from the correspondence that he had already been making efforts in that direction before September 26, and on the 12th of the month had been supplied with a written statement, bearing that date and containing most, if not all, of the information to be found in the documents of September 26.

Among the individuals to whom Mr. Eshelby had spoken on the subject before September 26 was Mr. James Alcock, a solicitor of Liverpool, and on receipt of the documents from Mr. Nash he at once wrote the following letter to Mr. Alcock:—

"Further to our previous conversation, I now have pleasure in enclosing information concerning the proposition as follows: (1) General scheme for increase of capital as laid before the board of directors together with general particulars. This scheme is merely a basis and could be altered to accommodate any party proposing to invest a substantial sum. (2) A personal letter from the managing director, giving more specific information. This is for your confidential information and use. I understand you have wealthy clients who might be willing to become shareholders, or you may know of some one who would like to start a son in a prosperous concern. In either case, I think, there would be no difficulty in accommodating the conditions to suit your clients. The additional capital is required wholly for development purposes."

That letter is, in subtance, a request to Mr. Alcock to find some client or clients willing to provide the new capital upon the terms proposed by the company or some modification thereof, as an investment pure and simple, or, alternatively, as an investment coupled with a provision for a son. No limitation is imposed on the number or class of persons to whose attention the matter is to be brought. So long as the money is forthcoming, the source from which it comes is quite immaterial.

Mr. Alcock's reply reads as follows:—

"Your letter of the 26th instant, with its various enclosures, has come to hand, and I am much obliged to you for all the particulars you have sent me. I will go carefully through these and will take the earliest opportunity that arises of placing the matter before any of my friends to whom I think it may appeal. It may be some little time before I shall be able to report anything definite to you, but next week I am hoping to see some of my wealthy clients and will then see what can be done."

No information is forthcoming as to the extent to which Mr. Alcock placed the matter before his friends, but on October 4 he sent the papers to Major Wrigley, the plaintiff's brother-in-law. He, in turn, sent them to the plaintiff, an utter stranger to the company and its directors, who, within a few days and after an interview with the defendant whereat the various statements in the documents were discussed and their accuracy confirmed, agreed to and did in fact subscribe for 3,000 ordinary shares, for which he paid in full on October 25 and which were duly allotted to him on the 31st of the same month.

The shares having seriously depreciated in value, the plaintiff, on June 18, 1926, brought this action, wherein he claimed to recover damages from the defendant, Nash, for fraudulent misrepresentations and for breach of statutory duty in not complying with section 81 of the Companies (Consolidation) Act, 1908. On this appeal we are concerned only with the second claim.

The section in question requires that every prospectus—which, by section 285, means any prospectus, notice, circular, advertisement, or other invitation offering to the public for subscription or purchase any shares, issued by or on behalf of the company or by or on behalf of any person who is or has been engaged or interested in the promotion of the company, must state particulars with regard to certain matters therein enumerated, and among them, subsection (1) (*e*), "the number and amount of shares . . . which within the two preceding years have been issued . . . as fully or partly paid up otherwise than in cash . . . and . . . the consideration for which these shares . . . have been issued."

No attempt was made to comply with any of the requirements of the section in the documents of September 26. At the trial the plaintiff proved that had he known that of the 40,300 shares issued by the company before October, 1921, 30,000 had been issued to the vendors of the patents as fully paid,

he would not have subscribed for the 3,000 shares and that he had suffered damage, and the jury answered in the affirmative the question, "Were the documents of September 26 an offer of shares made by the company to the public?" To the further question "Were these documents issued to the public?" they answered, "There is no proof of this." Judgment was not entered at the time, but after further argument on a subsequent date the learned Judge held that there was no evidence that the documents were ever issued to the public and entered judgment for the defendant.

With all respect to the learned Judge and my Lord, I cannot agree with that conclusion. In my opinion, the documents were issued to the public when Mr. Eshelby wrote on September 26 to Mr. Alcock asking him, in substance, to lay the proposition before his clients. That Mr. Alcock so understood it is obvious from his reply of the 28th, and that he did in fact bring it to the notice of one client, through whom it reached the plaintiff, is established.

The intention with which these documents were prepared must be determined by the construction properly imposed on them: they were drafted by the managing director and adopted and approved by the board collectively as an offer to the public to apply for shares, and for what purpose or with what intent were a dozen or two reproduced? If the answer were not obvious it would surely be supplied by the fact that almost before the ink was dry upon them—on the very day on which the directors affixed their approving signatures—one of their body despatched a copy to Mr. Alcock with the sole object of tapping the mineral resources of that gentleman's "well-to-do clients."

It has been well said that the true office of the prospectus is to secure applications from the public, and when the concomitant conditions exhibit a company making desperate efforts to raise further capital, a board of directors settling and approving an invitation to the public, a reproduction of that invitation adequate for the purpose of reaching the limited section of the public likely to entertain the investment, an open appeal to all and sundry in whom Mr. Alcock may succeed in arousing interest and the ultimate trickling of that appeal into the hands of an absolute stranger to the company and those who were in control of it, it is, in my opinion, impossible to resist the inference that the circulars were reproduced and in fact employed to fulfil the office of their existence and to reach a section of the public from which it was anticipated that a response might be forthcoming.

It is one thing for individuals engaged or interested in the promotion of a company to possess themselves of details, even in the shape of an advance copy of the prospectus, which may in due course be advertised or otherwise circulated, and to disclose the information so obtained to friends whose support they may wish to obtain or to whom they desire to point out an attractive investment, but quite another for the company, acting by the board, to hand the same details to any one or more of the directors or some other agent and authorize him or them to utilize the materials for the very purpose for which they were brought into existence—the securing of subscriptions from all and sundry willing to make an offer on the form so conveniently supplied with the information, and even on the former of these invitations I think it might well be held that the document was in fact issued to the public if it could be shown that the company authorized or was cognizant of the use which was being made of it.

The facts of this case are quite distinguishable from such a case as that of *Sherwell v. Combined Incandescent Mantles Syndicate, Limited* (23 *The Times* L.R., 482), where some of the directors, without any authority from the company, sent a prospectus marked "not for publication"—which is not the same as "issue"—to their personal friends. Here the invitation was extended, with the authority of the company, broadcast to any outsider whom Mr. Alcock might introduce, and it is idle to suggest that if that gentleman had produced applications from a dozen or more of his clients—wealthy or other—the company would have refused to accept their money.

Nor, with all respect, do I appreciate the relevancy of the argument based on the fact that the plaintiff's was the sole response. The question whether the prospectus was issued does not fall to be determined by the extent of its success, or by the number of copies circulated. The absence of a single response would not negative issue if otherwise established, and I do not accept the view that any burden is cast upon the plaintiff to establish a circulation to others besides himself if the circumstances proved are sufficient to establish an issue to him. Were it otherwise the Court might find itself involved in an inquiry as to the number of copies circulated or issued, and there is certainly nothing in any of the reported cases to suggest that course. Moreover, one can easily conceive a case where, the question of issue not being in dispute, the first individual applied to had agreed to provide all the capital required and had thereby obviated any necessity for further circulation. Could it be argued in such a case that the individual had lost the protection of section 81 because the issue had been confined to him and was therefore not an invitation issued to the public? And if so, at what numerical stage would the Courts recognize the issue as an invitation to the public?

There is no definition in the Act of the word "public." Mr. Justice Farwell in *Burrows v. Matabele Gold Reefs and Estates Company, Limited* (17 *The Times* L.R., 364; [1901] 2 Ch., 23), where he was dealing with section 8 of the Act of 1900, which commences with the words "Upon any offer of shares to the public for subscription" and which as amended by section 8 of the Act of 1907 is now reproduced in section 89 of the Act of 1908, said at page 27: "I think that the clue to the meaning of the word 'public' as used in this Act is to be found in section 10, subsection 4"—now section 81, subsection 7—and a little lower down on the same page the same Judge, after reading the subsection and the definition of the word "prospectus," adds, "An offer is not the less made to the public because it is sent to shareholders or debenture-holders as well as to other persons, or because it is not advertised in the public newspapers. But if it is sent solely to the shareholders or debenture-holders of the company, there is no offer to the public. The distinction is between persons who are members or debenture-holders of the company, on the one hand, and those who are not, on the other."

In the present case I do not think it is necessary to resort to that construction of the word—which may indeed be a little too refined, regard being had to places in the Act where the word is used without any apparent contrast between members and outsiders. But the observations of the learned Judge have never, so far as I know, been dissented from, and in construing the word in section 81 where there is a contrast between members and outsiders it may well be that his view ought to be adopted.

But, as I have already indicated, the plaintiff was, in my opinion, a member of the public in a wider sense of the word, ignorant of and unknown to the

company and its directorate, to whom the existence of the company and its pecuniary requirements were first made known by what has been held to be "an offer of shares to the public" circulated on behalf of the company by its accredited agent through a particular channel, but with intent to obtain from all and sundry to whom its contents should be made known the much desired subscriptions. I cannot myself appreciate how such a procedure really differs, except in detail, from an advertisement in the public Press addressed to all and sundry who choose to read it. In either case, if the invitation falls short of the statutory requirements, any invitee thereby led to take up shares, if he satisfies the Court that he would not have applied for the shares had the invitation fulfilled the statutory requirements, is entitled to such remedy by way of damages as the Legislature has afforded him.

In my opinion the learned Judge was wrong in holding that there was no issue to the public, and the appeal ought to be allowed and judgment entered for the plaintiff for the damages awarded to him by the jury.

[Solicitors—Messrs. Lake and Son; Messrs. Godden, Holme, and Ward.]

Chan. Div. (Tomlin, J.) 1928. Mar. 7.

ROYAL LONDON MUTUAL INSURANCE SOCIETY, LIMITED v. BARRETT.*

Insurance (Life)—Condition against suicide—Exception in favour of "third party" assignee—Assignment of policy to insurers—Suicide of assured—Whether insurers included in "third party."

An owner of leasehold premises demised them by way of mortgage to the plaintiffs, an insurance company, and assigned to them a policy of insurance effected with them upon his life. The policy provided:—

"The policy shall be void if the life assured dies by suicide or by the hand of justice. . . . The policy shall remain in force to the extent of the pecuniary interest of third parties *bona fide* acquired for valuable consideration, provided notice thereof in writing shall have been received and admitted by the directors at least one month prior to the date of death."

While the policy was in force the assured committed suicide. In an action by the insurance company against the assured's legal personal representative,

Held, that the insurers were not included in the expression "third party" and therefore the policy was void and they were not bound to satisfy themselves out of it but were entitled to enforce their security against the leasehold premises.

The plaintiffs in this action claimed £850, with interest thereon at the rate of 6 per cent. per annum from February 1, 1927, from the defendant, the legal personal representative of an assured person who committed suicide in 1927. They also asked that the defendant should be ordered to deliver up to them certain leasehold premises known as 44, Balmoral-road, Maindee, Newport, Monmouth. By a mortgage dated February 1, 1927, and made between the assured and the plaintiffs, the assured, in consideration of the sum of £850, demised the premises to the plaintiffs for all the unexpired residue of the lease, and by way of additional security assigned to the plaintiffs a policy of assurance on his life effected with them.

Clause 5 of the conditions of the policy provided as follows:—

"Suicides, &c.—The policy shall be void if the life assured dies by suicide or by the hand of justice. . . . The policy shall remain in force to the extent of the pecuniary interest of third parties *bona fide* acquired for valuable consideration, provided notice thereof in writing shall have been received and admitted by the directors at least one month prior to the date of death."

The plaintiffs contended that the policy of assurance on the assured's life became void under clause 5.

The defendant alleged that by the policy of assurance the plaintiffs agreed to pay £900 to the borrower or to his personal representatives or permitted assigns on the death of the borrower, and that the borrower died while the policy was still in force.

Mr. Gavin Simonds, K.C., and Mr. E. E. H. Brydges appeared for the plaintiffs; Mr. G. B. Hurst, K.C., and Mr. A. T. James for the defendant.

Mr. Simonds said that the question which arose was whether the policy became void under clause 5 so that the plaintiff company's only security was the leasehold premises, or whether the policy did not become void, so that the company were bound to satisfy themselves out of it. Where there was an instrument of this kind, there could not be a better way of excluding one or other of the parties than by using the expression "third parties" (*White v. British Empire Mutual Life Assurance Company,* L.R., 7 Eq., 394). It was not to be thought that it was the wish of the directors to be unjust in this case, but there were others who, in their view, had a better claim to their consideration than the defendant. The policy empowered the directors to make allowances, should the policy for any reason become void, and they wished to keep a free hand in this case.

Mr. Hurst submitted that "third parties" meant any persons other than the assured.

Mr. Simonds, in reply, contended that "third party" meant a person not a party to the transaction.

Mr. Justice Tomlin, in giving judgment, said that the only point was one of construction, arising out of the fact of the suicide of the assured. The policy was void, except in so far as it fell within the exception in clause 5. If the company were right, they could enforce their charge against the leasehold house; if they were wrong, the charge was enforceable against the policy to the extent of the mortgage money, and the leasehold house would go free.

It was impossible to say here that "third party" meant anyone other than the assured and therefore included the insurers. Upon the true construction of the clause the insurers were not included in the expression "third party," and the plaintiffs were entitled to enforce their security against the leasehold house.

[Solicitors—Messrs. Smith and Hudson; Messrs. Mills and Morley, for Mr. Hugh Meyrick Williams, Newport, Monmouth.]

* Reported by K. R. A. Hart, Esq., Barrister-at-Law.

Court of Appeal.
(Scrutton and Sankey, L.JJ., and Russell, J.)
1928. Mar. 5.

DE MONCHY AND OTHERS v. PHŒNIX INSURANCE COMPANY OF HARTFORD AND ANOTHER.*

Insurance (Leakage)—Certificate—Issue under alleged policies—Time limit for claim—Limit in policies—No limit in certificate—Volatility of thing insured—Bulk dependent on temperature—Whether "leakage" confined to loss of contents.

The plaintiffs had an interest in a certificate of insurance on 100 barrels of turpentine shipped from Florida to Rotterdam. This certificate had been issued under what were said to be policies of insurance subscribed by the defendants. The policies provided for payment for "leakage" in excess of 1 per cent., and, as the practice was to measure, but not to weigh, the amount shipped, and to weigh, but not to measure, the amount delivered, and as, owing to the volatility of turpentine, the weight of a gallon depended on the temperature, it was provided that the conversion of kilograms into American gallons should be on the basis of 3.25 kilograms to the gallon. The alleged policies contained a condition that no claim under them could be maintained unless brought within a year, but in the certificate there was no such condition. When the turpentine was discharged, the weight was short, as compared with the weight calculated from the number of gallons shipped, but the defendants declined to pay in the absence of injury to the barrels or some clear sign of leakage. The action was brought on the certificate but not within the year.

Held, that the contract was to pay for loss of weight or bulk, even if this was caused by change of temperature and not by loss of some of the contents of the barrels, and that, as the certificate was the actual insurance, and as, in the circumstances, the clause as to limitation of time could not be read into it, the plaintiffs were entitled to recover.

Decision of MacKinnon, J. (44 *The Times* L.R., 95), affirmed.

This was an appeal by the defendants from the judgment of Mr. Justice MacKinnon (44 *The Times* L.R., 95) in an action by the plaintiffs in respect of a loss of turpentine by leakage.

The plaintiffs were the owners of a quantity of turpentine which had been shipped in barrels from Florida. They had insured the turpentine with the defendants, two insurance companies, for the voyage. The perils insured against included leakage, and the plaintiffs claimed for loss alleged to have been caused by leakage.

The plaintiffs were interested in a certificate of insurance dated August 17, 1923, issued under an alleged policy of insurance subscribed by the first defendant company, and another alleged policy subscribed by the second defendant company. Each of the defendant companies insured respectively for 50 per cent. of 14,925 florins on 100 barrels of turpentine shipped from Jacksonville, Florida, to Rotterdam, on a steamship, the Cape Town Maru.

The alleged policies contained, *inter alia,* a clause "to pay leakage from any cause in excess of 1 per cent. on each invoice . . . conversion of kilograms into American gallons shall be made on the basis of 3.25 kilograms to the gallon."

The practice in the trade was not to weigh, but to measure, the amount of turpentine shipped, and to weigh, not measure, the amount of turpentine delivered.

On August 25, 1923, the plaintiffs shipped on the Cape Town Maru, at Jacksonville, 100 barrels of turpentine for carriage to Rotterdam. During the voyage the steamer met with heavy weather, and when the turpentine was discharged at Rotterdam it was alleged that 372.75 kilograms out of a total of 16,597.75 kilograms shipped had disappeared.

Turpentine was a volatile substance which expanded when heated, and the weight of a gallon would depend on the actual temperature at the moment, and a conventional weight per gallon was, therefore, agreed on. Up to a loss of 1 per cent. no claim could be made, but where there was a greater loss the underwriters had been in the habit of paying on the basis of the conventional weight, taking the difference between the weight shipped and the weight delivered as the amount of the loss. In this case the underwriters took the point that the insurance was only against leakage, and though, if the temperature fell, the contents of a barrel might occupy less space without any of the contents being lost, for such loss of bulk the underwriters would not be liable. They contended that "leakage" must be construed strictly, and that the word was applicable only where something which had been in a receptacle had accidentally got out of it and had been lost.

Another point taken by the defence was that the insurance was subject to a condition that no claim under it could be maintained unless brought within a year after the happening of the loss. The action had not been brought within a year. The condition referred to was in the original policies, but not in the certificate under which the plaintiffs were suing. The certificate stated that it represented and took the place of the policy.

Mr. Justice MacKinnon held that the contract was to pay for loss of weight or bulk, even if that loss of weight or bulk was caused by change of temperature and not by loss of some of the contents of the barrels, and that, as the alleged policies were not contracts of insurance at all, but the certificate was the actual insurance, and as, in the circumstances, the clause with regard to the limitation of time for making a claim could not be read into it, the plaintiffs were entitled to recover.

The defendants appealed.

Mr. W. A. Jowitt, K.C., and Mr. van den Berg appeared for the appellants; and Mr. Porter, K.C., and Mr. McNair for the respondents.

Lord Justice Scrutton.—This appeal against a judgment of Mr. Justice MacKinnon raises two questions, the first, as to the construction of a clause insuring against leakage of turpentine; the second, whether a term requiring an action to be brought within one year of the loss is part of the contract of insurance. This latter question involves the con-

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

sideration of the important subject of the American system of insurance by American certificate to be tendered under a contract of sale of goods c.i.f. as "insurance."

It appears that turpentine expands and evaporates under heat, and that in the sale of American turpentine for export it is sold in barrels by gallons. A complicated system of gauging the barrels is deposed to in the affidavit of Mr. Register, which I do not repeat, but it includes a system of filling a barrel to one gallon short of its capacity to allow for expansion, which capacity is gauged in America, the turpentine is weighed on arrival in Europe, and a conventional measure to turn gallons into weight is used in the trade to see whether what is shipped is delivered, it being taken in the trade that the normal loss on a voyage by evaporation is 1 per cent. There is a system of insurance of leakage from any cause over the normal 1 per cent. This being the course of trade, on July 27, 1923, the Columbia Naval Stores Company sold to de Monchy, Rotterdam, the present plaintiffs and respondents, 100 barrels of turpentine at a c.i.f. price in Dutch guilders per 16 gallons net shipping weight "one gallon out per barrel," referring to the system of gauging barrels with one gallon short; American net weight to be reduced at one gallon=3.25 kilos; payment by draft at sight with bill of lading and insurance policy attached, and/or certificate of insurance; insurance documents to include risk of leakage in excess of 1 per cent. upon the basis of the above reduction of weight. To carry out this contract, Mr. Register on August 23 gauged 100 barrels of turpentine at Jacksonville, Florida, and made the capacity 5,207 gallons, from which he subtracted 1 gallon per barrel and certified the shipment of 5,107 gallons. The Japanese steamer Cape Town Maru was on the coast of Florida from August 23 to September 19 before she sailed from Savannah for Rotterdam, and there were, therefore, considerable possibilities of evaporation. Meanwhile, the sellers, to carry out their contract of insurance, obtained an American certificate of insurance from the Phœnix Insurance Company of Hartford, and the Great American Insurance Company of New York. This document must be seen to be believed. There is, apparently, a blank form of certificate of insurance which the companies issue to persons who have a contract of insurance with them somewhat similar to an open cover. Someone has filled in a blank certificate with the subject matter of the insurance, "100 barrels pure gum turpentine"; the voyage, "per steamer Cape Town Maru from Jacksonville to Rotterdam"; and the value insured, "14,925 florins"; and then someone has stamped on the front of the document a clause which is also completely illegible and which is stamped over what can be discovered from other sources to have been originally a warehouse to warehouse clause. Someone has stamped on the back two or three clauses which are again on the original almost completely illegible and which also obliterate the names of the agents to whom claims should be made. From a legible copy of another certificate, supplied to this Court by the underwriters, it is clear what has happened. The leakage clause should be stamped on the front of the certificate where there is room for it; and the warehouse to warehouse clause would appear clearly below. Instead of that, the war risks clause has been stamped on the front (1) illegibly, and (2) obliterating the warehouse to warehouse clause. Apparently this was appreciated, and the war risks clause has been stamped a second time on the back, also nearly illegibly, and then the leakage clause has been stamped underneath it. Whether this destroys the protection of the warehouse to warehouse clause we have not to determine.

There was no evidence who produced this monstrosity, but we were told in Court that the sellers put the stamps on and apparently the agents of the companies then countersigned and approved it. I have rarely seen a more discreditable document from a business point of view and the American companies and sellers ought to be ashamed of having tendered it as a business document.

However, for the present point its relevance is the clause as to leakage. The certificate states that the insurance is under policies No. 924 of the Phœnix Insurance Company 50 per cent. interest, and No. 387 of the Great American Insurance Company. Certain bundles of documents were produced to us as representing these policies, and again the originals must be seen to be believed. It is sometimes said that in English policies the office boy sticks on slips and imprints stamps at his own sweet will, regardless of contradictions and repetitions; but an English policy is simplicity itself compared to these bundles. I deal only with the clauses about leakage. In the bundle of documents said to be Policy No. 924 there will be found: (1) A clause "not liable for leakage to molasses or other liquids unless occasioned by stranding or collision." (2) A clause that the company are not liable for leakage from turpentine in barrels when the ship is stranded, &c., and then only for excess of 3 per cent. (3) A clause that for an additional premium leakage may be covered by a clause (*a*) to pay leakage over 3 per cent. in excess of ordinary leakage of 1 per cent., or (*b*) to pay leakage from any cause whatsoever in excess of 1 per cent. (4) A clause dated June 15, 1923, the so-called policy being dated September 21, 1921, providing a substituted clause for clause 3 (*b*) above. It is this clause, apparently, for parts of it are illegible, which is stamped on the back of the insurance certificate.

When the Cape Town Maru arrived at Rotterdam the cargo was weighed by warehousemen in the usual way and a weight note signed. It appears from this weight note that while the average gross weight was about 202 to 197 kilos a barrel, and the average tare 35 to 37 kilos, there was one barrel with only 144 kilos gross, one 181, one 183, one 190, and a series of 195, 195½, and 196 kilos. The weight and gallons converted at the rate in the certificate produced a shortage of 374 kilos or 115 gallons. One per cent. leakage would be 51 gallons or 166 kilos, and there was accordingly a claim for 64 gallons or 208 kilos leakage. On this being presented to the American companies they refused to pay, saying that they would only pay on barrels which showed signs of leakage and/or ullage at time of discharge from the steamer and that "Consignees are not entitled to claim the difference between the shipped and landed weights unless the entire consignment shows signs of leakage." They were told by their English agents, and evidence was given to that effect, that it is impossible to see signs of leakage owing to turpentine being so volatile, and, when dry, leaving no stain on the outside of the barrel. They persisted in their refusal to pay European consignees, though paying their American assured on similar claims.

The action was therefore brought by the consignees, and the companies argued that the evidence of loss of weight was unsatisfactory, that the claim of the consignees did not take into account that the same weight of turpentine would bulk more in Florida in

August than at Rotterdam in October, and that there were no signs of leakage.

In my opinion the position of the American companies is untenable. It is probably quite true that the amount claimed as loss by evaporation or leakage from any cause (and evaporation is only a subtle form of leakage) is not the accurate amount, and that if the Kew Laboratory had investigated the matter with strict scientific accuracy a different result would have been arrived at; but the answer is that the insurers have adopted a conventional and business means of roughly estimating the loss; barrels do not all weigh the same, but they have agreed a conventional tare of 80lb. a barrel. The business methods of gauging and weighing are no doubt not precise, but they are those contemplated. The evidence by which they were proved is the ordinary evidence accepted in business matters and in the Commercial Court. It is known that American turpentine is sold and shipped by the gallon, and so a conventional method of turning gallons into kilos is agreed. The underwriters do not mean to insure ordinary evaporation or leakage, and so for one premium they only insure leakage in excess of 4 per cent., for a higher premium leakage in excess of 1 per cent. Anyone would expect turpentine which lay on a steamer on the coast of Florida for nearly a month in August and September to show more than ordinary evaporation or volatile leakage, and it did; in addition two casks leaked badly. In my view this defence of the underwriters fails, and does not reflect any credit on their business methods.

I now turn to the second and more difficult question. The voyage insured was in September and October, 1923. A long discussion as to this loss, and losses by other consignees, took place between the companies, their English agents, the consignees, and their insurance agents, during 1924 and 1925, and the writ was ultimately issued on February 12, 1926, on one consignment as a test case. The defence was delayed by the affidavit of ship's papers, but when in February, 1927, it was delivered it contained a defence which the Judge by mistake attributed to junior counsel for the defendants, but which we were informed was inserted by instructions of the American underwriters, to the effect that there was a clause in the contract of insurance that no action should be maintainable unless commenced within one year from the date of the loss. No such clause appears on the certificate and during the time that the case had been discussed, from the loss to the writ, no hint had been given by the underwriters that there might be such a defence to the action. Their solicitors had been asking for all sorts of information which was quite unnecessary if the point was good and protesting that the underwriters were anxious to get this test action decided as soon as possible.

The clause in question appears in a printed form of policy, headed in print "Cargo" and containing partly in writing the words "Columbia Naval Stores Company of Delaware . . . . Do make insurance and cause to be insured as per form attached." It is not clear who make insurance, the Columbia Company or the companies whose printed names appear at the top of the form. Otherwise the form throws no light on what is insured, nor does the "form attached" which consists of five or six different sets of clauses, in many respects contradictory. If material it would be interesting to set out the various clauses as to war risks, capture and seizure contained in the bundle. In the middle of the printed form of policy there appears this clause: "It is agreed that no suit or action for the recovery of any claim arising under this policy shall be maintainable in any Court unless such suit or action shall have been commenced within one year from the date of the happening of the loss out of which the said claim arose." No reference to it appears on the certificate, and if the European consignee wanted to comply with it he would first have to find out that it was on the form of policy in the United States, secondly, to decide whether it was part of the contract of insurance, thirdly, to find out in what State the policy was issued—which, as the two companies have their head offices in two different States, and the policy was countersigned in a third, is not very easy—fourthly, to ascertain what the laws of each State as to limitation were; and lastly, to see which was the "shortest time permitted." The forms bundled together contain many clauses which it is difficult to believe can apply. For instance, there is in the form attached a clause, "It is warranted by the assured that in all cases where certificates are issued in foreign currency the following clause shall be expressed in each certificate, 'premium and losses, if any, to be settled at .....,'" a sum to be filled in "per pound." No such clause appears in this certificate though it is countersigned by the underwriters. Is the clause part of the insurance in the certificates?—and instances might be multiplied.

I look at the matter from a business point of view. The underwriters know that these certificates will be tendered as contracts of insurance which can be sued on in Europe, thousands of miles from the bundle of documents called Policy No. 924. They say of the certificate that it "represents and takes the place of the policy." They say that "the clauses stamped or written on the back hereof are made a part of this certificate." They do not say that all or some of the clauses in a bundle of documents headed 924 are part of the certificate. On the contrary they say that the certificate takes the place of the policy and represents it. How is it open to underwriters to say that there is a clause not on the certificate which limits the right of recovery under it? If that is so, the certificate does not represent or take the place of the policy. The certificate contains the particulars of the goods insured and valued and the voyage and the ship and the full clause insuring against leakage, from all causes, above 1 per cent. Why cannot the consignee, taking the certificate, sue on it for loss by leakage according to its terms which are that it takes the place of and represents the policy? It may be that if any clauses on the form of policy are relevant to the amount of claim, they may be looked at for the purpose of "adjusting" the claim; but, in my opinion, if the underwriters wish to defeat the adjusted claim by the introduction of a time limit, they must give notice of it on the face of the certificate which takes the place of the policy; otherwise they are simply laying a trap for the European consignee who has no means of knowing of the time limit. Apparently, the question has arisen in the Courts of the State of New York, and in that case, *Graham Brothers v. St. Paul's Insurance Company* (1 American Maritime Cases, 836) the Judge, Mr. Justice Glennon, took the same view, and held that unless notice of such a clause was given on the face of the certificate it could not be enforced by the underwriters. The Judge said: "Notwithstanding that the certificate provides that the insurance is subject to the terms of the open policy, I think that a due regard for the holder's rights would require that this limitation be brought to his attention by a proper reference thereto in the certificate itself. While it is true that the so-called open policy

produced upon the trial by the defendants contained such a limitation, still how is the holder of the certificate to know of such limitation ? " This seems a sound business view with no legal reasons against it and I accept it and am glad that the Courts of the country of origin of this certificate system take the same view of it as I do.

The case may be put in another way. The clause itself refers to a claim arising under the policy. It appears to me that this claim arises under the certificate which alone states the goods and voyage assured, and in this case the risk. If the underwriters wish to bind the assured by a clause of which they give him no express notice on the certificate they must at any rate make it clear in the document which they try to incorporate that any clause of limitation refers to a claim under the certificate. A somewhat similar line of argument was acted on by this Court in the case of *Koskas v. Standard Marine Insurance Company* (43 *The Times* L.R., 169) on which the appellants relied. I do not quite know why they relied on it, for what was decided in that case was that the underwriters had not made it clear that notice to Lloyd's agent of a loss was a condition of recovery on the policy, and so could not rely on such a clause as a condition precedent ; and all the Judges pointed out the extreme difficulty of knowing how much, if anything, in the policy was incorporated in the certificate. We were told in the present case : " You must incorporate something, for the perils insured against are not exhaustively stated in the certificate." They are for the purpose of claiming for " leakage from any cause " ; and if the warehouse clause forms part of the certificate, as it does, apparently, in the original form with which the Court has been supplied, the perils insured under the land portion of that clause are stated on the face of the certificate. So are the war risks. It is true that sea perils are not so stated, and underwriters would find some difficulty in resisting their incorporation in the certificate, as a clause against them, which they had negligently omitted. But it is a different thing to try to incorporate a clause in their favour of which they have given the European assured no notice. The judgments of this Court in the case of *Donald H. Scott and Co., Limited v. Barclays Bank Limited* (39 *The Times* L.R., 198 ; [1923] 2 K.B., 1) contemplate that a certificate may be such that an action may be brought on it. Incidentally the form of this certificate fully justifies the view in that case that some certificates may not be good tender to a purchaser. In this case, however, the purchaser accepted the certificate.

In my opinion the judgment of Mr. Justice MacKinnon was right and the appeal should be dismissed with costs. I would add that I see no reason to think that the American system of a supposed continuous policy and certificates is any improvement either from a business or legal view on the English system of open cover, declarations, and separate policies, where required—rather the contrary.

Lord Justice Sankey.—The plaintiffs in this case sued under a certificate of insurance dated August 17, 1923, issued under policies of marine insurance subscribed to respectively by each defendant under which the plaintiffs were insured on 100 barrels of turpentine valued at a sum insured for shipment by the steamship Cape Town Maru at and from Jacksonville, Florida, to Rotterdam, Holland, against the ordinary marine perils and against leakage, by a clause in the following terms : " To pay leakage from any cause in excess of one per cent. on each invoice, or whole leakage without deduction if vessel or craft be stranded, sunk, burnt, on fire or in collision, or there be any forced discharge of cargo at a port of distress." The said barrels of turpentine were duly shipped on board the said vessel, but according to the contention of the plaintiffs they suffered from leakage during the voyage and on arrival at Rotterdam there was a shortage, in respect of which they claim.

Three points were taken for the defendants : (1) That there was not sufficient evidence that there had been such a loss. (2) That in any event the loss was not caused by leakage. (3) That in the policy of insurance there was a clause under which the defendants were not to be liable unless the action were brought within a year of the loss.

The learned Judge decided in favour of the plaintiffs and from his judgment the present appeal is brought.

It is necessary to state a few facts before dealing with the points. The turpentine was bought by the plaintiffs from the Columbia Naval Stores Company under a c.i.f. contract. As is usual in this trade in America the vendors took out with the defendants what may be called general policies, which are the policies above referred to, and when they sold the goods under a c.i.f. contract they handed to the purchaser a certificate of insurance " under the general policy," which is the certificate above referred to. A difficulty in the trade is caused by the fact that the amount of the turpentine is ascertained in different ways at the port of shipment and the port of unloading. At the port of shipment it is measured and the result is expressed in gallons. At the port of discharge it is weighed and the result is expressed in kilograms. The certificate of insurance provided the method of converting the kilograms into gallons. At the port of shipment the number of gallons was found to be 5,107. At the port of discharge by the above-mentioned method of calculation it was found to be 4,992. The result was a shortage of 115 gallons.

The defendants claim that under the leakage clause they are entitled to 1 per cent. franchise, which would amount to 51 gallons ; further, that owing to the fact that the temperature at Jacksonville is 20 degrees higher than the temperature at Rotterdam the turpentine at the former place expands and occupies a greater amount of space—that is to say, contains a greater number of gallons than it does in the cooler air of Rotterdam. There was evidence that on a cargo of the present sort the difference would represent 44 gallons. Adding this to the 51 gallons above referred to the defendants say that the real shortage or leakage is only a few gallons, in respect of which they have paid into Court with a denial of liability a sum which is more than sufficient to discharge their liability.

I now deal with the three points : (1) That the evidence with regard to the weighing or measuring is unsatisfactory. It was suggested that the weighing and measuring were a rough-and-ready and so an inaccurate method of ascertaining the quantity, but in cases of this character meticulous accuracy is not demanded either in the City or in the Courts. You do not weigh coal in apothecaries' scales nor measure turpentine in medicine glasses ; neither common sense nor common law requires such a method. Here, according to the affidavits, the measurement at Jacksonville and the weighing at Rotterdam were done in the usual and ordinary way. The learned Judge found that the result was substantially correct and I see no reason to interfere with his decision.

(2) That the greater part of the loss in question was not caused by leakage, but by a physical alteration in the volume due to the difference in temperature. It was said that in effect the plaintiffs, subject to the franchise of 1 per cent. and to the amount for which the payment into Court was made, actually received at Rotterdam what was shipped at Jacksonville. The word "leakage" standing by itself might not perhaps include evaporation and might perhaps refer only to a loss of liquid caused by the liquid getting from inside to the outside of the cask. By custom, however, or by contract a special and artificial meaning may be attached to the word and parties may agree upon a conventional method of ascertaining an amount, although the result may not be mathematically correct. In my view, that is what happened in this case. By the certificate of insurance the defendants agreed to pay for leakage from any cause in excess of 1 per cent., and they agreed that the number of gallons shipped at Jacksonville should be ascertained and the number of kilograms unloaded at Rotterdam ascertained and translated into gallons by means of a conventional calculation, and that the result of that conventional calculation should be compared with the result of the measurement at Jacksonville in order to ascertain the leakage. (3) That there was a time limit for bringing the action. The defendants contend that the limitation clause of 12 months applies to and defeats the present action. That limitation clause does not occur in the certificate, which is the only document that the plaintiffs ever had or saw. It only appears in the policy which, as above pointed out, was the general policy issued to and kept by the vendors. The clause is in the following terms: "It is agreed that no suit or action for the recovery of any claim arising under this policy shall be maintainable in any Court unless such suit or action shall have been commenced within one year from the date of the happening of the loss out of which the said claim arose." It will be noticed that the clause does not contain the words "or any certificate issued thereunder." Indeed, the policy is a somewhat extraordinary document. It consists of an original with many addenda, some of which are stamped on the policy, in some cases over and above clauses already there, in other cases gummed on to it, and in the result it is an almost illegible and unintelligible jumble of stipulations.

The defendants contend that the policy is incorporated by the certificate and forms part of their contract. The plaintiffs, while admitting that some clauses of the policy are incorporated in the certificate, deny that so unusual a clause as this limitation clause ought to be read into it. The learned Judge has accepted this view and I think he was right.

The certificate sued on certifies that the barrels in question were insured under certain policies, No. 924 of the Phœnix Company and No. 387 of the Great American Company; it adds: "This certificate represents and takes the place of the policy and conveys all the rights of the original policy-holder for the purpose of collecting any loss or claims as fully as if the property was covered by a special policy direct to the holder of this certificate and free from any liability for unpaid premiums."

It may be that in order to validate the certificate it is necessary to incorporate certain clauses of the policies and to provide thereby for necessary terms omitted from the certificate, but I do not think it is permissible to incorporate clauses which are not only not necessary to validate the certificate, but which have the effect of restricting it in the way the defendants desire to do.

In my view, if the defendants wish to rely upon a clause of this character they should give ample notice of it by placing it upon the certificate itself in order to show that the right of the assured is a strictly limited one, namely, a right which can only be enforceable within 12 months of the loss. The American decision of *Graham Bros. v. St. Paul's Insurance Company* (1 American Maritime Cases, 836) is to this effect. See the judgment of Mr. Justice Glennon at page 839.

For these reasons and for those given by Mr. Justice MacKinnon I am of opinion that this clause cannot be read into the certificate. In coming to this conclusion we are not in any way impugning the decision given by this Court in *Donald H. Scott and Co., Limited v. Barclays Bank Limited* (39 *The Times* L.R., 198; [1923] 2 K.B., 1), where the real question was whether the certificate there was an approved policy within the meaning of the contract in the case and the Court of Appeal held that it was not, or in *Koskas v. Standard Marine Insurance Company* (43 *The Times* L.R., 169), where this Court held that they were not satisfied that compliance with the clause therein referred to was a condition precedent to the plaintiffs' success.

In my opinion the appeal should be dismissed with costs.

Mr. Justice Russell.—I agree that this appeal should be dismissed and I only desire to express my views upon the question whether the one year clause applies, so as to defeat the plaintiffs' claim.

For brevity's sake I propose dealing with that matter as if only one policy, namely, No. 924 of the Phœnix Company, had to be considered.

In order to defeat the plaintiffs' claim the defendants must establish that the plaintiffs are bound by the one year clause as part of the contract under which they establish their claim to the insurance moneys.

The one year clause may, with diligence, be found in the crazy patchwork of documents and clauses which constitute Policy No. 924. The argument that the one year clause is part of the contract with the plaintiffs is based on the following matters. (1) The certificate states the insurance as being under Policy No. 924. (2) The certificate states only some of the risks insured: it does not mention perils of the sea. (3) The certificate provides in terms that claims are to be adjusted according to the usages of Lloyd's, but subject to the conditions of the policy and the contract of insurance. *Koskas'* case (43 *The Times* L.R., 169) is relied upon as establishing that, in these circumstances, one is bound to treat the policy and certificate as one document so that all the provisions contained in the policy are binding upon the holder of the certificate, except only such as are inconsistent with the provisions of the certificate. Hence it would follow that the certificate holder would be bound by the one year clause, even though he never knew of its existence.

On the other side the contention is that the certificate is stated to represent and take the place of the policy, and that, throughout the certificate, claims by the assured are described as claims "under the certificate"; further, it is pointed out that in some respects and for some purposes, the certificate specifically incorporates the terms of the policy, and this would be unnecessary if the provisions of the policy were intended to be incorporated *en bloc*.

There is no doubt much to be said in support of each of these rival views. There is, however, in my opinion, one thing which is reasonably clear about these documents :—namely, the intention of all parties that as far as is possible the certificates should be self-contained independent documents under which (without having recourse to any other document) insurance claims could be made and enforced by the indorsee against the Phœnix Company. In other words the terms of Policy No. 924 are not to be taken into account except to the extent that either the terms of the certificate or necessity may require. With those exceptions the rights of the indorsee are to be governed by the certificate and nothing else. To impute any other intention would be to impute an intention which would clog and hamper business, and which would be contrary to some of the express provisions of the certificate. There is in *Koskas'* case (*supra*) nothing which is contrary to this view. The point for decision in that case was whether compliance with a clause printed on and forming part of the certificate of insurance was a condition precedent to the right of the assured to sue. The certificate was silent as to risks insured. The Court held that in order to ascertain whether compliance was a condition precedent you must look at the whole contract, which in that case must necessarily include the policy which alone contained the risks insured. Upon a consideration of the policy and certificate they were unable to come to a conclusion that compliance with the clause was a condition precedent.

But for the purpose of making and enforcing their present claim against the Phœnix Company the plaintiffs have no need to refer to the policy at all except in regard to rates of exchange, the provision for which is contained in the policy and is specifically incorporated in the certificate as one of the conditions of the policy relating to adjustment. The risk in question in this action, namely, leakage, is specified in the certificate together with the machinery for comparing gallons with kilograms.

Why then, in this case, should or need the one year clause be imported into the certificate ? It applies in terms only to "any claim arising under this policy." It does not in terms apply to a claim under the certificate ; or a claim arising under the two documents jointly, or indeed to a claim arising by virtue of the policy. This may seem a narrow construction of the words used, but I see no reason for adopting, for the benefit of the underwriters, a more benevolent meaning of a clause inserted by them for the purpose of restricting the rights of their customers.

In my opinion where, as here, you have a claim under the certificate for loss in respect of a cargo specified in the certificate, by reason of a risk specified in the certificate, it would be wrong and contrary to the true intention of the parties, to apply to such a claim a provision of the policy which relates to a claim made under the policy and does not refer to a claim made under a certificate.

This is, in my view, sufficient to dispose of this point in the present appeal.

I express no opinion as to what the position would be if the claim had been in respect of a risk not covered by the certificate, but covered by the provisions of the policy ; where of necessity the policy must be referred to and read in conjunction with the certificate.

[Solicitors—Messrs. Windybank, Samuell, and Lawrence ; Messrs. William A. Crump and Son.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)

1928.
Mar. 9.

CREDITON GAS COMPANY v. CREDITON URBAN DISTRICT COUNCIL.*

Contract—Determination—No provision giving power to determine—Supply of gas to local authority—Whether contract binding for ever.

The plaintiffs, a gas company, made a contract with the defendants, a local authority, to light all the public lamps in the defendants' area "from and after the first day of September in every year up to the following first day of May inclusive." The contract contained no provision for its determination by either party, but it recited an earlier agreement which was to remain in force until the defendants should determine it ; and a supplemental agreement provided that the property in new lamps was to vest in the defendants if the contract lasted 15 years. After some years the defendants served on the plaintiffs a notice determining the contract on the expiration of four months. In an action for a declaration that the defendants could not determine the contract without the plaintiffs' consent,

Held, that it was in the power of the defendants to determine the contract, and the action failed.

Decision of Russell, J. ([1927] W.N., 325) affirmed.

This was an appeal by the plaintiffs from a decision of Mr. Justice Russell ([1927] W.N., 325).

By the terms of the Crediton Gas Act, 1906, the Crediton Gas Company was a body corporate with perpetual succession and a common seal, and by an agreement under seal made on March 30, 1909, with the Crediton Urban District Council, the company undertook to light all the public lamps in Crediton "from and after the first day of September in every year up to the following first day of May inclusive." Certain rates of payment were agreed upon, which were varied by a supplemental agreement dated June 30, 1921.

Neither agreement contained any provision whether, or how, either party could determine the contract.

On April 30, 1927, the council served a notice on the gas company "to determine their agreement with you for the public lighting of their district on August 31, 1927." The gas company contended that the agreement could not be terminated by the council without their consent, and brought an action for a declaration to that effect.

Mr. Justice Russell said that the plaintiffs had relied on observations by Lord Justice James in *Llanelly Railway and Dock Company v. London and North Western Railway Company* (L.R., 8 Ch., 942, at p. 949), approved by Lord Selborne in the House of Lords (L.R., 7 H.L., 550, at p. 567), as indicating that an agreement of the kind, mentioning no limit of time, was perpetual, but he did not think these remarks applied to the contract in the present case. Nor could the contract be held to be permanent

* Reported by G. T. Whitfield-Hayes and H. Langford Lewis, Esqs., Barristers-at-Law.

merely because the character of perpetuity attached to both contracting parties. He thought that there was an implication that either party could terminate on notice, and he therefore dismissed the action.

The plaintiffs appealed.

Mr. Grant, K.C., and Mr. D. D. Robertson appeared for the appellants ; Mr. Spens, K.C., and Mr. H. S. G. Buckmaster for the respondents.

The MASTER of the ROLLS, in giving judgment, said that the question was whether, on the true construction of an agreement between the parties, under which the plaintiffs agreed to supply the defendants with gas, that agreement ought to be treated as a perpetual agreement under which the plaintiffs were entitled to supply the defendants with gas for ever. His Lordship then stated the history of the agreement, which confirmed a previous verbal agreement. The plaintiffs were incorporated as a statutory company under the Crediton Gas Act, 1906, which incorporated portions of the Companies Clauses Consolidation Act, 1845, and the Gasworks Clauses Acts, 1847 and 1871. The plaintiffs were under a public duty to supply the defendants with so much gas as they should require to be supplied to them from time to time, and by section 10 of the Act it was provided that all existing contracts then in force should be as binding as if the statutory company had been a party thereto. These contracts were not under seal, and any contract with the defendant council would be invalid under the Public Health Acts unless under seal. But, as was said by Mr. Justice Walton in *Brooks, Jenkins and Co. v. Torquay Corporation and Others* (18 *The Times* L.R., 139 ; [1902] 1 K.B., 601, at p. 607), "it was not *ultra vires* for the local authority to pay for the work of which they had had the benefit."

On March 30, 1909, an agreement under seal was entered into between the plaintiffs and the defendants, at the instance of the defendants' auditors, and that was supplemented by a further agreement of June 30, 1921. These agreements were determined by notice dated April 30, 1927. No question was argued as to the length of notice, but it was said by the plaintiffs that there being no provision for the determination of the agreements they were still binding on the defendants, and for that proposition the authority of *Llanelly Railway and Dock Company v. London and North Western Railway Company* (L.R., 8 Ch., 942) was relied on. There Lord Justice James said (at pp. 949 and 950) :—

"I start with this proposition, that *prima facie* every contract is permanent and irrevocable, and that it lies upon a person who says that it is revocable or determinable to show either some expression in the contract itself, or something in the nature of the contract, from which it is reasonably to be implied that it was not intended to be permanent and perpetual, but was to be in some way or other subject to determination. No doubt there are a great many contracts of that kind : a contract of partnership, a contract of master and servant, a contract of principal and agent, a contract of employer and employed in various modes—all these are instances of contracts in which, from the nature of the case, we are obliged to consider that they were intended to be determinable. All the contracts, however, in which this has been held are, as far as I know, contracts which involve more or less of trust and confidence . . . . more or less of personal relations between the parties."

Here it was argued that no personal relations between the parties were involved in the present contract. But it was not unimportant to remember that the facts in that case were very special. The London and North Western Railway Company were anxious to obtain access to the town of Swansea, and agreed to use the access provided by the Llanelly Railway Company, which wanted money and agreed to give the London and North Western Railway Company running powers over their line into Swansea in consideration of a loan of £40,000. There was nothing of a transient nature in that contract. But how far did that principle apply to the present case ? Counsel had admitted that the defendants' obligation under the agreement was only to take so much gas as they wanted from time to time, and that they could have discontinued the use of half their street lamps if they wished.

The contract *per se* was not of the same character as that construed in the *Llanelly Railway* case (*supra*). There was a recital in the contract of 1909 referring to an earlier agreement which was to remain in force "until the council should determine the same," and that recital threw some light on the construction of the contract. There was, further, an indication contained in a clause of the supplemental contract, as to the property in new lamps, which was to vest in the defendant council if the agreement lasted for 15 years. Reading that supplemental agreement into the earlier one, it appeared clear that the determination of the contract was entirely within the power of the defendant council. It could not be said to be binding on the defendants *in sæcula sæculorum*. The appeal must be dismissed, with costs.

LORD JUSTICE SARGANT was of the same opinion. The contract itself must be examined in conjunction with the circumstances existing when it was entered into. On March 30, 1909, the parties were in this relative position. The plaintiffs were a statutory company bound to supply gas in accordance with their private Act. They were a new company formed, on the dissolution of an old limited company, by reincorporation of its members. Under the terms of the statute the engagements already binding on the limited company were made binding on the statutory company, and under section 24 of the Gasworks Clauses Act, 1871, they were bound to supply the defendant council with so much gas as they should from time to time require. On the other hand, it was a unilateral obligation, and their customers were not bound to take any more gas than they might require. The recital in the contract of 1909 showed that there was no definite scrapping of any existing agreement ; the intention of it was to state definitely and under seal the existing obligations of the parties. As far as he (his Lordship) could see there was no creation by the agreement of any obligation on the part of the defendants to take gas from the plaintiffs, only a right of the defendants to demand and an obligation on the plaintiffs to supply the gas demanded, with stipulations as to prices and times. What was alleged by the plaintiffs was that the agreement of 1909 had radically changed the position as between the parties, and bound the defendants to take a definite minimum supply of gas from the plaintiffs for ever afterwards. That was quite inconsistent with the recitals in the agreement, and if any further confirmation were required of the construction which he (his Lordship) preferred to adopt, it was to be found in clause 1 (*c*) of the supplemental agreement referring to a possible determination of the agreement, and what was to take place in that event. Reference had been made to the case of *Llanelly Railway and Dock Company v. London and North Western Railway Company* (L.R., 7 H.L., 550), but the circumstances of that case were so different that it could be no authority in the circumstances of the

present case. His Lordship then referred to the judgment therein of Lord Justice James and proceeded. The agreement mainly contained a statement of the method by which the supply of gas should be given to the defendants, and how it was to be paid for. That being so, the local authority was at liberty to obtain light from another source, and to notify the plaintiffs that they would not require a supply of gas in the future.

LORD JUSTICE LAWRENCE, who agreed, said he would only add a few words. In arriving at the meaning of the agreement it was important to remember the circumstances at the time when it was executed; there was a verbal agreement for the supply of gas which was to remain in force until determined. The Government auditor insisted that in order to regularize the defendants' payments for gas there ought to be an agreement made under seal. Accordingly the agreement of 1909 was prepared and executed. It contained a recital of the arrangements in existence before it was executed, and referred to the verbal agreement "to remain in force and be binding upon both parties until determined by the council." There was not a word in the agreement binding the council to take gas in any particular quantity, or of any particular quality. There was nothing in it to bind the defendant council in perpetuity to take gas whether they required it or not; it was purely a record of the terms and conditions of the supply of gas, so long as the relation of supplier and customer should last, and the relation was to remain on the old footing. The revocable bargain recited should, if it had been intended so to do, have been expressly varied by the agreement. That view was amply fortified by the supplemental agreement of 1921, in which the parties incidentally recognized that the main agreement might come to an end at any time. The cases cited by counsel for the appellants were distinguishable. Mr. Justice Russell had come to a right conclusion, and the appeal must be dismissed.

[Solicitors—Messrs. R. W. Cooper and Sons; Messrs. Guscotte, Wadham, Tickell and Co., for Mr. John Symes, Crediton.]

Chan. Div. (Clauson, J.) 1928. Mar. 7.

IN RE PITT—PITT v. MANN AND OTHERS.*

Trust—Administratrix—Debts paid and estate cleared—Power of Court to confirm appointment of new trustees by administratrix.

An administratrix with the will annexed, having paid all the debts and cleared the estate, executed a deed appointing two trustees of the will in her place and asked the Court to confirm the appointment.

Held, that the new trustees had been properly appointed by the deed.

The plaintiff, Agnes M. M. Pitt, was administratrix with the will annexed of Fanny C. E. Pitt, who died on January 13, 1917. The plaintiff, after paying the debts and clearing the estate, by deed dated October 11, 1927, appointed T. M. S. Pitt and E. L. Rowcliffe trustees of the will in her place.

The plaintiff issued this originating summons asking, *inter alia,* that it might be declared that the defendants, T. M. S. Pitt and E. L. Rowcliffe, were duly appointed trustees of the will by the indenture dated October 11, 1927, and if so whether in the place of the plaintiff or jointly with her, or if not so appointed that the defendants or some other fit and proper persons might be appointed trustees thereof under section 41 of the Trustee Act, 1925.

Mr. A. L. Ellis appeared for the plaintiff; Mr. J. H. Barron for the defendant trustees; Mr. Stafford Crossman for the next-of-kin; and Mr. Howard Wright for persons claiming to be interested under the will.

Mr. ELLIS called the attention of the Court to the decision in *In re Ponder—Ponder v. Ponder* ([1921] 2 Ch., 59), where in similar circumstances it was held that the Court had the same power of appointing a new trustee jointly with the administrator as it had of appointing a new trustee together with an executor *functus officio.*

MR. JUSTICE CLAUSON made a declaration that on the true construction of the deed of October 11, 1927, the defendant trustees had been properly appointed trustees.

[Solicitors—Messrs. Gregory, Rowcliffe and Co.; Messrs. Woolley, Tyler, and Bury.]

* Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.

K.B. Div. (Humphreys, J.) 1928. Mar. 8.

SINANIDE v. LA MAISON KOSMEO.*

Copyright—Original literary work—Phrase in advertisement—Beauty "a social necessity"—Copyright Act, 1911 (1 and 2 Geo. V., c. 46), s. 1.

The plaintiff, an electro-therapist, used in his advertisements of face treatment a phrase which he claimed to have invented, namely, that beauty (or youthful appearance) was "a social necessity, not a luxury." The defendant, who carried on the business of a beauty specialist and was in the habit of advertising his beauty treatment, then began to use in his advertisements the words, "A youthful appearance is a social necessity." In an action for breach of copyright,

Held, that the plaintiff's phrase was an "original literary work" within s. 1 of the Copyright Act, 1911, and was a good subject of copyright, and, as the defendant had unconsciously taken the phrase from some advertisement of the plaintiff, the latter was entitled to an injunction and nominal damages.

This action raised a question of infringement of copyright in an advertisement. The plaintiff, Dr. Oreste Sinanide, of 53, Sloane-street, S.W., an electro-therapist, contended that the defendant, Mr. Charles Francis Medlicott Abbott Brown, trading as La Maison Kosmeo, of 49, South Molton-street, W., who carried on the business of a plastic and cosmetic surgeon, had adopted in his advertisements a phrase which he (the plaintiff) had invented as a slogan for various advertisements connected with his work.

* Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.

Mr. H. St. John Field appeared for the plaintiff; Mr. Cartwright Sharp for the defendant.

Mr. St. John Field, in opening the case, said that the plaintiff had obtained diplomas in medicine and higher clinical training in the Universities of Athens and Paris. Since 1925 he had dealt mainly with the treatment of the human face, and it had been necessary for him to advertise to a considerable extent in connexion with that treatment. The plaintiff claimed to have invented a slogan in regard to those advertisements. The phrase was: "Beauty is a social necessity, not a luxury." The first word was sometimes varied to "youthfulness," or "youthful appearance," or "good looks"; but it was in the latter portion of the slogan—that was to say, the words "a social necessity, not a luxury"—that copyright was claimed. The defendant had also been advertising his beauty treatment for some time, but had not adopted a phrase similar to that used by the plaintiff before May 29, 1926, when he inserted in the *Illustrated Sporting and Dramatic News* an advertisement in these words:—"A youthful appearance is a social necessity."

The same phrase had been repeated in various subsequent advertisements. Before that date his usual slogan had been "Beauty is the best letter of introduction," a phrase which, counsel believed, was generally ascribed to Diogenes or Socrates. The plaintiff's contention was that the defendant's phrase was taken from that adopted by the plaintiff, and therefore constituted a breach of copyright.

The plaintiff gave evidence corroborating counsel's statement.

Mr. Cartwright Sharp, for the defendant, said that the defendant had been established for 23 years as a beauty specialist. He had sought to alter his advertisements at various times. In the spring of 1926 he wished to adopt a ladder design for a new advertisement. Various phrases were tried, till at last the right one was obtained in much the same manner as various words were tried, one after the other, to fit into the solution of a cross-word puzzle. The defendant had no idea that the particular phrase in question came from any other source.

Evidence was called on behalf of the defendant, and counsel addressed the Court.

Mr. Justice Humphreys, in giving judgment, said that the questions he had to decide were whether the phrase "Youthful appearance is a social necessity, not a luxury" could be the subject of copyright, and, if it could, whether the defendant had copied that phrase in such a way as to infringe the plaintiff's copyright therein.

Section 1 of the Copyright Act, 1911, provided that there should be copyright "in every original literary work." In considering whether the phrase in question was an "original literary work," the fact that it was used in an advertisement was no bar to its being a work of that kind. That followed from the decision in *Maple and Co. v. Junior Army and Navy Stores* (21 Ch. D., 369), which, so far as he was aware, was the first case in which it was decided that there could be copyright in an advertisement. The later cases had thrown no doubt on that point.

One of the reasons which led him to the conclusion that this phrase was "original" was that it was so obviously untrue. It was not correct to use the word "necessity" as a substitute for desirability of youthful appearance or beauty, which every one admitted. Beauty was certainly always an advantage, but he was not quite sure that the same applied to a youthful appearance. The phrase, however, was rather an arresting one, and if it had not been used by the plaintiff in his advertisement as "original" attention would, no doubt, have been called by the defendant to the use of the phrase in some other advertisement. In his judgment, therefore, the phrase did come within the language of the Copyright Act, 1911, as being the subject of copyright.

On the question whether the defendant had copied the phrase, it was not necessary that he (his Lordship) should find that there had been an intentional copying. He preferred to draw a distinction between stealing and copying of copyright. A breach of copyright might consist in the unconscious use of another's material, although the basis of copyright law might be the undesirability of breaking the Eighth Commandment. It was, however, significant that the defendant had been consistently varying his advertisements since 1905, but that it did not occur to him before 1926 how excellent the particular phrase adopted by the plaintiff would be to use in the exercise of a somewhat similar business; and that the first occasion on which it occurred to him was at a time when the plaintiff had been using that advertisement for some months with ever-increasing importance. He (his Lordship) therefore came to the conclusion that the defendant had unconsciously taken this phrase from some advertisement of the plaintiff which he had seen. There was nothing against the integrity or honesty of the defendant.

In the result the plaintiff was entitled to an injunction and nominal damages, which might be assessed at a shilling, and costs.

[Solicitors—Messrs. H. S. Wright and Webb; Messrs. Beardall and Co.]

Chan. Div. (Russell, J.) 1928. Mar. 9.

IN RE MADGE—PRIDIE v. BELLAMY.*

Will — Construction — Bequest—Articles to be selected by donee — Death of donee without making selection—Failure of bequest.

A testator bequeathed to his wife such articles as she should within two months select from the articles in certain rooms in a house. Five days after the death of the testator his wife died without having made any selection.

Held, that the right of selection did not pass to the wife's executors and therefore the bequest failed.

By his will, dated July 27, 1925, Sir William Thomas Madge, Bt., bequeathed to his wife "such articles of domestic or household use or ornament at Broughton Lodge, other than articles (not being pictures) belonging to or usually in the dining room or billiard room, as she should select within two months." Sir William Madge died on January 29, 1927. His wife died five days later without having exercised her right of selection. Her executors chose certain articles within the two months, and this summons was taken out to determine whether the right of selection was personal to Lady Madge, or whether it passed to her executors.

Mr. Wilfrid M. Hunt appeared for the independent executor of Sir William's will (two other executors were beneficially interested under the will); Mr.

* Reported by J. B. B. MacMahon, Esq., Barrister-at-Law.

P. H. L. Brough for the executors of Lady Madge; Mr. Winterbotham for Sir Frank Madge, Bt., the testator's grandson; and Mr. David Ll. Jenkins for Mrs. Forman, the testator's daughter.

MR. JUSTICE RUSSELL, in the course of his judgment, said that there was no modern authority, and one had to go back to Coke upon Littleton and Sheppard's *Touchstone*. But apart from any authority, it seemed from the words of the gift that the choice of the articles was to be the personal choice of the widow, and that until it was made there was no gift to her. Two passages had been cited to him, one from Coke upon Littleton, and the other from Sheppard's *Touchstone*.

In Coke upon Littleton, at page 145 *a*, there was this passage:

"Note, as to elections, these diversities following: First, when nothing passeth to the feoffee or grantee before election to have the one thing or the other, there the election ought to be made in the life of the parties, and the heir or executor cannot make election. But when an estate or interest passes immediately to the feoffee, donee, or grantee, there election may be made by them, or by their heirs or executors."

So, too, in Sheppard's *Touchstone*, at page 251:—

"So it is when a man hath six horses in his stable, and he doth grant me one of his horses, but doth not say which of them; in this case I may choose which I will have; and in these cases, when I have made my election, and not before, the grant is good. And if, in these cases, the grantee doth not make his election during his life, it seems the grant will never be good."

Those cases dealt with grants, but it seemed to him (his Lordship) that the same principle applied to gifts by will. When nothing passed to the donee until election the choice must be made during life, and, therefore, in this case the bequest failed because the wife died before she made her election.

[Solicitors—Messrs. Ponsford and Devenish; Messrs. Blundell, Baker, and Co., for Messrs. J. M. B. Turner and Co., Bournemouth.]

K.B. Div.
(Lord Hewart, C.J., Salter and Roche, JJ.)
1928. Mar. 8.

HEWETT AND OTHERS v. ESSEX COUNTY COUNCIL.*

Lands—Compulsory acquisition—Compensation—Bridge—Construction under statutory powers—Interference with access to wharf—Compensation obtainable by wharf-owners.

A county council was authorized by statute to construct a bridge over a navigable river giving access to a wharf resorted to by sea-going vessels and used for storage. The county council built the bridge and it interfered with access to the wharf, so that goods had to be transhipped into barges and the owners of the wharf had to acquire a new one. The freeholders and a mortgagee and the occupiers of the old wharf, the last-mentioned persons being tenants at will, claimed compensation as follows:—(1) Depreciation of freehold value of wharf, (2) cost of new wharf, (3) damage through loss of traffic at old wharf, (4) damage by reason of extra cost of handling traffic at new wharf, (5) damage to river sailing barge traffic, (6) damage from stoppage of dumb craft with goods for overseas, and (7) damage from loss of storage rents.

Held, that the wharf-owners were entitled only to compensation under the first head and not under any of the other heads.

This was an award in the form of a special case stated by Mr. Hugh C. Webster, an official arbitrator under the Acquisition of Land (Compensation) Act, 1919.

The claimants were chiefly members of the Hewett family, which had for generations owned a wharf, known as Hewett's Quay, on that part of the River Roding called Barking Creek, Essex. The claimants were respectively interested as follows:—Robert Muirhead Hewett, freeholder of part; Alice Minna Hewett, his wife, freeholder of part; Emily Ann Hewett, spinster, mortgagee; and the River Roden Company, Limited (a private company, whose directors and shareholders were all members or connexions of the Hewett family), occupiers.

The respondents, the Essex County Council, were empowered by the Essex County Council (Barking Bridge) Act, 1923, to construct a bridge for vehicular and pedestrian traffic across the river in question. The Act incorporated the Lands Clauses Acts (except sections 127 and 133 of the Lands Clauses Consolidation Act, 1845). The respondents, in pursuance of their statutory powers, constructed a bridge across the river. Barking Creek was navigable for sea-going vessels and sailing and other barges, and, before the construction of the bridge, gave access for such vessels and barges to Hewett's Quay, which was much resorted to by them for unloading goods. It was also much used for the storage and loading of goods consigned there for shipment.

The bridge constituted an obstruction to the navigation of the river and interfered with access to the wharf, so that sea-going vessels could no longer reach it, but had to tranship goods destined for the wharf into barges below the bridge. Sailing barges were also delayed owing to the necessity of lowering gear for the purpose of passing under the bridge. The business of Hewett's Quay was thereby much damaged and its value was much diminished, and the claimants were compelled to acquire a new wharf below the bridge for the purpose of dealing with such portion of their traffic as could be handled there.

They jointly claimed compensation under the following seven heads:—

(1) Depreciation of freehold value of wharf, £8,000. (2) Cost of new wharf, £9,900. (3) Damage sustained through loss of traffic at old wharf, £25,710. (4) Damage sustained by reason of extra cost of handling such portion of their traffic as they were able to deal with at the new wharf, £19,747. (5) Damage sustained to river sailing barge traffic, £500. (6) Damage sustained by total stoppage of dumb craft with goods for overseas, £62 10s. (7) Damage sustained by loss of storage rents, £3,900. Total, £67,909 10s.

Subject to the determination by the High Court as to the right of the claimants to recover anything in respect of items 2 to 7 inclusive, the arbitrator awarded the claimants £1,400 in respect of item No. 1 (depreciation of freehold), and £3,750 in respect of the other six items (depreciation of business). The

* Reported by J. W. HALL, Esq., Barrister-at-Law.

arbitrator found that the River Roden Company, Limited, which carried on the business at the wharf, were tenants at will of the freeholders, Robert Muirhead Hewett and Alice Minna Hewett, and paid no rent. Mr. and Mrs. Hewett held 9,901 out of 9,917 shares, the other 16 being held by other members of the family. He found that the claimants in acquiring and equipping Orrock's Wharf acted reasonably in order to mitigate the loss and damage which would otherwise have been inflicted on them, which consisted of :—(1) Depreciation in the value of Hewett's Wharf ; (2) Injury to their trade, viz. :—(*a*) The expense of equipping Orrock's Wharf; (*b*) loss of trade ; (*c*) increased cost in carrying on their trade.

The claimants submitted the following points of law :—(1) They had joined all parties known to have any interest in Hewett's Wharf, and if the claimants failed to give the respondents a satisfactory discharge for the compensation awarded, the respondents could deposit the same in the bank as prescribed by section 76 of the Lands Clauses Consolidation Act, 1845. (2) The claimants, as the owners of Hewett's Wharf, had the right of navigating Barking Creek as members of the public, but had, in addition, the exclusive access to and from Hewett's Wharf from and to the Creek, which was not a right in common with the rest of the public, and their right of exclusive access had been interfered with and injuriously affected by the construction of the bridge. (3) The claimants as the owners of that right of exclusive access to and from Hewett's Wharf were entitled to claim compensation for the resulting depreciation in value of Hewett's Wharf, and also for the loss and damage resulting to them by reason of the access of oversea and coast-wise vessels and sailing barges being obstructed, and for all other loss and damage thereby resulting. (4) On the assumption that it had become impossible for them to carry on at Hewett's Wharf the oversea and coast-wise portion of their business, it became their duty to mitigate so far as they could the resulting loss and damage and, for the purpose of so doing, they were entitled to acquire Orrock's Wharf below the bridge.

They therefore claimed to be entitled to recover compensation for (i.) the depreciation in value of Hewett's Wharf; (ii.) the cost of providing, equipping and maintaining Orrock's Wharf after giving the respondents credit for whatever sum might be awarded in respect of depreciation of the net annual value of Hewett's Wharf ; (iii.) all business lost by the obstruction, *i.e.*, business which could not commercially be transferred to or carried on at Orrock's Wharf ; (iv.) any additional expense imposed on the claimants in carrying on business at either wharf.

The respondents submitted the following points of law :—

(1) That a mere tenant at will could not claim compensation for injurious affection; a mere tenancy at will could not be injuriously affected ; (2) that the company could not claim jointly with the freeholders ; they had no joint interest or interest in common which could be the subject of a joint award ; (3) that when no land was taken the measure of compensation for injurious affection was the depreciation, if any, in market value irrespective of any particular business carried on.

The question for the opinion of the Court was whether the claimants were entitled to recover in respect of items No. 2 to No. 7 of their claim.

Sir Lynden Macassey, K.C., and Mr. Tristram Beresford appeared for the claimants ; the Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. W. Bowstead for the respondents.

In support of the respondents' third point the case of *Metropolitan Board of Works v. Howard* (5 *The Times* L.R., 732) was relied upon.

The Lord Chief Justice said that the question for the opinion of the Court was whether the claimants were entitled to compensation in respect of items No. 2 to No. 7 of their particulars of claim. In the opinion of the Court they were not so entitled, and, therefore, in the result, the claimants would receive £1,400 in respect of item No. 1. The arbitrator had dealt with the question of costs with the exception of the costs of the present argument, to which the acquiring authority were entitled.

[Solicitors—Messrs. Wilson and Blew; the Treasury Solicitor.]

House of Lords.
(Viscount Cave, L.C., Viscount Sumner, Lord Atkinson, Lord Buckmaster, and Lord Warrington of Clyffe.)
1928. Mar. 9.

LEVENE v. INLAND REVENUE COMMISSIONERS.
INLAND REVENUE COMMISSIONERS v. LYSAGHT.*

Revenue — Income-tax — Exemption — "Resident"—"Ordinarily resident"—Meaning of expressions—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 46 ; Sched. C, Rule 2 (*d*).

Consideration of the meaning of the expression "ordinarily resident" in Rule 2 (*d*) of Schedule C of the Income Tax Act, 1918, and of the expression "resident" in s. 46 of the same Act.

One decision of the Court of Appeal (43 *The Times* L.R., 337 ; [1927] 2 K.B., 38) affirmed, and another decision of the Court of Appeal (43 *The Times* L.R., 337 ; [1927] 2 K.B., 55) reversed.

In the first case Mr. Levene appealed against an order of the Court of Appeal (43 *The Times* L.R., 337 ; [1927] 2 K.B., 38), affirming an order of Mr. Justice Rowlatt (42 *The Times* L.R., 743), which affirmed a determination of the Commissioners for the Special Purposes of the Income Tax Acts in favour of the Crown. In the second case the Inland Revenue Commissioners appealed against an order of the Court of Appeal (43 *The Times* L.R., 337 ; [1927] 2 K.B., 55), reversing by a majority an order of Mr. Justice Rowlatt, which affirmed a similar determination of the Special Commissioners.

The House dismissed the appeal in Levene's case, and allowed (by a majority, the Lord Chancellor dissenting) the appeal in Lysaght's case.

The questions for the determination were (*mutatis mutandis*) the same in both appeals, but the facts of the two cases were different. Those questions were whether the appellant in the first case (or the respondent in the second case) was, during the material years, shown to have been (*a*) a person not "resident" in the United Kingdom for the purposes of Rule 2 (*d*) of the General Rules applicable to Schedule C of the Income Tax Act, 1918, and therefore entitled to relief from income-tax in respect of interest or dividends on securities of a foreign State or British Possession payable in the United Kingdom ;

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

or (*b*) a person not "ordinarily resident" in the United Kingdom for the purpose of section 46 of that Act and therefore entitled to exemption from income-tax in respect of British War Loan.

LEVENE'S CASE.

In this case the material period consisted of the five income-tax years beginning on April 6, 1920, and ending on April 5, 1925.

Early in 1918 the appellant, who had then decided to live abroad, surrendered the lease of his house in London and sold his furniture. Thereafter, until December, 1919, he maintained no sort of establishment in this country, but stayed at various hotels here. The appellant had previously applied for a passport for himself and his wife to leave England in pursuance of his decision, but these applications were refused. Upon his third application, made in November, 1918, a passport was granted to the appellant and his wife, and they went abroad, though they were detained in England and unable to leave until December, 1919, owing to the state of health of the appellant's wife.

In the course of the five years above mentioned the appellant (who was not always accompanied by his wife) was in England for a total of 102 weeks only out of 260 weeks. For the remaining 158 weeks he was in Monaco or France. During the years 1922, 1923, and 1924 the appellant was in treaty for flats in Monaco (in which place he had decided to set up a permanent establishment), but no suitable premises could be found, and all negotiations fell through until, in January, 1925, the appellant took a nine years' lease of an unfurnished flat in Monaco, where he had since resided with his wife. Since he gave up his residence here in 1918 the appellant had never had any intention of again taking a flat or a house in Great Britain. While in Monaco or France, the appellant and his wife (until the flat at Monaco was taken) lived in hotels.

The reasons for the visits of the appellant and his wife to this country were to obtain medical advice; to visit relatives; to take part in certain religious observances; to visit the graves of parents; and to deal with income-tax matters, including preparation for and attendance upon the hearing of his claims for exemption from tax, the refusal of which was the origin of this appeal. In no year was the appellant physically present in the United Kingdom for a period equal to six months.

The income of the appellant was derived from securities of British Possessions and British War Loan, and in respect of the income-tax paid on or deducted from this income the appellant had preferred claims to relief and repayments.

The Special Commissioners rejected the appellant's claim, being of opinion that during the material period the appellant was resident and ordinarily resident in the United Kingdom.

Mr. Justice Rowlatt affirmed the determination of the Special Commissioners, and his decision was affirmed by the Court of Appeal (the Master of the Rolls (Lord Hanworth), Lord Justice Sargant, and Lord Justice Lawrence).

Mr. Maugham, K.C., and Mr. Nissim appeared for the appellant; the Attorney-General (Sir Douglas Hogg, K.C.), the Solicitor-General (Sir Thomas Inskip, K.C.), and Mr. R. P. Hills for the respondents.

The Lord Chancellor.—My Lords: The appellant, Mr. L. N. Levene, has been assessed to income-tax on his dividends from securities of British Possessions and from War Loan for the tax year 1920-21 and the succeeding four tax years, and has claimed to be excused from such tax, that is to say, from tax on the dividends from the securities of British Possessions, on the ground that during the years in question he was not "resident" in the United Kingdom within the meaning of Rule 2 (*d*) of the General Rules applicable to Schedule C of the Income Tax Act, 1918, and from tax on the dividends on War Loan on the ground that during the same years he was not "ordinarily resident" in the United Kingdom within the meaning of section 46 (1) of the Act. On appeal to the Special Commissioners under section 27 of the Finance Act, 1924, those Commissioners disallowed the appellant's claim to exemption and confirmed the assessment, subject to a case which they stated for the opinion of the High Court; and on the argument of the case the decision of the Special Commissioners was affirmed by Mr. Justice Rowlatt and afterwards by the Court of Appeal. Mr. Levene has now appealed to this House.

From the case stated by the Special Commissioners it appears that the appellant is a British subject, and formerly lived in a house in Curzon-street, London, of which he held a lease, until the month of March, 1918, when he decided to break up his establishment and (to use his own expression) to "live abroad"; that he then sold his furniture and surrendered the lease of his house, and until December, 1919, continued to live in the United Kingdom, in hotels. In December, 1919, he went abroad and did not return until July 10, 1920, since when he has been in the United Kingdom for the following periods:—

	Weeks.
1920—July 10 to November 24 ..	19
1921—July 2 to November 27 ..	21
1922—April 9 to June 18 .. and Sept. 10 to November 19	20
1923—April 12 to June 27 .. and Sept. 10 to November 15	20
1924—April 10 to July 1 .. and Sept. 10 to November 23	22

During the remainder of these five years he was staying at Monaco and at various places in France.

From March, 1918, until January, 1925, the appellant had no fixed place of abode, but stayed in hotels, whether in this country or abroad. In the course of the years 1922, 1923, and 1924, he made endeavours to find a suitable flat in Monaco, but the negotiations came to nothing since none of the premises inspected were suitable, until in January, 1925, the appellant took a lease of a flat in Park Palace, Monte Carlo, for nine years, for which he paid a premium of 130,000f. and he lived there with his wife until he came to England for the purposes of the appeal to the Special Commissioners. Both he and his wife have indifferent health, and have been advised to live in the South of France and avoid the United Kingdom in the winter months. One of the reasons for their visits to England was to obtain medical advice. They also came to visit their relatives in England, and (on one occasion) to make arrangements for the care of a brother of the appellant who is mentally afflicted. Other reasons for the appellant's coming to England annually were to take part in certain Jewish religious observances, to visit the graves of his parents, who are buried at Southampton, and to deal with his income-tax affairs.

After setting out the above facts and the contentions of the parties, the Special Commissioners gave their decision in the following terms:—

"The appellant is a British subject and until March, 1918, he was a householder in London. He then surrendered the lease of his house and sold his furniture, and from March, 1918, until January, 1925, he did not

occupy any fixed place of residence, but lived in hotels whether in this country or abroad.

"He was admittedly resident and ordinarily resident in the United Kingdom until December, 1919. He then went abroad, and in each subsequent year he has spent between 7 and 8 months abroad and between 4 and 5 months in the United Kingdom.

"We are satisfied upon the evidence that when he left the United Kingdom in December, 1919, he had formed the intention, which he has consistently carried out ever since, of living abroad for the greater part of the year, but of returning to this country each year and remaining here for considerable periods though not for a period equal in the whole to 6 months in any year.

"The questions for decision are whether he was entitled to exemption from income-tax on War Loan interest under section 46 of the Income Tax Act, 1918, as a person not ordinarily resident in the United Kingdom, and on interest on securities of British Possessions under rule 2 (*d*) of the General Rules applicable to Schedule C as a person not resident in the United Kingdom.

"These are in our opinion questions of degree, and taking into consideration all the facts put before us in regard to the appellant's past and present habits of life, the regularity and length of his visits here, his ties with this country, and his freedom from attachments abroad, we have come to the conclusion that at least until January, 1925, when the appellant took a lease of a flat in Monte Carlo, he continued to be resident in the United Kingdom. The claims for the years in question therefore fail."

It is obvious that the conclusions of the Special Commissioners above quoted are so worded as not to be mere inferences in law from the facts found in the earlier part of the case, but to be themselves substantive findings of fact; and accordingly under the well established rule those findings cannot be disturbed by the Courts unless there was no evidence to support them. But before dealing with that question I think it desirable to say something about a matter which was much discussed during the argument namely, the meaning of the word "reside" and the expression "ordinarily reside" as used in the Income Tax Act, 1918.

My Lords, the word "reside" is a familiar English word and is defined in the Oxford English Dictionary as meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place." No doubt this definition must for present purposes be taken subject to any modification which may result from the terms of the Income Tax Act, 1918, and the Schedules; but, subject to that observation, it may be accepted as an accurate indication of the meaning of the word "reside." In most cases there is no difficulty in determining where a man had his settled or usual abode, and if that is ascertained he is not the less resident there because from time to time he leaves it for the purpose of business or pleasure. Thus, a master mariner who had his home at Glasgow, where his wife and family lived, and to which he returned during the intervals between his sea voyages, was held to reside there, although he actually spent the greater part of the year at sea (*In re Young*, 1 Tax Cas., 57; *Rogers v. Inland Revenue Commissioners*, 1 Tax Cas., 225). Similarly a person who has his home abroad and visits the United Kingdom from time to time for temporary purposes without setting up an establishment in this country is not considered to be resident here—although, if he is the owner of foreign possessions or securities falling within Case 4 or 5 of Schedule D, then if he has actually been in the United Kingdom for a period equal in the whole to six months in any year of assessment he may be charged with tax under rule 2 of the Miscellaneous Rules applicable to Schedule D. But a man may reside in more than one place. Just as a man may have two homes—one in London and the other in the country—so he may have a home abroad and a home in the United Kingdom, and in that case he is held to reside in both places and to be chargeable with tax in this country. Thus, in *Cooper v. Cadwalader* (5 Tax Cas., 101) an American resident in New York who had taken a house in Scotland which was at any time available for his occupation, was held to be resident there, although in fact he had only occupied the house for two months during the year; and to the same effect is the case of *Loewenstein v. de Salis* (10 Tax Cas., 424). The above cases are comparatively simple, but more difficult questions arise when the person sought to be charged has no home or establishment in any country and lives his life in hotels or at the houses of his friends. If such a man spends the whole of the year in hotels in the United Kingdom, then he is held to reside in this country; for it is not necessary for that purpose that he should continue to live in one place in this country but only that he should reside in the United Kingdom. But probably the most difficult case is that of a wanderer who, having no home in any country, spends a part only of his time in hotels in the United Kingdom and the remaining and greater part of his time in hotels abroad. In such cases the question is one of fact and of degree, and must be determined on all the circumstances of the case (*Reid v. Inland Revenue Commissioners* [1926] S.C., 589; 10 Tax Cas., 673). If for instance such a man is a foreigner who has never resided in this country, there may be great difficulty in holding that he is resident here. But if he is a British subject the Commissioners are entitled to take into account all the facts of the case, including facts such as those which are referred to in the final paragraph above quoted from the case stated in this instance. Further, the case may be different, and in such a case regard must be had to rule 3 of the General Rules applicable to all the Schedules of the Income Tax Act, 1918, which provides that every British subject whose ordinary residence has been in the United Kingdom shall be assessed and charged to tax notwithstanding that at the time when the assessment or charge is made he may have left the United Kingdom, if he has so left the United Kingdom for the purpose only of occasional residence abroad.

Turning to the facts of this case, I think it clear that the appellant falls within the category last described. He is a British subject and formerly resided in England. Early in the year 1918 he formed the project of living abroad and thereupon broke up his establishment in this country; but in fact he continued to reside here in hotels until the end of the year 1919. He then went abroad from time to time, but continued to live in hotels either here or in France and he did not actually find a home abroad until the month of January, 1925, when he took a lease of a flat at Monte Carlo. The result is that during the period from the end of 1919 until January, 1925, he went much abroad, partly for the sake of his own and his wife's health, partly no doubt to search for a house or flat, and partly (as may be inferred from the finding of the Special Commissioners) in the hope of escaping liability to the English income-tax; but none of these purposes was more than a temporary purpose, and he regularly returned to England for the greater part of the summer months though for less than one-half of each year. On these facts I think that it was plainly

open to the Special Commissioners to find that during the years in question he was resident in the United Kingdom, and I think it probable that Rule 3 above quoted applied to him.

It remains to be considered whether during the period in question the appellant "ordinarily resided" in the United Kingdom for the purposes of section 46 of the Act, and I think that there was material upon which the Special Commissioners could answer this question in the affirmative. The suggestion that in order to determine whether a man ordinarily resides in this country you must count the days which he spends here and those which he spends elsewhere, and that it is only if in any year the former are more numerous than the latter that he can be held to be ordinarily resident here, appears to me to be without substance. The expression "ordinary residence" is found in the Income Tax Act of 1842 and occurs again and again in the later Income Tax Acts, where it is constrasted with usual or occasional or temporary residence; and I think that it connotes residence in a place with some degree of continuity and apart from accidental or temporary absences. So understood the expression differs little in meaning from the word "residence" as used in the Acts; and I find it difficult to imagine a case in which a man while not resident here is yet ordinarily resident here. Upon this point also, as upon the other, I think that the finding of the Special Commissioners cannot be disturbed.

For these reasons I am of opinion that this appeal fails and I move your Lordships that it be dismissed with costs.

Viscount Sumner.—My Lords: Early in 1918 Mr. Levene, a British subject, formed the intention to "live abroad." He sold his house in Mayfair, sold such furniture as was not in settlement, and then lived in hotels in England for the best part of two years. I will assume that, but for passport difficulties and the condition of his wife's health, he would have gone abroad sooner. He left England in December, 1919.

Accordingly on April 6, 1920, at the beginning of the five years of charge now in question, he was, in the words of Rule 3 of the General Rules, "a British subject, whose ordinary residence has been in the United Kingdom" and so he remained chargeable to tax notwithstanding, if he had left the United Kingdom for the purpose only of occasional residence abroad. Was that the only purpose of his leaving so far as residence is concerned?

The Special Commissioners found that it was, and I think it is clear that they had evidence before them, on which they could so find. His only declaration was that he meant to live abroad, not saying whether it was to be an occasional or a constant, a part time or a whole time sojourn. He was advised by his doctor to seek a better climate, which is consistent with returning to England when English weather mends. He had gone out of business in England and had broken up his establishment, but he still had in England business interests connected with his income tax assessments, and ties of filial piety and religious observance, for his father was buried at Southampton and he was himself a member of the English community of Jews. What he actually did was to come back to England after an absence of about seven months, and he remained for nearly five. In the meantime he had not set up an establishment abroad, but had lived in hotels. This, however, was only what he had done in England from March, 1918, to December, 1919. I think there was ample evidence before the Special Commissioners to show that a man, who left England to live abroad as he had been living here, and when warm weather came returned to his native country and to his permanent associations, had in 1919 "left the United Kingdom for the purpose of occasional residence only." If so, he remained chargeable.

So much for the year of charge 1920-1921. In the following years he was a bird of passage of almost mechanical regularity. No material change occurred in his way of life, for his enquiries for a permanent flat came to nothing until so late as not to affect his life and residence for the period in question.

It is suggested that the Special Commissioners misdirected themselves in point of law, because they took into account, with regard to the earlier years, conduct which occurred only subsequently. I agree that the taxpayer's chargeability in each year of charge constitutes a separate issue, even though several years are included in one appeal, but I do not think any error of law is committed if the facts applicable to the whole of the time are found in one continuous story. Light may be thrown on the purpose, with which the first departure from the United Kingdom took place, by looking at his proceedings in a series of subsequent years. They go to show method and system and so remove doubt, which might be entertained if the years were examined in isolation from one another. The evidence as a whole disclosed that Mr. Levene continued to go to and fro during the years in question, leaving at the beginning of winter and coming back in summer, his home thus remaining as before. He changed his sky but not his home. On this I see no error in law in saying of each year, that his purpose in leaving the United Kingdom was occasional residence abroad only. The occasion was the approach of an English winter and when with the promise of summer here that occasion passed away, back came Mr. Levene to attend to the calls of interest, of friendship and of piety. My Lords, for these reasons I think it unnecessary to express, in regard to Mr. Levene's case, any opinion on the question of the tests of residence which are material for income tax purposes or on the meaning of "temporary" in this connexion, in cases where a person, not within Rule 3, comes from abroad to the United Kingdom and remains for a longer or shorter time, but not permanently. Of the other conclusions of the Special Commissioners I say nothing except that, in my opinion, they in no way impair the soundness of their conclusion on Rule 3.

I wish, however, to point out the position in which Mr. Levene and others like him now find themselves. It is trite law that his Majesty's subjects are free, if they can, to make their own arrangements, so that their cases may fall outside the scope of the taxing Acts. They incur no legal penalties and, strictly speaking, no moral censure if, having considered the lines drawn by the Legislature for the imposition of taxes, they make it their business to walk outside them. It seems to follow from this and from other general considerations that the subject ought to be told in statutory and plain terms when he is chargeable and when he is not. The words "resident in the United Kingdom," "ordinarily," or otherwise, and the words "leaving the United Kingdom for the purpose only of occasional residence abroad," simple as they look, guide the subject remarkably little as to the limits within which he must pay and beyond which he is free. This is the more likely to be a subject of grievance and to provoke a sense of injustice when, as is now the case, the facility of communications, the fluid and restless character of social habits, and the pressure of taxation have made these

intricate and doubtful questions of residence important and urgent in a manner undreamt of by Mr. Pitt, Mr. Addington, or even Sir Robert Peel. The Legislature has, however, left the language of the Acts substantially as it was in their days, nor can I confidently say that the decided cases have always illuminated matters. In substance persons are chargeable or exempt, as the case may be, according as they are deemed by this body of Commissioners or that to be resident or the reverse, whatever "resident" may mean in the particular circumstances of each case. The tribunal thus provided is neither bound by the findings of other similar tribunals in other cases, nor is it open to review, so long as it commits no palpable error of law, and the Legislature practically transfers to it the function of imposing taxes on individuals, since it empowers them in terms so general that no one can be certainly advised in advance whether he must pay or can escape payment. The way of taxpayers is hard and the Legislature does not go out of its way to make it any easier. If it had been possible in this case to apply the principle that a taxing statute must impose a charge in clear terms or fail, since it is to be construed *contra proferentem*, our duty would have been plain, but since the words are plain and it is only their application that is haphazard and beyond all forecast, Mr. Levene has no remedy in your Lordships' House.

So far as it is permissible to express an opinion on the facts, I think that for the purpose of taxing his Colonial and Indian securities Mr. Levene was at all material times resident in the United Kingdom and, for the purpose of taxing his holding in War Loan, it could not be said of him that he was not ordinarily resident here. Accordingly in my judgment his appeal fails.

LORD WARRINGTON OF CLYFFE.—My Lords: The appellant in this case claims relief from income-tan for the financial years ending respectively o April 5, 1921, April 5, 1922, April 5, 1923, April 5, 1924, and April 5, 1925.

His claim falls under two heads:—(1) In respect of income payable in the United Kingdom on securities of British Possessions and (2) in respect of income of British War Loan.

The claim under the first head is based upon Rule 2 (*d*) of the rules applicable to Schedule C.

"No tax shall be chargeable in respect of . . . ahe interest or dividends on any securities of . . . British Possession which are payable in the United Kingdom, where it is proved to the satisfaction of the Commissioners of Inland Revenue that the person owning the securities and entitled to the interest or dividends is not resident in the United Kingdom. . . ."

The claim under the second head is based upon section 46 (1) of the Income Tax Act, 1918:—

"Where the Treasury have before the commencement of this Act issued or may thereafter issue any securities which they have power to issue for the purpose of raising any money or any loan, with a condition that the interest thereon shall not be liable to tax or supertax, so long as it is shown, in manner directed by the Treasury, that the securities are in the beneficial ownership of persons who are not ordinarily resident in the United Kingdom, the interest of securities issued with such a condition shall be exempt accordingly."

War Loan Stock was issued under the condition mentioned in the section.

In order, therefore, to support his claims it was incumbent on the appellant to prove that in the one case he was not resident, and that in the other he was not ordinarily resident in the United Kingdom.

His claims having been rejected by the Commissioners of Inland Revenue he appealed to the Special Commissioners for Income Tax.

They expressed their decision in the following terms:—

"These (viz., the questions they had to decide) are in our opinion questions of degree, and taking into consideration all the facts put before us in regard to the appellant's past and present habits of life, the regularity and length of his visits here, his ties with this country, and his freedom from attachments abroad, we have come to the conclusion that at least until January, 1925, when the appellant took a lease of a flat in Monte Carlo, he continued to be resident in the United Kingdom."

It will be observed that they do not in express terms state that he continued to be ordinarily resident here, but, from the terms in which they state the questions they had to decide, it is clear that the decision was intended to cover both cases.

At the request of the appellant the Special Commissioners stated a case for the opinion of the High Court. The case came before Mr. Justice Rowlatt on July 23, 1926, who affirmed the decision of the Special Commissioners and dismissed the appeal.

An appeal to the Court of Appeal was dismissed by an order dated March 16, 1927.

It is not quite clear whether the Special Commissioners intended their decision to be a finding of fact or a conclusion of law. If it were the former there is at least ground for saying that it was not open to appeal, but as the case was argued in both Courts below and in this House upon its merits, I think I ought to state shortly my reasons for thinking that the decision was correct.

The appellant is a British subject. Down to March, 1918, he had a permanent home in London. In that month he sold his furniture and in April he surrendered the lease of his house. He continued, however, to live in England in various hotels until December, 1919. So far there is no question that he was both resident and ordinarily resident in the United Kingdom.

He is married, but has no children. His family ties are in this country, his wife having five sisters and he himself six brothers and sisters residing here.

Apparently under medical advice to the effect that he and his wife should live in the South of France and avoid the United Kingdom in the winter months, he and his wife in December, 1919, went abroad. They returned to this country on July 10, 1920. From that day until November 24, 1920, they remained in England. They then again went abroad until July 2, 1921, when they returned here and stayed until November 27. Thev then went abroad. On April 9, 1922, they returned to England, where they stayed until June 18. They were abroad until September 10. From that day until November 19 they stayed here. They then went abroad and remained there until April 12, 1923. On that day they returned and stayed in this country until June 27. They then went abroad, returning on September 10, and staying here until November 15. They were abroad from that day till April 10, 1924, when they returned here and stayed until July 1. From that day until September 10 they were abroad. They then returned and stayed until November 23, when they again went abroad. In no year of assessment did their stay here extend to six calendar months. While abroad, as well as while in England, they had no settled home but lived at hotels at Monaco and at various places in France. In

England also they lived in hotels. The appellant states that he intended throughout to live abroad, but his intention does not appear to have been of a very pressing character, for though he made in the course of the years 1922 to 1924 endeavours to find a suitable flat he did not succeed until January, 1925. Since he gave up his house in 1918 he has had no intention of again taking a house or flat in the United Kingdom. He stated to the Special Commissioners various reasons for his visits to England—to obtain medical advice, to visit relatives, to take part in certain Jewish religious observances, to visit the graves of his parents, to deal with his income-tax affairs.

These being the facts, the question is whether the Special Commissioners, the King's Bench Division, and the Court of Appeal were wrong in the conclusion at which they respectively arrived.

I do not attempt to give any definition of the word "resident." In my opinion it has no technical or special meaning for the purposes of the Income Tax Act, 1918. "Ordinarily resident" also seems to me to have no such technical or special meaning. In particular it is, in my opinion, impossible to restrict its connotation to its duration. A member of this House may well be said to be ordinarily resident in London during the Parliamentary Session and in the country during the recess. If it has any definite meaning I should say it means according to the way in which a man's life is usually ordered.

In the present case, taking the several years of assessment in succession, in that ending April 5, 1921, there is no substantial difference between the nature of his residence abroad and that of his residence here, except that the former was for a longer period. He did, in fact, what many wealthy people do at the present time; he spent the winter and spring, and in this particular instance the early summer, abroad and the rest of the summer and the autumn here, again going abroad for the winter. In the year ending April 5, 1922, there was no substantial change, but in those ending April 5, 1923, and April 5, 1924, we find a change to this extent, that he now returns to this country in April, goes abroad for the usual summer holiday, and returns to this country till the winter season comes round again. I will assume that, for the purpose of determining whether in any year he is ordinarily resident, the usual ordering of his life must be judged by what he does in that and preceding years only; still in the first year the circumstances show that the stay in England was as much in the ordinary course as his previous residence, and in subsequent years he developed habits of periodical changes of abode, each one of which may be said to be in accordance with the usual ordering of his life.

I have not thought it necessary to rest my opinion upon the third of the general rules applicable to all schedules, but it is difficult to see any answer to the case of the respondent under it. The appellant is a British subject, his ordinary residence was unquestionably in the United Kingdom until December, 1919, and I fail to see that his subsequent departure from the United Kingdom in any of the years in question was otherwise than for the purpose of occasional residence abroad.

Rule 2 of the miscellaneous rules applicable to Schedule D has no direct application to this case, which is under Schedule C, and I do not see that it throws any light on the two questions which here arise for decision.

In conclusion, I desire, as far as I am concerned, to leave open the question whether the appellant's position has been altered by the acquisition in January, 1925, of a flat in Monte Carlo as his settled residence there.

On the whole I am of opinion that the appeal fails and ought to be dismissed with costs.

LORD ATKINSON and LORD BUCKMASTER concurred.

[Solicitors—Mr. M. A. Jacobs; the Solicitor of Inland Revenue.]

LYSAGHT'S CASE.

In this case the respondent claimed similar relief in respect of the tax years 1922-23 and 1923-24 as being a person not resident and not ordinarily resident in the United Kingdom in those years.

The respondent was born in England of Irish parents and was engaged from the age of 21 years in his uncle's business in England, which was subsequently turned into a limited company called John Lysaght, Limited, having its principal works at Bristol and Newport. By the year 1919 the respondent was a director and managing director, but on his partial retirement in that year he retained only a post of advisory director at a retaining fee of £1,500 a year and director's fees. On his partial retirement he sold the property called Backwell Down, near Bristol, where he had been living during his active participation in the affairs of John Lysaght, Limited, and went with his family to live permanently on a family property, "Hazelwood," Mallow, Ireland. After undertaking a visit to Australia on behalf of the company in 1919, he took a furnished house at Burnham, in Somerset, until 1920, but in 1920 he went to live permanently at "Hazelwood," and had never since had any place of abode in England.

The respondent went to the monthly meetings of the directors of John Lysaght, Limited, and on his visits for that purpose attended consultations and committee meetings, and had visited the branch business at Scunthorpe, Lincolnshire, on several occasions. The total number of days spent in England, which included two periods of delay in this country enforced by illness, was as follows:—

In the year ending April 5, 1923	..	101 days.
" " " 1924	..	94 "
" " " 1925	..	84 "
In the period from April 6, 1925, until September 25, 1925		48 "

The visits to England were solely for business purposes, and the respondent's wife never accompanied him. Save that he owned a field of about three acres near Burnham, which he was anxious to sell, and was a member of, but a very infrequent visitor at, the Savile Club, London, he had no real connexion other than a business one with England. His business activities in Ireland were confined to the management of his estate at Mallow, and his banking account was at the Mallow branch of the Bank of Ireland, a small account being also opened at a branch of the Westminster Bank at Bristol, but the registered address for his various securities was "Hazelwood," Mallow. Lengthy trips abroad had been undertaken during the past five years by the respondent on behalf of the company.

Upon those facts the Special Commissioners held that the respondent was both "resident" and "ordinarily resident" in the United Kingdom for each of the two years in question.

Mr. Justice Rowlatt affirmed the decision of the Special Commissioners, but his decision was reversed by the Court of Appeal by a majority (the Master of the Rolls (Lord Hanworth) and Lord Justice Sargant, Lord Justice Lawrence dissenting).

The Attorney-General (Sir Douglas Hogg, K.C.), the Solicitor-General (Sir Thomas Inskip, K.C.), and Mr. R. P. Hills appeared for the appellants; Mr. Latter, K.C., and Mr. Stephen Benson for the respondent.

THE LORD CHANCELLOR (read by LORD WARRINGTON OF CLYFFE).—My Lords: The facts in this case as found by the Special Commissioners may be very shortly stated. The respondent, Mr. S. R. Lysaght, who was born in England of Irish parents, was formerly the managing director of a company called John Lysaght, Limited, which has works at Bristol and Newport, and while he was so engaged owned a property near Bristol and resided there with his family. In the year 1919 he partially retired from the business but was appointed an advisory director. Thereupon he sold his property near Bristol and went to live on a family property at Mallow in Ireland, which he had purchased in the year 1916, and from that time he has had no definite place of abode in this country, but he comes to England from time to time in circumstances detailed in the following paragraph from the case stated by the Special Commissioners:—

"(4) The appellant [*i.e.*, the present respondent] comes to England for a meeting of the directors of John Lysaght, Limited, every month and remains for consultations with the other directors and for committee meetings. The company have a branch business at Scunthorpe, Lincs, and the appellant has visited this business on several occasions during his visits to England. On the occasion of these visits he spends about a week in England. On two occasions his return to Ireland was delayed by illness. The total number of days spent in England in the respective years has been as follows:—

	Days
In the year ending April 5, 1923..	101
In the year ending April 5, 1924..	94
In the year ending April 5, 1925..	84
In the period from April 6 till September 25, 1925	48

When in England the appellant generally stays at the Spa Hotel, Bath, at which the meetings of the directors of the company are held. Occasionally he has stayed at his brother's house at Chepstow. These visits to England are solely for business purposes, and the appellant's wife never accompanies him on these visits. He owns a field of about three acres near Burnham, purchased many years ago, which he is anxious to sell. He has a few relatives and many friends in England. He has also relatives and friends abroad.

"(5) He has no business activities in Ireland except the management of his estate at Mallow, of which 800 acres are in hand.

"(6) His banking account is at the Mallow branch of the Bank of Ireland, but he has also a small account at a branch in Bristol of the Westminster Bank. The registered address of his various securities is 'Hazelwood,' Mallow. He is a member of the Savile Club, London, but hardly ever goes there. During the past five years he has made three lengthy trips to Australia and South America on behalf of the company."

The respondent, having been assessed by the General Commissioners to income-tax in respect of the tax-years 1922-23 and 1923-24 in respect of income from foreign and colonial Government securities and War Loan, claimed exemption from tax under rule 2 (*d*) of the General Rules applicable to Schedule C of the Income Tax Act, 1918, and section 46 (1) of the same Act on the ground that during the years in question he was neither resident nor ordinarily resident in the United Kingdom; but the claim was disallowed by the Inland Revenue Commissioners, and on appeal to the Special Commissioners they confirmed the decision of the Inland Revenue Commissioners subject to a case stated for the opinion of the High Court. After stating the facts and the contentions of the parties, the case proceeds as follows:—

"We held that the appellant was both ordinarily resident and resident in the United Kingdom for each of the two years ending April 5, 1923, and April 5, 1924, respectively."

On the case being argued, Mr. Justice Rowlatt refused to disturb the Special Commissioners' decision, but the Court of Appeal (by a majority) took a different view. The Crown now appeals to this House.

My Lords, this case differs in an essential respect from the case of *Levene v. Commissioners of Inland Revenue*, which your Lordships have just decided. In that case the appellant, Mr. Levene, was during the period in question a homeless man living at different hotels in the United Kingdom and abroad. In the present case the respondent, Mr. Lysaght, has a permanent home in Southern Ireland, where he lives with his family; but he comes to England once a month for business purposes, stays at an hotel and, when his business (which usually occupies about a week) is concluded, he returns home. It is unnecessary for me to repeat the observations which I have made in the previous case as to the meaning of the expressions "reside" and "ordinarily reside"; and it is enough to say that, on the view which in that case I have taken as to the meaning of those expressions, there appears to me to be no reason whatever for holding that the respondent is resident or ordinarily resident in this country. It is true that he comes here at regular intervals and for recurrent business purposes; but these facts, while they explain the frequency of his visits, do not make them more than temporary visits or give them the character of residence in this country. That he has a small account at a bank in Bristol—doubtless for use during his visits to this country—and a club in London to which he hardly ever goes, appear to me to be trivial circumstances which cannot affect the decision. If the respondent is held to reside here and to be taxable accordingly, there would appear to be no reason why those many foreigners who periodically visit this country for business purposes, and having concluded their business go away, should not be made subject to a like burden.

But it was argued—and this was the point mainly insisted upon on behalf of the Crown—that the conclusion of the Special Commissioners that the respondent was both resident and ordinarily resident in the United Kingdom was a finding of pure fact, and accordingly could not be disturbed by the Court of Appeal. No doubt the rule is well established that a finding of the Special Commissioners on a question of pure fact cannot be reviewed by the Courts except on the ground that there was no evidence on which the Special Commissioners could as reasonable men have come to their conclusion, and this although the Court of review would, on the evidence, have come to a different conclusion. But it does not appear to me that the conclusion of the Special Commissioners in the present case was a finding of pure fact. It is true, as Mr. Justice Rowlatt said in *Pickles v. Foulsham* (39 *The Times* L.R., 478; [1923] 2 K.B., 413), that where a man resides is a question of fact to be

determined on proper legal principles ; and it is true also, as he said in the same case, that when you get a case on the border line—*i.e.*, where there is evidence both ways which is nearly balanced—it becomes very essentially a question of fact. A good instance of this is the case of *Levene* to which I have referred. But, as Lord Parker said in *Farmer v. Cotton's Trustees* (31 *The Times* L.R., 478 ; [1915] A.C., 922, at p. 932), it is not always easy to distinguish between questions of fact and questions of law for the purposes of the Taxing Acts ; and I venture to express my concurrence with the protest made by Lord Atkinson in *Great Western Railway v. Bater* (38 *The Times* L.R., 448 ; [1922] 2 A.C., 1, at p. 12) against the attempt which is often made to secure for a finding on a mixed question of law and fact the unassailability which belongs only to a finding on a question of pure fact. In the present case the Special Commissioners appear to me to have so framed their case as to prevent (if possible) any confusion of that kind. They have carefully and fully stated all the material facts found by them to exist and then, after setting out the rival contentions of the parties (some of them being contentions of law), they have "held" that the appellant was both ordinarily resident and resident in the United Kingdom in the years in question. This seems to me to mean that on the facts already found by them and on their view of the law they were prepared to draw the inference of residence. In short, it is a mixed finding of fact and law ; and unless such a finding is open to review by the Courts little benefit will accrue to the subject from the right which is given to him to have a case stated for the opinion of the King's Bench Division. In my opinion this argument fails.

I feel compelled to add that, if the Special Commisioners' decision is to be taken as a finding on the facts only, then it appears to me that there was on their own showing no evidence upon which that finding could properly be based.

For these reasons I would dismiss this appeal.

LORD SUMNER.—My Lords : What has to be decided in this case is really the meaning of the word "resident" in the Income Tax Act, 1918, and the mode in which that meaning is to be settled in particular cases. The respondent, who lives in the Irish Free State, claimed exemption from tax, as to some of his securities because he was "not ordinarily resident in the United Kingdom" within section 46 (1), and as to others because he was not "resident in the United Kingdom" within the General Rules applicable to Schedule C, No. 2 (*d*). The Commissioners for Special Purposes decided against him in both cases. Section 46 (1) provides that the non-residence there mentioned is to be shown "in manner directed by the Treasury," while Rule No. 2 (*d*) of the General Rules exempts a taxpayer for non-residence "where it is proved to the satisfaction of the Commissioners of Inland Revenue" but no distinction has been drawn nor has any point been taken on this ground.

There is, however, a preliminary question on the form of the Special Commissioners' decision. Their case stated is framed thus :—

"2. The following facts were admitted or proved in evidence. . . . . .

3. It was contended by the appellant. . . . .

4. It was contended on behalf of the Crown. . . . . .

5. We held that the appellant was both ordinarily resident and resident in the United Kingdom. . . . ."

Paragraph 2 set out under six heads the circumstances of various kinds relevant to the issue of Mr. Lysaght's way of life and particularly of his visits to England. It was contended that this paragraph and this alone stated the facts found by the Special Commissioners and that paragraph 5 found no fact but only stated their opinion of the consequences in law, which followed from their previous finding. In that case, if residence, ordinary or other, is a question of fact the case must have gone back to be completely stated ; if it is purely a question of law, the whole case would be open for your Lordships' decision as to the consequences legally arising from the facts found.

It is certainly much to be wished that the Special Commissioners should be scrupulously careful to say that they "find" a conclusion of fact, arrived at from other facts found, or, if they only mean to apply the law as they understand it to be and not to draw any conclusion of fact, should say, that they hold so and so in accordance with what they conceive to be the law, for a debate on the meaning of a case stated is an unsatisfactory prelude to a debate on the general law applicable. I have, however, no doubt as to the Special Commissioners' meaning here. Their experience makes them fully conversant with the wide scope of their functions and with its limits and it is most unlikely that they intended to leave unfound the ultimate fact of residence, which was the substance of the whole case before them. It is as though a jury, fully directed by the trial Judge, had found a special verdict stating the points which the evidence had proved to their satisfaction, and had concluded "We hold this to have been careless and unreasonable conduct on the defendant's part and we find for the plaintiff."

It is well settled that, when the Special Commissioners have thus ascertained the facts of the case and then have found the conclusion of fact which the facts prove, their decision is not open to review, provided (*a*) that they had before them evidence, from which such a conclusion could properly be drawn, and (*b*) that they did not misdirect themselves in law in any of the forms of legal error which amount to misdirection.

My Lords, the word "ordinarily" may be taken first. The Act on the one hand does not say "usually," or "most of the time," or "exclusively," or "principally" ; nor does it say, on the other, "occasionally," or "exceptionally," or "now and then," though in various sections it applies to the word "resident," with a full sense of choice, adverbs like "temporarily" and "actually." I think the converse to "ordinarily" is "extraordinarily" and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not "extraordinary." Having regard to the times and duration, the objects and the obligations, of Mr. Lysaght's visits to England there was, in my opinion, evidence to support, and no rule of law to prevent, a finding, that he was ordinarily resident, if he were resident in the United Kingdom at all. No authority was cited which requires special consideration on this head.

Grammatically the word "resident" indicates a quality of the person charged and is not descriptive of his property, real or personal. To ask where he has his residence is often a convenient form of inquiry but only as leading to the question "then where is he resident himself ?" I think this distinction, though often pointed out, has too often been overlooked in the arguments in the reported cases. No doubt, on the authority of the merchant seamen's cases, Mallow was Mr. Lysaght's home and he resided there. There were his family seat and his demesne lands, his wife and family, his farming and his sport, and though some people may be able to make them-

selves at home from home anywhere, I do not suppose that the Spa Hotel, Bath, however excellent, was much of a home to Mr. Lysaght. This, however, is not conclusive. Who in New York would have said of Mr. Cadwalader "his home's in the Highlands; his home is not here"? After all, many nomads are homeless folk, though they may reside continually here and there within the limits of the United Kingdom. Property, obviously, is no conclusive test. Whether Mr. Lysaght resides in his own or in a hired house in Ireland cannot have much to do with it, nor is a person precluded from being resident, because he puts up at hotels, and not always the same hotel, and never for long together. It was said in *Cadwalader's* case (5 Tax. Cas., 101) that an establishment was set up in the United Kingdom. None was set up here and in fact Mr. Lysaght had closed his English establishment some years before, but although setting up an establishment in this country, available for residence at any time throughout the year of charge, even though used but little, may be good ground for finding its master to be "resident" here, it does not follow that keeping up an establishment abroad and none here is incompatible with being "resident here," if there is other sufficient evidence of it. One thinks of a man's settled and usual place of abode as his residence, that the truth is that in many cases in ordinary speech one residence at a time is the underlying assumption and, though a man may be the occupier of two houses, he is thought of as only resident in the one he lives in at the time in question. For income-tax purposes such meanings are misleading. Residence here may be multiple and manifold. A man is taxed where he resides. I might almost say he resides wherever he can be taxed.

There is again the circumstance that Mr. Lysaght only comes over for short visits. Does this make any conclusive difference? If he came for the first three months in the year for the purpose of his duties and then returned home till the next year, would there not be evidence that he was resident here, and, if so, how does the discontinuity of the days prevent him from being resident in England, when he is here in fact, though the obligation to come, as required, is continuous and the sequence of the visits excludes the elements of chance and of occasion. If the question had been one of "occasional residence" abroad in the language of General Rule 3 these facts would have satisfied the expression, for residence is still residence, though it is only occasional, and I see no such fundamental antithesis between "residence" and "temporary visits" as would prevent Mr. Lysaght's visits, periodic and short as they are, from constituting a residence in the United Kingdom, which is "ordinary" under the circumstances.

My Lords, I think it is the shortness of the aggregate time during which Mr. Lysaght is here that constitutes the principal, though by no means the only point in his favour, but the question of a longer or a shorter time, like other questions of degree, is one peculiarly for the Special Commissioners. I do not say that time might not be so short, or again so long, as to make it right to hold, no matter what other evidence there was, that, as the case might be, there was either no evidence of residence or that the evidence was all one way in favour of it, but these questions are not before us.

It is attractive to say, as in substance was the opinion of the Court of Appeal, that "resident" in this case is a matter of law, as being a matter of interpretation, but that does not cover the ground. Interpretation only says what the Act itself refrains from telling us, namely, the meaning of the word "resident," but, as that meaning is its meaning in the speech of plain men, the question still remains, whether plain men would find that the result of the facts found was "residence" in its plain sense, and I do not doubt that the Special Commissioners understood the word not otherwise than in its correct legal signification and so applied it. Accordingly I do not think that their decision can be interfered with.

It remains to notice an argument founded on the Finance Act, 1924, section 27. This section provides that, in the case of questions as to "ordinary residence" under section 46 (1) of the Income Tax Act, 1918, or as to "residence" in Rule 2 (*d*) of the General Rules, applicable to Schedule C, a person aggrieved by the decision of the Commissioners of Inland Revenue can apply to have his claim for relief determined by the Special Commissioners, who are to proceed as on an appeal against an assessment under Schedule D, subject to all the provisions of the Income Tax Acts relating to such an appeal. This was what Mr. Lysaght did, and the section is supposed to show that "residence" and "ordinary" residence are questions of law. I do not think that it does. It only shows that they are questions which the Special Commissioners are competent to review, leaving the distinction between questions of law and questions of fact untouched. True, the Special Commissioners can state a special case for the opinion of the High Court on a question of law, but the section does not say that "residence" and "ordinary" residence in themselves are such questions of law and it is only on such questions as may arise, if any, that the case can be stated. The Special Commissioners are not required to find out or to formulate such questions. If, as here, they say "The appellant immediately upon the determination of the appeal declared to us his dissatisfaction therewith, as being erroneous in point of law, and in due course required us to state a case . . . which case is here stated," they have done their duty, and it is open to your Lordships to say that, not having misdirected themselves in point of law and not having proceeded without evidence on which they could properly find as they have found, their determination is not erroneous in point of law. This satisfies the section. It does not say, expressly or by implication, that "resident," whether "ordinary" or other, raises a question of law in itself.

LORD ATKINSON concurred in the following judgment of Lord Buckmaster.

LORD BUCKMASTER (read by LORD ATKINSON).—My Lords: The real question that arises in this case is whether the finding of the Special Commissioners that the respondent was resident and ordinarily resident in England is a finding of fact which cannot be disturbed, or whether it is open to examine the circumstances set out by the Special Commissioners for the purpose of seeing whether the conclusion they drew is one that this House will accept. The distinction between questions of fact and questions of law is difficult to define, but according to the respondent whether a man is resident or ordinarily resident here must always be a question of law dependent upon the legal construction to be placed upon the provisions of an Act of Parliament. I find myself unable to accept this view. It may be true that the word "reside" or "residence" in other Acts may have special meanings, but in the Income Tax Acts it is, I think, used in its common sense and it is essentially a question of fact whether a man does or does not comply with its meaning.

It is, of course, true that if the circumstances found by the Special Commissioners in the special

case are incapable of constituting residence their conclusion cannot be protected by saying that it is a conclusion of fact, if there are no materials upon which that conclusion could depend. But if the incidents relating to visits to this country are of such a nature that they might constitute residence and their prolonged or repeated repetition would certainly produce that result then the matter must be a matter of degree, and the determination whether the degree extends so far as to make a man resident or ordinarily resident here is for the Special Commissioners and it is not for the Courts to say whether they would have reached the same conclusion. This case is an excellent illustration of this particular point. The respondent's home is in Ireland and he has no definite place of abode in England, as found by the Special Commissioners.

[His Lordship read section 4 of the case, already cited by the Lord Chancellor.]

It could not, I think, be denied that, even although the respondent had his home in Ireland, his sojourn in this country might be so prolonged as to place his residence here beyond dispute, but none the less I understand the judgment of the Court of Appeal to mean this, that they regard the purpose of his visits sufficient to show that he could not be regarded as resident. They state that it was not of his own free choice but in obedience to the necessities of his position in relation to the company of John Lysaght, Limited, that he was over here, from which it would appear that the element of choice is regarded by the Court of Appeal as a factor of great, if not of final, consequence in determining residence. In my opinion this reasoning is not sound. A man might well be compelled to reside here completely against his will ; the exigencies of business often forbid the choice of residence, and though a man may make his home elsewhere and stay in this country only because business compels him, yet none the less, if the periods for which and the conditions under which he stays are such that they may be regarded as constituting residence, it is open to the Special Commissioners to find that in fact he does so reside and if residence be once established "ordinarily resident" means, in my opinion, no more than that the residence is not casual and uncertain, but that the person held to reside does so in the ordinary course of his life.

Lord Warrington of Clyffe.—My Lords : This case raises under different circumstances the same questions as those raised in *Levene's* case just decided by your Lordships' House, viz., whether the respondent (as he is in this case) was in either of the years of assessment, viz., 1922-23 and 1923-24, resident and ordinarily resident in the United Kingdom.

The respondent was entitled to certain securities of British Possessions the interest on which was payable in the United Kingdom and to British War Loan Stock issued with the condition mentioned in section 46 of the Income Tax Act, 1918.

Having been assessed to income-tax on both classes of security, he appealed to the Special Commissioners, who decided that he was resident, in the case of one class, and was ordinarily resident, in the case of the other.

A case was thereupon stated by the Special Commissioners for the opinion of the High Court. The case was heard before Mr. Justice Rowlatt, who affirmed the decision of the Special Commissioners. The respondent appealed to the Court of Appeal, which, by a majority (Lord Hanworth, M.R., and Lord Justice Sargant, Lord Justice Lawrence dissenting), allowed the appeal and set aside the judgment of Mr. Justice Rowlatt and the decision of the Special Commissioners, being of opinion that the respondent was not at the material times either resident or ordinarily resident in the United Kingdom.

The argument of the Attorney-General in this House was rested exclusively on the contention that the questions to be determined are both questions of degree and therefore of fact and that there was on each question evidence on which the Special Commissioners might reasonably come to the conclusion at which they arrived, and consequently their decision was not subject to review.

I have reluctantly come to the conclusion that it is now settled by authority that the question of residence or ordinary residence is one of degree, that there is no technical or special meaning attached to either expression for the purposes of the Income Tax Act, 1918, and accordingly a decision of the Special Commissioners on the question is a finding of fact and cannot be reviewed unless it is made out to be based on some error in law, including the absence of evidence on which such a decision could properly be founded.

In *Bayard Brown v. Burt* (27 *The Times* L.R., 363 ; 5 Tax Cas., 667, at p. 670) Mr. Justice Hamilton after mentioning the finding of the Commissioners that the appellant was resident in the United Kingdom said :—"That only raises a question of law, if it can be contended that it is impossible to draw that conclusion of fact as to his residence in the United Kingdom from the facts set out in the case." This view was affirmed in the Court of Appeal (27 *The Times* L.R., 572).

The same view was expressed by Mr. Justice Rowlatt in *Pickles v. Foulsham* (39 *The Times* L.R., 478 ; [1923] 2 K.B., 413). The point was not raised in the Court of Appeal.

In *Reid v. Inland Revenue Commissioners* ([1926] S.C., 589 ; 10 Tax Cas., 673) (a Scotch case), the Lord President (Lord Clyde) at page 678 said :—"It is obvious that the more general and wide the scope of expressions used in a statute, the more difficult it may become to convict those whose duty it is to interpret it of an error or misdirection in applying it to a given state of facts. It may be possible in such cases to predicate of a particular state of facts that they lie outside the scope of the expressions used, although it may be really an impossible task to define that scope positively and with exact accuracy. The expression 'resident in the United Kingdom' and the qualification of that expression implied in the word 'ordinarily' so resident are just about as wide and general and difficult to define with positive precision as any that could have been used. The result is to make the question of law become (as it were) so attenuated, and the field occupied by the questions of fact become so enlarged, as to make it difficult to say that a decision arrived at by the Commissioners with respect to a particular state of facts held proved by them, is wrong."

In the same case Lord Sands said :—"When a statute uses ordinary non-technical language describing a certain person or thing in general or ambulatory terms, and it becomes merely a matter of impression or opinion whether, in relation to the special circumstances, a person or thing falls within the expression, the tendency of the law is to treat a finding upon the matter as a finding of fact." He concurred in refusing to disturb the determination of the Special Commissioners though he was not sure that he would have been prepared to differ had they decided the other way.

See also the opinion of Lord Halsbury in *Smith v. Lion Brewery Company* (27 *The Times* L.R., 261 ; [1911] A.C., 150, at p. 155) and that of Lord Buckmaster in *Malcolm v. Lockhart* (35 *The Times* L.R., 231 ; [1919] A.C., 463, at p. 466) and my own remarks in the Court of Appeal in *Cooper v. Stubbs* (41 *The Times* L.R., 614 ; [1925] 2 K.B., 753, at p. 772).

In the present case, after stating that certain facts set forth in detail were either admitted or proved, the Special Commissioners "held" that the present respondent was both ordinarily resident and resident in the United Kingdom for each of the two years in question.

The most material fact in the present case in favour of a finding contrary to that of the Special Commissioners was that the respondent had a permanent family home in Southern Ireland. His visits to this country were for business purposes as advisory director of John Lysaght, Limited, of which he had previously been director and managing director ; they were frequent and regular and the number of days spent in this country in the two years in question was 101 and 94 respectively.

I cannot say that there was no evidence on which the Special Commissioners could properly arrive at their conclusion, though I am not sure that I should have taken the same view.

I think the appeal ought to be allowed with costs here and below and the judgment of Mr. Justice Rowlatt restored.

[Solicitors—The Solicitor of Inland Revenue ; Messrs. Whites and Co., for Messrs. Clarke, Sons, and Press, Bristol.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) } 1928. Feb. 27.

RAEBURN v. RAEBURN.*

Divorce — Judicial separation — Jurisdiction —Residence—Service—Respondent outside jurisdiction at commencement of suit—Matrimonial home—Statute of Citations, 1531 (23 Henry VIII., c. 9), s. 2—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 32.

Personal presence of the respondent in England at the date of the filing of a petition for judicial separation is not essential for the founding of such a suit, although the proceedings are governed by the principles and rules of the Ecclesiastical Courts. The real question is whether at the time when the petition, endorsed with the citation, is issued for service the respondent is resident within the jurisdiction.

Graham v. Graham (39 *The Times* L.R., 139 ; [1923] P., 31) and *Armytage v. Armytage* (14 *The Times* L.R., 480 ; [1898] P., 178) distinguished.

This was an issue directed to be tried in connexion with a petition for judicial separation filed on October 3, 1927, by Lady Raeburn, formerly Mrs. Olga Lucia Hatton, widow, of Overdale, St. John's, Woking, Surrey, against Sir William Hannay Raeburn, Bt., a shipowner. The issue was whether there was residence of the parties, or either of them, within the jurisdiction of the Court at the material times so as to found the petition. Lady Raeburn was the plaintiff in the issue, and Sir W. Raeburn the defendant.

Mr. Bayford, K.C., and the Hon. Victor Russell appeared for the plaintiff ; Mr. Cotes-Preedy, K.C., Mr. Bush James, and Miss B. H. Davy for the defendant.

Mr. Bayford said that Sir W. Raeburn was a widower when he was married at St. Margaret's, Westminster, on June 5, 1917, to the plaintiff. The husband was a Scotsman, the wife English. After the marriage they lived at Wood End, Helensburgh, Dumbartonshire, which house was still retained by the defendant. In the year 1918 he became member of Parliament for Dumbartonshire, and in October, 1918, leased a flat at North Gate, Regent's Park, for his daughter by his former marriage, but had the right to stay at the flat when he pleased. In May, 1919, he bought the house Overdale at Woking, and in 1923 retired from Parliament. He and his wife continued to live at Wood End and at Overdale. Differences arose between them, and finally the wife filed a petition for judicial separation on October 3, 1927. It was alleged that the Court had no jurisdiction because the husband happened to be in Scotland at that time, and also on the ground that he was not resident in England. The petition was served on the respondent in England on November 19, 1927. Counsel read a number of letters from Sir W. Raeburn referring to his intentions as to residence.

Lady Raeburn, in cross-examination, said that her husband had an office in London, with a private secretary there. In November, 1927, her husband began proceedings in Scotland by a writ of non-adherence.

Sir William Raeburn gave evidence.

Mr. Cotes-Preedy, in submitting that there was no jurisdiction in England to entertain the petition, said that it was necessary that both parties should be resident here when the proceedings were begun, and the defendant was not so resident within the jurisdiction. He cited *Graham v. Graham* (39 *The Times* L.R., 139 ; [1923] P., 31) in which it was held that it had been established in *Armytage v. Armytage* (14 *The Times* L.R., 480 ; [1898] P., 178) and in *Anghinelli v. Anghinelli* (34 *The Times* L.R., 438 ; [1918] P., 247) that according to the practice of the Ecclesiastical Courts a suit for judicial separation, which was now substituted for a divorce *a mensa et thoro*, could not be entertained against a respondent who at the time of the citation or of the institution of the suit was resident out of the jurisdiction.

The President.—But Mr. Justice Horridge said in *Graham v. Graham* (*supra*) : "It must be shown that the respondent is resident in the jurisdiction at the time of the citation being issued and the proceedings commenced." When is the suit "commenced ? "

Mr. Cotes-Preedy.—Surely when the petition is filed.

Counsel said that the defendant was not resident within the jurisdiction at all, as the Regent's Park flat was taken for his daughter, and the Woking house merely as a residence while he sat in Parliament.

Mr. Bayford said that the correspondence showed that Sir W. Raeburn bought the Woking house with the intention of making it a home in England for himself and his wife during their joint lives, and for her after his death. He had a residence in Scotland also, but there was no limitation to the number of

* Reported by William Latey, Esq., Barrister-at-Law.

permanent residences that one might legally have, and the Woking house was a permanent residence at which he had the right to live. He went there from time to time. He spent money on it and enlarged it and left it to his wife by a will which he subsequently changed. It was a matrimonial residence in England, which gave the Court jurisdiction in this suit. In *Armytage v. Armytage* (*supra*) there had never been any matrimonial residence in this country.

The PRESIDENT.—It was a different class of case setting up the proposition that if it is necessary for the Court to assume jurisdiction, both the spouses being here, to protect one of the spouses, it assumes jurisdiction.

Mr. BAYFORD said that in *Anghinelli v. Anghinelli* (*supra*) the outstanding fact was that though the husband's domicile was Italian he lived with his wife in London when not travelling abroad on his business. He referred to *Le Mesurier v. Le Mesurier* (11 *The Times* L.R., 481 ; [1895] A.C., 517), *Ward v. Ward* (39 *The Times* L.R., 440), *Donegal v. Donegal* (3 Phillimore, 586), and *Eustace v. Eustace* (39 *The Times* L.R., 687 ; [1924] P., 45), in which it was held that there was jurisdiction to decree judicial separation at the suit of the wife where the husband was domiciled in England, although at the date of the institution of the suit he was not resident in this country. In his submission a suit "commenced" when the respondent was served. Until then the respondent knew nothing about the suit. As regards the Statute of Citations, citation could be served upon a person not resident within the jurisdiction, but if he were served within the jurisdiction the Court could entertain a suit *in personam*. Residence of the petitioner alone was sufficient to found jurisdiction, and the petitioner was undoubtedly resident here, and the respondent was admittedly served within the jurisdiction.

LORD MERRIVALE delivered a considered judgment as follows :—

This is an issue directed to determine whether there was residence of the parties or either of them within the jurisdiction of the Court at the material times or time so as to found a petition for judicial separation. *Actor sequitur forum rei,* and the material question is whether on October 3, 1927, when the petition was filed, or November 19, when personal service was made on the respondent in England, he was resident in England so as to give jurisdiction here.

The parties are of Scottish domicile. The petitioner was of English birth, and the marriage of the parties took place in London in 1917. At all material times the respondent had and maintained a freehold house called Wood End at Helensburgh, Dumbartonshire, and a freehold house called Overdale at Woking in Surrey. He was also lessee of a flat at North-gate, Regent's Park. Differences between the petitioner and the respondent, which were to some extent disclosed at the hearing of the issue, have given an abnormal character to their marital relations. After a long period of recurring, if not continual, disagreement, their conjugal affairs reached a crisis in the autumn of 1927. On October 3 the petitioner filed her petition for judicial separation, alleging grounds which would be sufficient, if established, to procure dissolution of marriage, if the parties were domiciled here ; and in particular, so far as regards the matters now in question, alleging facts within and without the jurisdiction on which a finding of cruelty is sought. Pending this suit, on November 29 the respondent commenced proceedings in the Court of Session in Scotland, alleging non-adherence of the now petitioner, and claiming restitution of conjugal rights in accordance with Scottish law.

What is to be ascertained is whether the respondent was in October or November resident within the jurisdiction, as the petitioner no doubt was, so as to entitle her to bring her suit in this Court. While residence is the question raised by the issue, it is necessary before dealing generally with that matter to consider a contention raised on the respondent's behalf, that residence in the sense required by the authorities which govern the matter cannot be held to exist unless it be shown that on October 3, when the petition was filed, the respondent was within the jurisdiction. This was submitted as a consequence of the provision in the Matrimonial Causes Act, 1857, section 22 (continued by the Supreme Court of Judicature (Consolidation) Act, 1925, section 32) which directs that in suits of judicial separation the Court shall give relief on principles and rules as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts acted and gave relief. It was said that, inasmuch as by virtue of the Statute of Citations (23 Henry VIII., c. 9) no person might be cited in an Ecclesiastical Court out of the jurisdiction where he should be inhabiting at the time of award or going forth of the citation, personal presence in England of the respondent at the date of the filing of the petition for judicial separation is essential.

To warrant this proposition reference was made to some words of Mr. Justice Gorell Barnes, as he then was, in *Armytage v. Armytage* (14 *The Times* L.R., 480 ; [1898] P., 178), to the effect that this Court would interfere if the parties were within the jurisdiction at the commencement of the suit, and an expression in the judgment in *Graham v. Graham* (39 *The Times* L.R., 139 ; [1923] P., 31), "It must be shown that the respondent is resident in the jurisdiction at the time of the citation being issued and the proceedings commenced." As no such contention as is raised here was in question in either of those cases, the cases have no direct bearing. The argument founded on the words cited ignores the language of the Statute of Citations as well as the procedure of the Ecclesiastical Courts. What was required by the statute was habitancy within the jurisdiction, that is to say residence. If residence was vouched by affidavit the Court issued a citation which might be served within the diocese or without it, as appears in numerous cases cited in Sir Robert Phillimore's Edition of Burn's Ecclesiastical Law (9th edition, 1842) and in the judgment of Dr. Lushington in *Collett v. Collett* (3 Curt., 726). It is interesting to note that in *Collett v. Collett* (*supra*) Dr. Lushington refers at p. 731 to the issue of citation as "the time of the quasi-commencement of the suit," and to bear in mind that at that period alimony *pendente lite* ran not from the date of the citation but from the return to the citation.

What is clear on the words of the Statute of Citations and in the proceedings of the Ecclesiastical Courts is that residence was the condition precedent of jurisdiction, and the present effect of this is apparent when regard is had to the statutory power of this Court, by virtue of the Matrimonial Causes Act, 1857, section 42, in aid of the jurisdiction dependent on residence, to serve process out of the jurisdiction.

The real question in the case, therefore, is whether at the time when the petition, endorsed with the citation, was issued out for service the respondent

was resident within the jurisdiction. By her petition Lady Raeburn alleged, as the fact undoubtedly was, that she was living at Overdale, Woking. She alleged further that the respondent at that time was living at North-gate, Regent's Park. She stated by affidavit that "in the year 1919 the respondent purchased Overdale, Woking, and it has been the matrimonial home in England of the respondent and myself. We have generally lived at Overdale when not residing at the respondent's house in Scotland, Wood End." In her evidence at the hearing she described Overdale as "the home in which I have lived with the respondent, and where I am living now." The respondent's case was outlined in an affidavit containing these statements :—"I was born in Glasgow of Scottish parents and have always resided in Scotland and have had my business in Scotland. I have never owned or rented a house or flat in England with the exception of the flat at 68, North-gate, Regent's Park, until I bought Overdale, Woking, in 1919, as a place at which to stay when up in London for my Parliamentary duties. When I left Parliament in 1923 I at once placed Overdale in the agent's hands for sale and received an offer, which I was about to accept, when, in order to prevent a complete breach with my wife and to keep alive the possibility of reconciliation, I refused the offer so as to be able to allow her to remain in the house as she desired. I, however, never withdrew the house from the agent's hands, and left the boards offering for sale still standing. Since 1925 I have slept at Overdale only on three occasions, and never for more than two nights. In 1918 I had also taken in my name a flat at North-gate for my daughter to reside in."

The respondent also gave evidence *viva voce* at the hearing. In effect he described Overdale as a house he had bought so as to have a place to go to while he was in Parliament. The period thus defined ended at the General Election in 1923, and the house had been purchased a few months after the General Election of 1918, at which the respondent became a member of Parliament. Speaking of the relation of Overdale to Wood End between 1919 and 1924, the respondent said, "I did not regard Overdale as a home any more than I would a furnished house at North Berwick." As to the suggestion on the petitioner's part that the respondent carried on in London a branch of the shipping business of his firm, no definite proof was given, and on the whole I am satisfied that although the respondent sometimes used the office of a shipping firm in London for business purposes he did not in the ordinary sense of the term carry on business here.

Some reliance was put for the petitioner on the respondent's user of a right to the flat at North-gate. The lease of the flat had been originally acquired in view of its contemplated occupation by the parties when they might think fit to be there, but for some years it had become the usual residence of the respondent's daughter, where from time to time, as he found it convenient, the respondent lived during varying periods. I do not find the respondent to have been a habitual or usual resident at the flat, or to have kept it as a residence.

The conflict of evidence as to Overdale necessitates a careful scrutiny of the statements and acts of the parties. That it was the petitioner's home before and at the date of the petition, formerly an house additional to the house Wood End and latterly a home exclusive of Wood End, I have no doubt. The respondent, however, did not use it as the petitioner did ; but that it stood on the same footing with him as a furnished house that he might take at a watering place is not the fact. The correspondence between the parties throws some light on the matter. On October 5, 1918, before the purchase the respondent wrote of "a little place in England which I can make your home while I live and leave to you when I have gone." On February 28, 1920, while improvements and furnishing were going on at a cost stated to be between £5,000 and £6,000 the respondent wrote from Overdale to the petitioner at Wood End of the time "when we come and settle down." On October 24, 1922, in correspondence during a period of acute differences, while writing to the petitioner in these words, "Return to me to my home at Helensburgh," he added :—"Although I do not need to live in the south I shall, as far as I can manage to, give you quite a good portion of the year in Woking." Other letters between 1922 and 1924 show the respondent's resolve to keep the house as a matrimonial home in the hope of better relations with the petitioner. There were in 1925 dates of critical disagreement between the petitioner and the respondent, and an arrangement was proposed by the respondent and accepted by the petitioner. The respondent set out his view thus :—"My idea was that I would be willing you should continue to occupy Overdale and I would come to try to show you the possibility to throw the past behind our backs." Letters in January, 1926, deal with a project for removal from Overdale to some smaller house. On July 30, 1926, a suspension of disputes for a year had been arranged "in the hope," as the respondent wrote, "that we shall be happy and united." In March, 1927, differences became acute, and in April the respondent's solicitors informed the petitioner that he would be closing Overdale by midsummer, and would be glad if she would make arrangements to join him at Wood End at that date. But the respondent did not close the house or call on the petitioner to leave it.

Discussions proceeded on the alternative of complete reconciliation and definite separation ; and meanwhile the petitioner, as the respondent's wife, remained mistress of the house at Overdale, the respondent maintaining the establishment under her control. On October 24, 1927, he wrote this, when the question was raised as to the household there :—"I pay their (the servants') wages. I am still the owner of Overdale and head of the house." The last interview between the parties before the service of the petition took place at Overdale on November 18. The respondent was there as master of the house to discuss with his wife, its mistress, "whether," to quote his words, "there was any way out from their dissensions." That the relation of the spouses was for years unsettled and unhappy, and that in consequence the respondent was commonly absent from Overdale, seem to me mere incidents of their mutual discontents. During the whole time he had the right to be whenever he would in the home he maintained and when he thought fit, though but rarely he acted upon his rights. A seaman ordinarily absent from this country is resident in the home which he provides here for his wife. So is a man of business whose employment keeps him constantly abroad.

I am bound upon the facts to hold that the respondent was resident within the jurisdiction of this Court at all material times, and that the petitioner is entitled to succeed on the issue, with costs.

[Solicitors—Messrs. Charles Russell and Co. ; Messrs. Donald McMillan and Mott.]

K.B. Div. (Roche, J.) 1928. Mar. 16.

BONHAM v. MAYCOCK.*

Mortgage—Redemption—Receipt of payment—Authority of mortgagee's solicitor—Receipt of interest—Whether an implication of authority to receive principal.

An authority to receive the interest on a mortgage does not imply an authority to receive the principal.

This was an action tried at Worcester Assizes. The plaintiff, Mr. Ellis Edward Bonham, of Box Hedge, Banbury, Oxfordshire, claimed from the defendant, Mrs. Bessie Henrietta Maycock, formerly Miss Wrightson, of Horne Farm, Stoke Bruern, Northants, £300 and interest due under a covenant in a mortgage deed dated June 28, 1922, made between Mr. Henry Alfred Savage and the defendant of the one part, as mortgagors, and the plaintiff of the other part, as mortgagee.

The defendant admitted the deed, but alleged that on or about July 21, 1923, she paid to the plaintiff's solicitor and agent, Mr. Harry Cecil Kilby, thereunto lawfully authorized, the £300 with all interest due thereon.

Mr. Ralph Thomas appeared for the plaintiff; Mr. W. G. Earengey for the defendant.

MR. JUSTICE ROCHE, in his considered judgment, said that both the plaintiff and the defendant were clients of Mr. Harry Cecil Kilby, a solicitor, who had been dishonest and had taken the money of one of the parties. The defendant had been housekeeper to two of her uncles named Savage, and at their request approached Mr. Kilby and asked him to raise a loan. Ultimately, a mortgage was arranged for £300 on a farm belonging to the Savages, but before it was executed one of the Savages died, leaving his interest in the farm to the defendant, and the mortgage was, therefore, on property belonging to her and the surviving brother. The usual covenant for repayment was contained in the deed. Mr. Kilby, who carried the transaction through for both parties, kept the deed and paid interest to the plaintiff down to 1925. In 1926 he died, and the following state of facts came to light. In 1923 Mr. Kilby received £300 from the defendant and the surviving Mr. Savage to be paid to the plaintiff and gave a receipt for it in the following words:—

"July 21, 1923.

"No. — Stoke Bruern

"Received of Miss Wrightson and Mr. H. Savage the sum of three hundred and nine pounds to mortgage and interest to be paid to Mr. E. E. Bonham, of Banbury.—H. Cecil Kilby."

The defendant now alleged payment to the plaintiff "by his solicitor or agent, Harry Kilby," on the ground that Mr. Kilby had express or implied authority to receive the principal. Mr. Kilby had not at any time paid the money to the plaintiff, nor had he given up any deed or deeds to the defendant. No evidence was given or could be given by the defendant of express authority, and he (his Lordship) found as a fact that there was no holding out. The holding out of Kilby as entitled to receive interest was no holding out of him as being entitled to receive the principal. As regarded the deeds, there was no evidence that the defendant knew either where they were, or that Mr. Kilby had them.

The real question was whether, apart from express authority or holding out, there was implied authority. He was quite satisfied that there was no such implication. There was a short answer—namely, that Mr. Kilby did not receive the money as agent for the plaintiff at all, but as agent for the payors, not for the payee. But although that was his decision he would give his reason for differing from Mr. Earengey's contention that authority to receive interest or principal could be conferred by implication if the scrivener or solicitor was allowed to retain the security, and if it was one which did not require a reconveyance. That argument depended on cases relating to scriveners, and whether those cases were applicable to solicitors.

Scriveners were an extinct race. Apparently the last of them was a contemporary of Dr. Johnson; for the following passage was to be found in Boswell's "Life of Johnson" (vol. 3, p. 20, cited in *Adams v. Malkin*, 3 Camp., 534):—

"Johnson.—It is wonderful, Sir, what is to be found in London. The most literary conversation that I ever enjoyed was at the table of Jack Ellis, a money scrivener behind the Royal Exchange, with whom I at one period used to dine generally once a week.

"Note by Boswell.—This Mr. Ellis was, I believe, the last of that profession called scriveners, which is one of the London companies, but of which the business is no longer carried on separately, but is transacted by attornies and others. He was a man of literature and talents."

Reference was made to *Henn v. Conisby* (1 Ch. Cas., 93); to the Eq. Cas. Abr., 145; to *Duchess of Cleveland v. Executors of Geo. Dashwood* (Freeman, Ch. Rep., 249); *Martyn v. Kingsly* (Prec. Ch., 209). His LORDSHIP also read a passage of some length from the judgment of Chief Justice Gibbs in *Adams v. Malkin* (*supra*), decided in 1814, in which it was stated:—

"The banker would not be an attorney, though he were occasionally to fill up bonds for his customers; nor does the attorney become a money scrivener, though on particular occasions he incidentally has the money of his clients to lay out for them. In order to make a man a money scrivener, he must carry on the business of being trusted with other people's monies to lay out for them as occasion offers. . . . Nor, if on one or two occasions money were deposited with him to lay out, would that constitute him a money scrivener."

Apart from express decisions as to solicitors, his LORDSHIP continued, he would hold on the facts which he learned from those cases that a solicitor was not a scrivener. But there was direct authority in two cases cited by Mr. Thomas for the plaintiff. The first was *Wilkinson v. Candlish* (5 Ex., 91), in which Baron Parke said:—

"An authority to receive the interest of a mortgage by no means imports an authority to receive the principal"; and again, "There is nothing but an authority for the payment of interest to him, and that is no authority for him to receive the principal."

The other case, *Kent v. Thomas* (1 H. and N., 473), was even more decisively in the plaintiff's favour, for in that case a solicitor received a part of the principal and did not pay the mortgagee, and Baron Watson said:—

"He was the agent of the plaintiff to receive the interest; but as to the principal, Baron Parke in

* Reported by J. W. HALL, Esq., Barrister-at-Law.

Wilkinson v. Candlish (*supra*) pointed out that an authority to receive the interest on a mortgage by no means imports an authority to receive the principal."

For those reasons the plaintiff was entitled to judgment for £300, with costs.

[Solicitors—Messrs. Bristowes, for Messrs. Fairfax and Barfield, Banbury ; Messrs. James, Mellor, and Coleman, for Messrs. Phipps and Troup, Northampton.]

K.B. Div. (MacKinnon, J.) 1928. Mar. 13.

LOWE v. BENTLEY.*

Limitations (Statute of) — Counterclaim—Calculation of period—Date to be taken—Whether issue of writ or delivery of counterclaim—Limitation Act, 1623 (21 Jac. I., c. 16), s. 3.

Section 3 of the Limitation Act, 1623, bars a counterclaim on a cause of action which arose more than six years before the delivery of the counterclaim, though less than six years before the issue of the writ in the action.

In this action the plaintiff, Mr. Alfred Lowe, of Edgbaston, Gammon-lane, Watford, issued the writ on December 23, 1926, claiming from Mr. Walter Bentley, of 122, Shaftesbury-avenue, W.C., (1) £515 alleged to be due on an account stated contained in letters between the parties in 1921 and 1922—that claim was not persisted in ; (2) £60, the amount of a cheque drawn by the plaintiff on December 24, 1920 (five years and 364 days before the writ), and paid to the defendant in settlement of bets on horse races.

The statement of claim in the action was delivered on July 4, 1927. On October 19, 1927, the defendant delivered a defence, set-off, and counterclaim, in which he said that if, contrary to his contention, the plaintiff was entitled to recover the sum of £60 from him he paid to the plaintiff by cheques dated December 28, 1920, and January 17, 1921, £65 and £67 10s. respectively in settlement of bets on horse races. He set-off the plaintiff's claim of £60 and counterclaimed £72 10s. The plaintiff, in reply, pleaded the Statute of Limitations (21 Jac. I., c. 16).

Mr. Claude Grundy appeared for the plaintiff ; Mr. J. P. Valetta for the defendant.

Mr. GRUNDY admitted the set-off, since it was held in *Walker v. Clements* (15 Q.B., 1,046) that, a set-off being matter of defence, the period allowed by the Statute of Limitations must be estimated to the date of the plaintiff's writ.

Mr. VALETTA contended that a counterclaim was in the same position as a set-off and relied on *Walker v. Clements* (*supra*). Lightwood on the Statute of Limitations was apparently of the same opinion.

Mr. GRUNDY referred to Halsbury's Laws of England (Vol. 19, p. 184). The author of the article took the opposite view to Lightwood. *McGowan v. Middleton* (11 Q.B.D., 464) and *Beddall v. Maitland* (17 Ch. D., 174) were referred to, but were admittedly not directly in point. Counsel submitted that, a counterclaim being in its nature a cross-action, the material date was the date on which the counterclaim was delivered, and not the date of the writ.

* Reported by J. W. HALL, Esq., Barrister-at-Law.

MR. JUSTICE MACKINNON, in giving judgment, said that the proceedings arose out of gaming transactions. On December 23, 1926, the plaintiff issued his writ claiming £60 on a cheque dated December 24, 1920, under a now repealed statute of William IV. The defendant replied by a set-off and counterclaim, alleging that on December 28, 1920, and January 17, 1921, he paid £65 and £67 10s. respectively, which he claimed to be entitled to recover under the same statute. The counterclaim was delivered on October 19, 1927, more than six years after the defendant's right accrued under the Act of William IV.

It was admitted by Mr. Grundy that the set-off was good, notwithstanding that the debt accrued more than six years before the delivery of the counterclaim, because there was clear authority in *Walker v. Clements* (15 Q.B., 1,046) that the Statute of Limitations was not a bar to a set-off unless the six years had expired before the plaintiff's action was brought. There remained the defendant's counterclaim for the amount by which the £132 10s. he had paid exceeded the plaintiff's claim.

He had heard an interesting argument on the question whether the Statute of Limitations operated in the same way as to a counterclaim and as to a set-off. Was the period of six years to be taken to the date of the issue of the writ or to the date of the delivery of the counterclaim ? Lightwood on the Statute of Limitations expressed the opinion that in counterclaim as in set-off the period was reckoned to the date of the writ, and referred in support of that contention to the judgment of Lord Campbell, C.J., in *Walker v. Clements* (*supra*) and to *Ord v. Ruspini* (2 Esp., 569), which had not been cited before him (his Lordship) in the present case ; and he doubted whether a decision in 1797 could assist him much.

But a writer in Halsbury's Laws of England equally confidently asserted that a counterclaim was different and that the time ran to the date of delivery. Mr. Valetta relied on the words of Lord Campbell, C.J., in *Walker v. Clements* (*supra*) :—

"The set-off is substituted for a cross-action. When are we to suppose that cross-action brought ? Clearly at the time of the commencement of the plaintiff's action, since a set-off not then existing cannot be insisted upon."

And Mr. Justice Coleridge said :—

"I am of the same opinion. A set-off must be available as a cross-action would be."

At that date there was no practice or right to set up a counterclaim, which was first created by section 24 (3) of the Supreme Court of Judicature Act, 1873. Lord Campbell, therefore, was not referring to the modern practice of counterclaim. He meant that a set-off was the setting up of a cross-demand by way of defence to the plaintiff's claim, and it must, therefore, be established at the date of the writ.

He did not think that the reasoning applied to a counterclaim, and the judgment of Mr. Justice Fry in *Beddall v. Maitland* (17 Ch. D., 174) showed that a modern counterclaim was entirely different from the old set-off. The question in *Beddall v. Maitland* (*supra*) was whether relief could be given in respect of a counterclaim which arose since the date of the writ. Sir George Jessel, M.R., in *Original Hartlepool Collieries Company v. Gibb* (5 Ch. D., 713) held that the counterclaim could not extend to any right of action subsequent to the date of the original writ. From that decision Mr. Justice Fry differed, and he (his Lordship) thought that the reasoning of Mr. Justice Fry, which was approved in *McGowan v. Middleton* (11 Q.B.D., 464), was right in showing that a counterclaim was essentially different from a set-

off. A counterclaim, therefore, was only good if the cause of action arose less than six years before the delivery of the counterclaim. In this case, therefore, the counterclaim was barred, and there must be judgment for the defendant on the claim with costs and for the plaintiff on the counterclaim with costs.

[Solicitors—Mr. Sydney A. Musson; Messrs. Edmond O'Connor and Co.]

K.B. Div. (Rowlatt, J.) 1928. March 15.

ATTORNEY-GENERAL v. LUNCHEON AND SPORTS CLUB, LIMITED.*

Revenue — Betting duty — Totalisator — *Pari-mutuel*—Management by proprietor of club—Transactions by members—Whether bets—Whether proprietor a bookmaker—Finance Act, 1926 (16 and 17 Geo. V., c. 22), ss. 15, 18.

The defendant company owned a club and managed on the premises a totalisator and a *pari-mutuel* by means of which members could back horses running in races. The amount staked by backers of losers formed the fund for paying the backers of winners, the defendant company deducting 10 per cent. for expenses.

Held, that the transactions constituted bets within s. 15 of the Finance Act, 1926, and the defendant company was a bookmaker within s. 18 and was liable to pay betting duty thereon.

This was an information in which the Attorney-General alleged that the Luncheon and Sports Club, Limited, the proprietors of the Stadium Club, of 85, High Holborn, W.C., were liable to pay betting duty in respect of wagers on horse-races made by the members of the club by means of the totalisator and *pari-mutuel* managed by the company on the premises of the club.

The Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. Bowstead appeared for the Attorney-General; Mr. Roland Oliver, K.C., Mr. G. D. Roberts, and Mr. D. A. S. Cairns for the defendant company.

The SOLICITOR-GENERAL, in opening the case, said that the Stadium Club was formed for the promotion of special intercourse among its members. The defendant company had entire control of all matters of finance in connexion with the club. The members of the club were elected in the ordinary way, but their election was subject to confirmation by the defendant company. The club consisted mainly of a large hall, at one end of which were the totalisator and the *pari-mutuel*, and a gallery which was used as a restaurant. On the ground floor was a boxing ring. The totalisator was a mechanical apparatus, which was used on "big race" days. The *pari-mutuel* was worked on exactly the same principle but it was operated by hand.

Members wishing to back horses by means of those instruments were required to join, at a fee of 10s. 6d., the club pool, which had certain rules, one of which stated that the club acted merely as distributing agent. By another rule the club was empowered to deduct 10 per cent. of the gross amount of the stakes in respect of the facilities provided to members and the superintendence and general running expenses of the pool.

A member of the club pool obtained a credit voucher for 10s., which he marked with the name and number of the horse which he wished to back for a win or a "place." He handed the voucher to a clerk, who sat before the *pari-mutuel*, and that clerk handed it to the clerk who operated the board. On the board were shown the numbers of the horses on the race-cards, the names of the jockeys, and the number of vouchers which had been handed in in respect of each particular horse. The same procedure was adopted with regard to place-betting. The board recorded the result of the race and showed how much each backer was entitled to win.

The fund from which the winnings came was formed by the wagers made by the members who had backed the losing horses. The backers of the winners received the purely honest starting price. The odds continually altered during the wager as each voucher was handed in. Settlement was made by or with backers every Saturday.

In those circumstances the questions arose whether a bet had been made, whether the defendant company was a "bookmaker," and whether a "bet" had been "made with a bookmaker" within section 15 of the Finance Act, 1926, which rendered payable a duty "on every bet made with a bookmaker." The Crown alleged that those questions must be answered in the affirmative. By subsection (3) of section 15 betting duty was payable by "the bookmaker with whom the bet is made." In section 18 "bookmaker" was defined as "any person who, whether on his own account or as a servant or agent to any other person, carries on, whether occasionally or regularly, the business of receiving or negotiating bets. . . ." "Bet" was defined as "a bet on an event of any kind."

The substance of the transaction had to be regarded and not what it was called in the rules. The method of calculating the odds—whether they were made by a bookmaker leaning over the rails on a racecourse or whether they were regulated mechanically by the number and sagacity of the backers of the losing horses—could not possibly affect the substance of the matter. A member of the pool made a wager or venture of a sum of money on the result of a race. The person to whom he looked for payment of his winnings was the defendant company, and the only person to whom he was liable to pay if he lost was also the defendant company. Those circumstances made the transaction a bet which was dependent on the result of a race. The defendant company was in the same position as a successful bookmaker. When it had paid out the sums due to winners and received the sums due from losers it found itself in possession of a very handsome profit. The defendant company took the risk of any bad debts. He referred to *Tollett v. Thomas* (L.R., 6 Q.B., 514) and *Dark v. Island Bay Park Racing Company* (4 N.Z.L.R., 301).

Mr. OLIVER submitted that persons who invested in a totalisator pool did not in law make a bet. If that were not so, in the circumstances of the present case no bet was made with a bookmaker within section 15 of the Act of 1926. If the test were that money was won or lost on the result of a race it would be betting to engage in a sweepstake. Distinction had been drawn between gaming and betting contracts, and the present contracts were gaming contracts. The only thing which differentiated what had occurred in the present case from a sweepstake was that the member who ventured his

* Reported by G. F. L. BRIDGMAN, Esq., Barrister-at-Law.

money could choose his horse, whereas in a sweep-stake his horse was allotted to him by chance.

Counsel referred to the definitions of gaming and wagering contracts given by Lord Justice Cotton in *Thacker v. Hardy* (4 Q.B.D., 685, at p. 695), and by Mr. Justice Hawkins in *Carlill v. Carbolic Smoke Ball Company* (8 *The Times* L.R., 680 ; [1892] 2 Q.B., 484, at p. 490), and said that the defendant company could not win as the result of any transaction in the pool. The 10 per cent. deduction made by them was in no sense winnings but was merely a commission charged for the expense and trouble of conducting the pool. Nor was it certain that the backers of a winning horse would win. If the winner was a "red-hot" favourite, which had attracted practically all the bets in the pool, the deduction of the 10 per cent. might result in the backers of that winner receiving sums which were less than their stakes.

No one who used accurate language could describe the transactions which had been referred to as "bets." They were no more "bets" than to play bridge for a stake was to make a bet. He referred to *Reg. v. Hobbs* (14 *The Times* L.R., 573 ; [1898] 2 Q.B., 647).

If the transactions through the pool were held to be bets the defendant company was admittedly a bookmaker. The Act gave a very wide definition of a bookmaker, but that did not make taxable every bet negotiated with a bookmaker. The only thing at which the Act had struck was a bet made with a person in the ordinary sense of the English language. It did not tax a bet negotiated by a person. If what had occurred was a bet it was not made with a bookmaker but with the other members who had backed horses. The defendant company was only the stakeholder. The fact that the defendant company paid to the winners the money of the losers before it was actually received by them did not affect the question but was merely a matter of accountancy.

The SOLICITOR-GENERAL replied.

MR. JUSTICE ROWLATT, in his considered judgment, said that the issue raised by the information was whether, when the totalisator or the *pari-mutuel* was used at the Stadium Club, bets were made so as to attract the betting duty imposed by section 15 of the Finance Act, 1926. Two questions arose. One was whether the transaction which took place constituted a bet. The second was whether, if it did, that bet was made with a bookmaker within the meaning of that phrase as defined in section 18 of the Act of 1926.

The real point to be determined was between what parties the transaction took place. If a number of persons paid money into a pool, each naming a competitor in some contest in respect of which he paid in his money, and those persons later divided the pool among those who had named the winner in proportion to the amounts which they had respectively paid in, they would gamble on precisely the same principle as the members of the Stadium Club did by the use of the totalisator and the *pari-mutuel*. Possibly there would be no bet, and at any rate there would be no bet made with a bookmaker. On the other hand, a person might accept sums from backers not at odds then declared but at such odds as in the event would show a book exactly balanced subject to a percentage for himself. In that case there would be a series of bets, and of bets made with a bookmaker, because, although in the aggregate the balancing of the book eliminated all chance of the person who kept the book winning or losing anything, nevertheless, in respect of each particular transaction he and the backer were parties to a simple bet.

The contention made on behalf of the defendant company was that the present case was of the former description, the club being a mere distributing agent. In his opinion, however, the club was a principal in each transaction, and was only a mere distributing agent in the sense that the various transactions balanced. There was no getting away from the fact that the winners looked to the club and the club looked to the losers. The winners did not look to the losers directly. The circumstance that the fraction of the pool remaining in the hands of the club after the payments had been more than enough to recoup defaults did not affect the matter. The Crown was entitled to the relief they claimed, with costs.

A stay of execution for ten days was granted on the usual terms.

[Solicitors—The Solicitor of Customs and Excise ; Messrs. de Buriatte and Bowen.]

Prob., Divorce, and Adm. Div. (Bateson, J.) — 1928. Mar. 5.

THE POINT BREEZE.*

Ship—Practice—Collision—Bail given to avoid arrest of ship—Additional bail demanded after judgment—Arrest of ship—Warrant of arrest set aside—Effect of giving bail.

The defendants in an action *in rem* for damage by collision gave bail in an amount specified by the plaintiffs in order to avoid the arrest of their ship. After judgment had been delivered in the action, pronouncing the defendants' ship alone to blame, the plaintiffs, who in the meantime had dry-docked their vessel and discovered further damage, demanded additional bail and arrested the defendants' ship. The defendants gave the additional bail under protest and moved to set aside the warrant of arrest.

Held, that the effect of giving bail was to extinguish the plaintiffs' maritime lien and to release the defendants' ship altogether in that action, and the warrant of arrest must, therefore, be set aside.

This was a motion brought by the defendants, the owners of the American motor-ship Point Breeze, to set aside a warrant of arrest in an action *in rem* for damage by collision.

The facts were shortly as follows : On November 6, 1927, a collision occurred between the plaintiffs' steamship Flamand, a French cross-Channel steamship, and the Point Breeze, which was owned by the United Petroleum Company, Inc., of America. The Flamand, after the collision, proceeded on her voyage, but having encountered fog she ran aground on a shoal when approaching Dunkirk. She remained aground for an hour and after getting off took tug assistance into port.

On December 6 the plaintiffs issued a writ against the Point Breeze and the defendants' solicitors accepted service and gave an undertaking to put in bail. On December 19 the defendants provided

* Reported by A. W. GRANT, Esq., Barrister-at-Law.

a bail bond in the sum of £3,500, the amount of security demanded. On December 21 judgment was pronounced by the Admiralty Court, holding the Point Breeze alone to blame and referring the damage to the Registrar for assessment. On December 28 the plaintiffs demanded additional bail in £3,000, and, without any application to the Court, arrested the Point Breeze at Southampton shortly before she was due to sail. On December 29 the defendants, under protest, gave an undertaking to provide the additional bail, and they now moved to set aside the warrant of arrest. By the collision the Flamand sustained bow damage, and the first demand for £3,500 bail was apparently based on the survey of that damage. After being dry-docked, however, damage caused by the stranding was revealed, and the plaintiffs apparently contended that that damage was due to the collision.

Mr. C. R. DUNLOP, K.C., who with Mr. R. F. HAYWARD appeared for the defendants in support of the motion, contended that when bail was given by a defendant in the amount specified by the plaintiff, for the purpose of releasing a ship from arrest or liability to arrest, the effect was to extinguish the plaintiff's maritime lien and to release the defendant ship altogether. She could not afterwards be arrested in the same action. If the defendant appeared to defend the action and judgment was given against him and his bail, as in the present case, the plaintiff's cause of action was merged in the judgment. It was a judgment *in personam* and could be enforced by writ of *fi. fa.* or other mode of execution in the High Court. Counsel proceeded to cite the cases of *The Kalamazoo* (15 Jurist, 885); *The Wild Ranger* (Br. and Lush., 84); *The Zephyr* (11 L.T. (N.S.), 351); *The Hero* (Br. and Lush, 447); *The Flora* (L.R., 1 A. and E., 45); The *Johannes* (L.R., 3 A. and E., 127); *The Freedom* (L.R., 3 A. and E., 495); *The Dictator* ([1892] P., 304); *The Gemma* (15 *The Times* L.R., 529; [1899] P., 285); and *The Joannis Vatis* (No. 2) (38 *The Times* L.R., 566); [1922] P., 213).

Mr. A. T. BUCKNILL, opposing the motion, submitted that the fact that the plaintiffs, owing to a mistake, had demanded bail for less than the amount of their damage and less than the value of the *res*, did not debar them, either on authority or in equity, from obtaining further bail up to the full value of the delinquent ship. A plaintiff undoubtedly had a right to maintain the arrest of a defendant ship until he had obtained bail for the full value of that ship.

MR. JUSTICE BATESON.—You say you can go on arresting every day for a week.

Mr. BUCKNILL.—Subject, of course, to these considerations, that I must not exceed the value of the ship, and if I act unreasonably the Court can penalize me. Leave of the Court might be necessary where the ship had already been under arrest and released, because the Court had had its hand on the ship and as a matter of courtesy leave of the Court must be obtained before re-arrest. There was no clear authority against the right to arrest after bail had been given for less than the full value of the ship. On the other hand there were clear cases where re-arrest had occurred without leave. The observations of Dr. Lushington in *The Kalamazoo* (*supra*) and *The Wild Ranger* (*supra*) must be read in the light of his later decision in *The Hero* (*supra*), which was entirely favourable to the present plaintiffs. *The Dictator* (*supra*) and *The Gemma* (*supra*) had superseded most of the older decisions. The plaintiffs at any rate had the right to re-arrest for costs (see *The Freedom* (*supra*) and *The Lorena* (Roscoe's Admiralty Practice, 4th Edition, p. 340)).

MR. JUSTICE BATESON.—I think this motion must succeed. The collision happened on November 6, 1927, between the Flamand, a French ship, and the Point Breeze, an American ship. On December 2 the vessel was surveyed in Dunkirk for damage, and all the damage that was found was damage to her stem. On December 6 a writ was issued against the Point Breeze. The defendants' solicitors accepted service and gave the usual undertaking to put in bail. On December 19 the bail bond was completed in the sum of £3,500 as demanded by the plaintiffs. On December 21 judgment was given that the Point Breeze was alone to blame, and on December 28—that is seven days after the judgment—the plaintiffs asked for additional bail of £3,000, and they arrested the Point Breeze at Southampton for that amount in this action. On December 29 the defendants' solicitors gave an undertaking to give the additional bail, but they gave it under protest. Now they move before me to set aside that arrest. The case seems to be covered by the clear expression of opinion of Dr. Lushington in *The Kalamazoo* (15 Jurist, 885, at p. 886): "but the effect of taking bail is to release the ship in that action altogether. It would be perfectly absurd to contend that you could arrest a ship, take bail to any amount, and afterwards arrest her again for the same cause of action. The bail represents the ship, and when a ship is once released upon bail she is altogether released from that action." He goes on to say that there is no way of making the defendants pay—that is putting it in quite general language—except through the bail or the *res*. That part of the judgment has since been overruled in *The Gemma* (15 *The Times* L.R., 529; [1899] P., 285), *The Dictator* ([1892] P., 304), and other cases, whereby it is made plain that anybody getting judgment in an action *in rem* is entitled to issue execution for any balance against the parties who have appeared to defend in such an action. But the earlier part of the judgment that I have read does not seem to me to have been qualified, except possibly by Dr. Lushington himself, and I shall deal with this later. In *The Wild Ranger* (Br. and Lush., 84, at p. 87) Dr. Lushington repeats: "Now bail given for a ship in any action is a substitute for the ship; and whenever bail is given, the ship is wholly released from the cause of action, and cannot be arrested again for that cause of action." It is true that the facts of *The Wild Ranger* (*supra*) were these—the owners of the ship and of the cargo each arrested the ship. The shipowners obtained bail for some £92 less than their claim turned out to be. The cargo owners had the ship sold, and their claim was satisfied out of the proceeds, leaving a balance in Court. The shipowners then sought to get the balance out of the proceeds in Court, and that was refused. That, of course, nowadays would not be so, but the statement of Dr. Lushington that I have read is a repetition of what he said in *The Kalamazoo* (*supra*), and as I have said, as far as I know, has not been directly overruled. *The Wild Ranger* (*supra*) was decided in 1863. It is quite true that in 1865 and 1866 he decided two cases, *The Hero* (Br. and Lush., 447) and *The Flora* (L.R., 1 A. and E., 45), which seem to throw some doubt on this general statement that I have referred to. In *The Hero* (*supra*) Dr. Lushington at page 448 says: "In *The Kalamazoo* (*supra*) and *The Wild Ranger* (*supra*) are expressions which, literally interpreted, would indicate that I have no power to grant a re-arrest for the same cause of action after the property has been released on bail: but those expressions must be

read subject to the fact which formed the ground of the decision in each of those cases, that the cause of action had passed into *res judicata*. I am of opinion that where application to increase the amount of the action is made before judgment has been pronounced, the Court has power to direct measures to be taken to do full justice to the plaintiff," but he limits any power to re-arrest or arrest after bail to applications made before judgment has been pronounced. Therefore it does not help Mr. Bucknill here because judgment pronouncing for liability had been given before he attempted to arrest. It is also to be noted that application was made to the Court apparently for leave to arrest the ship. The other case was *The Flora* (*supra*), and I confess that *The Flora* (*supra*) is a difficult case to follow from the report in L.R., 1 A. and E., 45. It seems from the headnote that the defendant there had consented to have the amount in the action increased, and the Court made an equitable order allowing the re-arrest to stand, but cancelled the bail bond already given. Nothing of that is said in the judgment or in the argument, and although Mr. Vernon Lushington—as he then was—relied on *The Kalamazoo* (*supra*) and *The Wild Ranger* (*supra*) as to there being no power to re-arrest without leave of the Court, Dr. Lushington said at p. 46 that "it was the practice to arrest the cargo whether freight was due or not, and held the re-arrest to be valid"—but on what ground exactly that was done, and how far the headnote, which speaks of the amount in the action being increased by consent, and so forth, affected it, does not appear, and I do not think, in face of the distinct expression in *The Kalamazoo* (*supra*) and *The Wild Ranger* (*supra*) that you cannot arrest a vessel after she has been once released on bail in the same action for the same cause of action, that ruling should be departed from. One other case which seems to support my view to some extent is *The Johannes* (L.R., 3 A. and E., 127). That was a case before Dr. Phillimore. The only significance of that is that the claim to re-arrest was abandoned by the eminent counsel who was conducting the case for the plaintiff. The other cases where re-arrest has been allowed are cases with regard to costs, which started with *The Freedom* (L.R., 3 A. and E., 495). I am not at all sure that *The Freedom* (*supra*) really decided that there was power to re-arrest for costs, except in the sense that it was the method of execution most convenient in the Admiralty Court, although it has always been treated, I think, as being a re-arrest for costs. That course has been followed in the case of *The Lorena* (unreported)—a case noted at page 340 of Roscoe's Admiralty Practice (4th Edition) and *The Falk* (4 Asp. M.C., 592).

Those, of course, are re-arrests for costs after judgment given, and after costs have been ascertained. If bail were given after such an arrest as contemplated in this case, or a re-arrest after judgment, there is no judgment against such bail, nor so far as I know, any means of obtaining one in the action.

In this case what the plaintiffs have been trying to do is to arrest the ship after they have got bail for their claim and have released the ship, and have got judgment, but before the amount of their claim is ascertained. They got judgment referring the matter to the Registrar, but he has not ascertained what amount is due, and it may well be that it will be some time before he does ascertain it. If the plaintiffs are right in their contention that they are entitled to arrest this ship it seems to me that it will open the door to the re-arrest of vessels or their arrest after getting bail whenever a party thinks that his claim might be bigger than it is. No immunity from arrest will be obtained by giving bail, and the effect on maritime liens might be very serious. If there is a right to arrest it is the right to arrest in a damage case, and the only right to arrest in a damage case is that which the party claiming has got by a maritime lien, and a maritime lien follows the ship into other people's hands. The position of people who have ships that have been released on bail (if I were to allow this arrest to stand) would be very unfortunate. So far as I know what is being attempted in this case has never been attempted before. I have dealt with *The Hero* (*supra*) and *The Flora* (*supra*), and I have also dealt with *The Freedom* (*supra*) class of case, which does not seem to me to be this case at all. I do not think, in these days at any rate, it is desirable to extend the power of arresting the property of a defendant. It may be very hard in the sense that Mr. Bucknill's clients may be defeated by the owners of the Point Breeze from prosecuting part of a just claim which they may be able to substantiate because the Point Breeze may never come back to this country. I should hope that that would not be the result, but I cannot help it if it is. I have not referred to *The Zephyr* (11 L.T. (N.S.), 351) or to *The Joannis Vatis* (No. 2) (38 *The Times* L.R., 566; [1922] P., 213) because I do not think they carry the case any further, but I think I have referred to all the others that have been mentioned.

Of course there is the point, I suppose, that if application for leave to arrest had been made—before this arrest was actually made—to try and bring the case within *The Hero* (*supra*) I think leave would have had to be refused upon the same grounds as those which I have indicated for allowing this motion with costs.

[Solicitors—Messrs. Thomas Cooper and Co., for the defendants; Messrs. Stokes and Stokes, for the plaintiffs.]

K.B. Div. (Roche, J.) 1928. Mar. 15.

SYMINGTON AND CO. v. UNION INSURANCE SOCIETY OF CANTON, LIMITED.*

Insurance (Loss)—Clause in policy but not in slip—Warehouse to warehouse clause—Loss "reasonably attributed to fire."

The respondents, who were cork growers and had a factory and a warehouse near Algeciras, sent from the factory to Algeciras quantities of cork for shipment and allowed it to accumulate on the jetty till there should be enough for a cargo. While an accumulation on the jetty was awaiting shipment the respondents effected with the appellants an insurance by a slip. Before the policy was issued a fire broke out on the jetty, and to prevent its spreading to the cork the authorities jettisoned part of the cork and threw sea-water on the rest, with the result that a large portion was lost or damaged. The policy, when issued, contained a warehouse to warehouse clause and provided for payment of any loss "which may reasonably be attributed to fire," and a clause in the margin provided that shore risk against fire was not

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

covered where the assured had fire insurance. The marginal clause was not in the slip. The respondents, who had another insurance against fire, claimed under the insurance, and in an arbitration an award was given in their favour.

Held, (1) that as the slip contained the real contract the marginal clause must be treated as non-existent, (2) that as the goods at the time of the loss were in the ordinary course of transit they were covered by the warehouse to warehouse clause, and (3) that the loss might reasonably be attributed to fire, and therefore the award must be affirmed.

This award of an arbitrator, stated in the form of a special case, raised a question of the construction of a contract of insurance.

Mr. Le Quesne, K.C., and Mr. Simey appeared for the insurance company, the appellants; Mr. Porter, K.C., and Mr. Somervell for the claimants, the respondents.

By an insurance effected in 1919 the company insured goods of the claimants, Symington and Co., at and from any port or ports, place or places between Bordeaux and Nice, both inclusive, to the United Kingdom and until delivered at destination inland . . . in the vessel called the Hillhouse . . . sailing February, 1920. . . . Beginning the adventure upon the said goods and merchandises from the loading thereof on board the said ship. . . .

The claimants were cork growers, carrying on business in Spain. In 1919 they had a factory and warehouse at San Roque, which is about eight miles north of Algeciras, and is connected therewith by railway. The cork was sent down from the claimants' warehouse at San Roque to Algeciras, where there was a jetty but no warehouse, and was either shipped from the jetty at Algeciras or was ferried across from the jetty to Gibraltar and shipped there. Owing to lack of railway facilities the cork was sent down to Algeciras in small quantities day by day, and was allowed to accumulate on the jetty till there was enough to be shipped to the United Kingdom.

On February 9, 1920, there was on the jetty at Algeciras awaiting shipment an accumulation of cork consisting of 1,105 bales of large grain and 1,006 of small grain. Some of the small grain had been lying on the jetty since August, 1919, and the rest of the cork had been sent down from the warehouse at San Roque in November and December, 1919, and January, 1920. The claimants expected to ship the accumulated cork on a steamer, the Hillhouse, about February 20, 1920.

On November 25, 1919, the claimants effected an insurance of £20,000 on the cork with the present appellants and other companies, the insurance to begin on January 1, 1920.

On February 9, 1920, before any declaration had been made under the insurance and before a policy had been issued, a fire broke out on the jetty at Algeciras at some distance from the claimants' cork. To prevent the fire from spreading to the claimants' cork the port and military authorities decided to jettison part of it and to throw sea-water on the part which remained on the jetty. As a consequence 1,011 bales of large grain and 205 bales of small grain were lost or damaged. The claimants claimed under the policy, and the claim was referred to arbitration. The arbitrator awarded in favour of the claimants subject to the decision of this special case.

The policy contained material clauses as follows:—

"1. Warranted free of capture seizure arrest restraint or detainment. . . .

"6. The insured goods are covered subject to the terms of this policy from the time of leaving the shipper's or manufacturer's warehouse during the ordinary course of transit until on board the vessel . . . and from the vessel whilst on quays wharves or in sheds during the ordinary course of transit until safely deposited in consignee's or other warehouse at destination named in policy.

"9. Warranted free from particular average . . . but notwithstanding this warranty the assurers are to pay the insured value of any package or packages which may be totally lost in loading transhipment or discharge, also for any loss . . . which may reasonably be attributed to fire. . . ."

There was also inserted in the margin of the policy the following clause:—

"This policy not to enure to the benefit of any Fire Insurance Company. It is warranted and agreed by the assured that any shore risk against fire granted herein shall not cover where the assured or any carrier or other bailee has fire insurance which would attach if this policy had not been issued."

The arbitrator held that the policy should be read as not containing that marginal clause, because it was not contained in the slip which represented the real contract between the parties.

Mr. Le Quesne, in opening the case, submitted, first, that when the loss occurred the risk had not attached. The insurance was from any port or ports, place or places between Bordeaux and Nice, and that must mean some place on the coast line from Bordeaux to Nice and could not include San Roque, which was eight miles inland. The policy was evidently only intended to cover the goods from some place to which ships could go. The warehouse to warehouse clause must be read as beginning from the claimants' warehouse at the port or place of loading. These goods were never in a warehouse, because the arbitrator had found as a fact that the Algeciras jetty was not a warehouse.

Secondly, clause 9, the "free from particular average" clause, making the insurers liable for damage attributable to fire, could not have the effect of doing away with the rule as to proximate cause, and here the proximate cause of the loss was the action of the port authorities and was not the fire, which was admittedly some distance away. Thirdly, the insurers were entitled to rely on the marginal clause, and the claimants could not recover because they had another insurance against fire.

Mr. Simey, who followed, submitted that the loss was not attributable to fire but to acts done in apprehension of fire; the loss was not due to a peril insured against.

Mr. Porter supported the award in favour of the claimants, and Mr. Le Quesne replied.

Mr. Justice Roche stated the facts, and said that the first point he would deal with was the marginal clause providing for the case of another insurance against fire. The arbitrator had held that that clause must be treated as non-existent because it did not appear in the slip, and the slip contained the real contract between the parties. In that he thought that the arbitrator was right.

Then it was said that the risk had not attached when the damage occurred. Reading the whole policy together, he concluded that, whether San Roque was a place within the meaning of the first part of the policy or not, the goods at the time of the loss were in the ordinary course of transit, and were covered by the warehouse to warehouse clause. He held, therefore, that the risk had attached, and that the goods were covered by the policy.

It was further said that there was no loss by a peril insured against, but that the cause of the

loss was the action of the authorities, for which the insurers were not liable, as the policy was expressed to be warranted free of capture, seizure, &c. As to that, he thought that the case was within the principles laid down by Mr. Justice Gorell Barnes in *The Knight of St. Michael* (14 *The Times* L.R., 191 ; [1898] P., 30, at pp. 34-35). There was imminent danger of fire, and the loss, if not strictly speaking a loss by fire, was a loss *ejusdem generis*. The arbitrator had held that the loss might reasonably be attributed to fire, and he thought that the view of the arbitrator was right. It was not necessary to attempt to define "restraint of princes," but he held that the action of the authorities in this case did not constitute such a restraint. The arbitrator had come to a right conclusion, and the award must be affirmed.

[Solicitors—Messrs. Waltons and Co. ; Messrs. Parker, Garrett, and Co.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) } 1928. Mar. 6.

SLOGGETT v. SLOGGETT.*

Divorce — Practice — King's Proctor's rights—Powers of the Court—Intervention by King's Proctor before decree *nisi* — Collusion not charged — Matrimonial Causes Act, 1857 (20 and 21 Vict., c. 85), s. 29—Matrimonial Causes Act, 1860 (23 and 24 Vict., c. 144), s. 7—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), ss. 178, 181.

It is open to the King's Proctor by direction of the Court to intervene during the progress of a divorce suit with new evidence before decree *nisi*, subject to the direction of the Attorney-General, not only when collusion is in question but when other matters are in question. It was held that the Attorney-General was entitled, in the circumstances, to direct the King's Proctor to present new evidence.

This was a summons adjourned into Court for argument.

Mrs. Mary Sybil Williams Sloggett, *née* Lane, petitioned on December 8, 1926, for the dissolution of her marriage with Mr. Albert Arthur Sloggett, on the ground of his adultery with Marjorie Bragazzi Turner at the Grand Hotel, Leigh-on-Sea. The petition showed that the marriage took place at St. Giles' register office, London, on November 5, 1920, and the parties lived at 1, St. Mary's Mansions, St. Mary's-terrace, Paddington, and at other places. There was no issue.

The petitioner also said that on or about October 25, 1925, she cohabited with a man at the Hotel Cecil, Strand, and that on or about October 29, 1925, she cohabited with the same man at the Hotel Russell, Russell-square. She asked the Court to exercise its discretion in her favour.

The case came on for trial before the President on May 25 and 26, 1927, the petitioner's counsel being Mr. Cotes-Preedy, K.C., and Mr. W. N. Stable. After hearing the evidence and the arguments of counsel his Lordship adjourned the suit in order that the King's Proctor might be heard in argument upon the matter. The King's Proctor accordingly took out the present summons for directions.

The Attorney-General (Sir Douglas Hogg, K.C.) and Mr. Clifford Mortimer appeared for the King's Proctor ; Mr. W. N. Stable and Mr. J. M. Buckley for the petitioner.

The Attorney-General submitted that it was desirable that the Court should make a definite pronouncement as to the powers and duties of the King's Proctor in such circumstances as were disclosed in the present case. At the hearing Mr. Cotes-Preedy had presented a very remarkable story. He said that the petitioner was a foundling, supposed to have been born in 1901, who did not know her parents. She was given the name of Mary Lane by the Board of Guardians under whose care she came. In 1917, when quite a young girl, she became the mistress of a man whose name was not mentioned. A year later she met Mr. Sloggett and became his mistress, and she married him on November 5, 1920, the home being for the most part provided by her first lover, who for a time continued, it seemed, to be the chief means of the married couple's support. The first lover visited them, but apparently his old relation with the wife had ceased. In January, 1923, Mr. Sloggett was convicted at the Central Criminal Court on a charge of false pretences and sentenced to a term of imprisonment. Meanwhile Mrs. Sloggett had lived with her mother-in-law until she left the house because of differences between them in March, 1923. The same day she met an elderly man whose name was written down and not disclosed, who took her temporarily to a hotel, and adopted her as his niece. She continued to live with him as a member of his family, but it was stated that there had never been any suggestion of immoral relations between them.

On the release of Mr. Sloggett from prison in May, 1925, Mr. Martin, a brother-in-law of the petitioner, with the knowledge of her solicitors, saw Mr. Sloggett and made an offer of £300 for him to go abroad, and asked him for the name of the woman with whom he had committed adultery as revealed in the police court proceedings. The petitioner's solicitors found that the husband was arranging to commit adultery for her benefit and they declined to entertain such an arrangement. There were constant entries in their bills of costs relating to the matter. In a subsequent letter Mr. Sloggett said that he was offered £100 down, £100 on decree *nisi*, and £100 on decree absolute ; he said that he received £30 in all but withheld the information as to his adultery until he got full payment.

Then the wife, as she said everything seemed so hopeless, herself committed adultery, and sent her husband information of it in order to enable him to divorce her, and she told him to employ a certain firm of solicitors, and that his costs would be paid. Towards the end of 1925 there were further police-court proceedings against Mr. Sloggett, and in November of that year she learned of his adultery with the woman Turner. At the time she was afraid of publicity and delayed filing her petition for a year. Before the petition was filed she saw Mr. Sloggett at Pentonville Prison, and offered him £50 not to defend the case, as it would make things easier for her.

After the hearing the President said that three questions presented themselves : (1) Was there connivance by the petitioner in the adultery of her husband ? (2) Did these discussions amount to a

* Reported by William Latey, Esq., Barrister-at-Law.

scheme of collusion? (3) Was there conduct conducing to adultery on his part? He adjourned the case for the King's Proctor to be heard in argument upon it.

Continuing, the ATTORNEY-GENERAL said that he thereupon directed the King's Proctor to ascertain the facts, and as a result of the investigation he was prepared to adduce evidence showing that the adultery which the petitioner admitted having committed at the Hotel Russell on October 29, 1925, really occurred on November 24, 1925. Not only did she commit adultery in a moment of despair, but, owing to some difficulty in proving identification, she committed another act of adultery in order that the evidence should be complete. That was a very grave fact. He would not be justified in asking the Court to act on the evidence of the husband with regard to collusion, and the position now was that either the King's Proctor, in obedience to the direction of the Court, had to argue on a false state of facts or he had to bring the real facts before the Court before decree *nisi*.

The matter was governed by the Supreme Court of Judicature (Consolidation) Act, 1925, section 181, which did not alter the old law, and by section 183. Section 181 (2) and (3) read:—

"(2) Any person may at any time during the progress of the proceedings or before the decree *nisi* is made absolute give information to His Majesty's Proctor of any matter material to the due decision of the case, and His Majesty's Proctor may thereupon take such steps as the Attorney-General considers necessary or expedient:

"(3) If in consequence of any such information or otherwise His Majesty's Proctor suspects that any parties to the petition are or have been acting in collusion for the purpose of obtaining a decree contrary to the justice of the case, he may, under the direction of the Attorney-General, after obtaining the leave of the Court, intervene and retain counsel and subpœna witnesses to prove the alleged collusion."

The last subsection re-enacted section 7 of the Matrimonial Causes Act, 1860, which created the decree *nisi*. In *Hudson v. Hudson and Poole* (1 P.D., 65) it was suggested by Sir James Hannen, President, that only in the case of suspected collusion could the King's Proctor intervene during the progress of a divorce suit, and if there were any other material facts in question he must watch and take action if necessary after decree *nisi*. In that case the Queen's Proctor desired to intervene after decree *nisi* on the grounds of the petitioner's cruelty and adultery but not collusion. Sir James Hannen said: "If the information leads the Queen's Proctor to suspect collusion, then the direction of the Attorney-General will be that the Queen's Proctor should intervene in the suit. . . . But if the Queen's Proctor does not, from the information he has received, suspect collusion, the statute does not enable him to intervene at all in his official capacity."

In *Jackson v. Jackson* (26 *The Times* L.R., 476; [1910] P., 230) the view was expressed by Mr. Justice Bargrave Deane on behalf of himself and Lord Mersey, both great authorities on the practice of the Court, that before decree *nisi* the King's Proctor, on the direction of the Attorney-General, could, if necessary, call evidence. The Attorney-General of the day (now Lord Reading) did not feel disposed to take such action in that case, but in view of this judicial expression of opinion he (Sir Douglas Hogg) thought it necessary to ask for a judicial opinion on the respective responsibilities of the Attorney-General and of the King's Proctor. That officer now applied for leave to ask questions with the object of satisfying the Court that the petition had been falsely presented, and, as to the duty of the Attorney-General, he submitted that a Law Officer might be left to perform his duties with discretion. He referred to *Lautour v. Her Majesty's Proctor* (10 H.L. Cas., 685), which was a decision that there was power to award costs to the Queen's Proctor when he intervened as to collusion but not otherwise. The general power to award costs to the Queen's Proctor was provided in the subsequent Matrimonial Causes Act, 1860.

The ATTORNEY-GENERAL referred to *Masters v. Masters* (34 L.J., P. and M., 7), and said that *Sottomayer v. de Barros* (5 P.D., 94) was a direct decision that the Queen's Proctor might before decree *nisi* file pleas other than that of collusion. Thereby Sir James Hannen seemed to have given a decision conflicting with his previous one in *Hudson v. Hudson and Poole* (*supra*).

LORD MERRIVALE.—Matters before decree *nisi* were in issue in *Sottomayer v. de Barros* (*supra*). Sir James Hannen's observation in *Hudson v. Hudson and Poole* (*supra*) was *obiter*.

The ATTORNEY-GENERAL referred to *Drummond v. Drummond* (2 Sw. and Tr., 269), *Boardman v. Boardman* (L.R., 1 P. and D., 233), *Dering v. Dering* (L.R., 1 P. and D., 531), and *Gaskill v. Gaskill* (38 *The Times* L.R., 1; [1921] P., 425) in which the Attorney-General appeared as *amicus curiae* and called expert evidence on the question of the period of gestation, and Lord Birkenhead, sitting as a Judge, gave judgment on the basis of the specialist's evidence.

LORD MERRIVALE.—No question was raised as to the procedure. It was taken for granted.

In conclusion, the ATTORNEY-GENERAL said that though he submitted that the King's Proctor clearly had the right of intervening before decree *nisi*, if so directed by the Attorney-General, the last thing the former would desire was a decision making him a sort of poor respondent's solicitor to act whenever the respondent did not want to bear the expense. In all the cases in which the parties were before the Court the King's Proctor during the six months elapsing between decree *nisi* and decree absolute made inquiry and in proper cases adduced evidence. But he might intervene at an earlier stage, and if such a power existed there could not be a better case for its exercise than the present. The evidence had raised in his Lordship's mind some doubt as to connivance if not collusion. It might be that there was new evidence sufficient to prove connivance and not collusion as to the particular adultery. Therefore he asked leave to cross-examine the petitioner and call evidence from the Hotel Russell.

Mr. STABLE said that he offered no opposition on the petitioner's behalf, but would merely cite certain authorities. He referred to *Gethin v. Gethin* (2 Sw. and Tr., 406) and submitted that *Lautour v. Her Majesty's Proctor* (*supra*) was a decision negativing the Attorney-General's argument. The "steps" to be taken by the Attorney-General under the section of the statute cited above were confined to watching and inquiry. A possible escape from the dilemma caused by the ambiguity of the statutes might be found in section 178 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, which re-enacted section 29 in the 1857 Act imposing upon the Court the duty to satisfy itself both as to the facts alleged and as to any possible connivance or collusion and as to any countercharge against the petitioner. Possibly this gave the Court authority to direct the King's

Proctor to intervene during the progress of the suit, and then his costs would have to be borne by the public.

LORD MERRIVALE.—That may be so, as neither of the parties is here in the public interest. Some months ago a grave question arose as to territorial waters in the Admiralty Court in the case of *The Fagernes* (43 *The Times* L.R., 746 ; [1927] P., 311) and the Attorney-General was called in.

Mr. STABLE referred to *Higgins v. King's Proctor* and *King's Proctor v. Carter* (26 *The Times* L.R., 303 ; [1910] P., 151) and submitted that the position was as follows : The Court might at any time direct the King's Proctor to argue under section 181 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925. After decree *nisi* the King's Proctor, like any other member of the public, could for any material reason show cause why the decree *nisi* should not be made absolute, but intervention by the King's Proctor was confined to cases where collusion was alleged either alone or at least as one of the elements to be brought to the notice of the Court. If the King's Proctor took any part in a suit before decree *nisi* apart from this it could only be by virtue of section 178 (1) of the 1925 Act.

In answer to the PRESIDENT, Mr. STABLE said that in *Gaskill v. Gaskill* (*supra*) it was difficult to see upon the authority of what statute or rule the expert evidence was called.

In reply the ATTORNEY-GENERAL said that the real point was : If material facts, not collusive, were brought to his knowledge what "steps" was the Attorney-General to take ? Surely those which he thought expedient, and his object must be to ensure, in the public interest, that the Court should be satisfied that all the truth should be before it.

LORD MERRIVALE delivered a considered judgment as follows :—

Directions of the Court are asked in this case with a view to the determination of certain questions, which arise from time to time with regard to the powers and duties of the King's Proctor in relation to suits for divorce. The matter arises upon a reference to the King's Proctor made by the Court upon the hearing of an undefended suit wherein, upon inquiries by the Court, facts appeared which needed investigation.

In view of certain doubts expressed in the course of the proceedings in the case of *Jackson v. Jackson* (26 *The Times* L.R., 476 ; [1910] P., 230) and of the necessity for and importance of the regular conduct of proceedings in divorce the Attorney-General appeared for the King's Proctor and asked that, if the proposal should commend itself to the Court, facts resulting from inquiries made and to be made by the King's Proctor should be duly considered at the adjourned hearing of the suit and that for that purpose counsel nominated by the Attorney-General should be present.

Counsel appeared for the petitioner and stated that the petitioner did not oppose the application for an order for intervention of the King's Proctor in the present case—if the Court should think it admissible under the statutes—but submitted that upon the true construction of the Matrimonial Causes Acts, now contained in the Supreme Court of Judicature (Consolidation) Act, 1925, intervention of the King's Proctor before decree *nisi* is limited to cases in which he suspects collusion.

The words in the section which might, *prima facie*, appear to warrant action by the King's Proctor in cases like the present were—it was said—those of the enactment which appeared fourth in order among the provisions of section 7 of the Matrimonial Causes Act, 1860—the section introducing into the practice of the Divorce Court the decree *nisi*—and which is now embodied substantially in the Supreme Court of Judicature (Consolidation) Act, 1925, section 181.

Shortly put, the argument upon section 181 (2) and (3) is that expressed in the maxim *expressio unius exclusio est alterius*. The generality of the enactment that the King's Proctor may take such steps as the Attorney-General may direct was said to be limited by the subsequent provision for intervention in the suit if collusion is suspected. It was also said that there is no express authority for directions by the Court in a case like the present. The question for decision does not depend upon the precise effect on the powers and duties of the King's Proctor of the successive enactments in the section in question. Wider considerations are involved. It is necessary to take into account the subject-matter of the statute and the various provisions which relate to it. Foremost of them is the enactment originally contained in the Matrimonial Causes Act, 1857, sections 29 and 30, now embodied in the Supreme Court of Judicature (Consolidation) Act, 1926, section 178 (1) and (2), whereby on a petition for divorce it becomes the duty of the Court to satisfy itself so far as it "reasonably can both as to the facts alleged and also as to whether the petitioner has been accessory to or has connived at or condoned the adultery or not, and also to inquire into any countercharge which is made against the petitioner," and in case of an adverse finding against the petitioner in respect of either of the matters specified, or a finding of collusion between the parties, to dismiss the petition. Contrary to the ordinary course of trial of civil proceedings the Court is required not only to deal with issues raised by the parties but with independent matters deemed by the Legislature fit to be dealt with in respect of a larger interest, namely, that of the community.

No doubt has ever been thrown, so far as I am aware, on the peremptory character of the obligation which was cast upon the Court by section 29 of the Matrimonial Causes Act, 1857. Very soon after the passage of the Act a practical demonstration of its effect was given.

In a case of *Lloyd v. Lloyd and Chichester* (1 Sw. & Tr., 567) the Judge Ordinary, Sir Cresswell Cresswell, called for a bill of costs of one of the parties, called and examined a witness on a question which thereon arose, and adjourned the case for further evidence which was dealt with in like manner.

At the time of the hearing of *Lloyd v. Lloyd and Chichester* (*supra*) the statute which gave the King's Proctor special duties in relation to suits for divorce had not been passed. The need of some provision such as it enacted was, however, making itself felt.

In a case heard when the 1860 Act, by which this provision was made, was newly in operation, *Forster v. Forster* (3 Sw. & Tr., 151, at p. 156) the Judge Ordinary made these observations : "Soon after the Court was established it was suspected that attempts had been made to procure a dissolution of marriage by means of collusion, and there had been other instances in which both the party suing and the party sued were equally anxious to obtain a divorce, and without collusion the party sued abstained from setting up matter which might be set up in answer to the petition. It was in order to check these practices that the statute was passed."

So far as I know the power of the Court to require the services of the King's Proctor in aid of

the discharge of its duties under section 29 of the Matrimonial Causes Act, 1857, has never been seriously questioned. The matter is of course not of a purely judicial character, so far as the administration of justice *inter partes* is concerned. There are, however, references to it in reported cases. For example, when Sir James Wilde, afterwards Lord Penzance, had succeeded Sir Cresswell Cresswell, in a case of *Masters v. Masters* (34 L.J., P. and M., 7) the matter was discussed, and in a case of *Richards v. Richards* (21 L.T., 598) action such as is in question here was taken. Comparatively recent instances in reported cases are found in the action taken by Sir John Bigham, President, (Lord Mersey), and Mr. Justice Bargrave Deane in *Jackson v. Jackson* (*supra*) and by Lord Birkenhead, L.C., when he came to the assistance of the Court, in *Gaskill v. Gaskill* (38 *The Times* L.R., 1 ; [1921] P., 425). Both warrant the view that the several relevant enactments are properly regarded as enabling the Court to seek the aid of the King's Proctor in respect of questions of fact as well as those of the Law Officers of the Crown upon questions of law at any stage of a case.

Numerous cases were cited before me in which discussions arose as to the limits of the action of the King's Proctor where there was no antecedent direction of the Court. Some of these cases determine that he may intervene in respect of matters other than collusion (*Sottomayer v. De Barros,* 5 P.D., 94 ; *Drummond v. Drummond,* 2 Sw. and Tr., 269 ; *Boardman v. Boardman,* L.R., 1 P. and D., 233) and in his official capacity or as a member of the public (*Lautour v. Her Majesty's Proctor,* 10 H.L. Cas., 685), or they decide in what cases before the Judicature Act he had a statutory right to costs as against a party to the suit (*Masters v. Masters, supra*). Discussions which arose on these topics do not affect the more important of the matters now under consideration.

The report of the proceedings in *Jackson v. Jackson* (*supra*) indicates a doubt on the part of the Law Officers at that time as to the extent of the obligation cast then and now on the King's Proctor by the provisions of the statutes. No such doubt, however, was suggested in the more recent case of *Gaskill v. Gaskill* (*supra*). What was then done was consistent with the course taken by Lord Penzance at an earlier time, when perhaps the process of reference to the King's Proctor of matters requiring investigation, in aid of the discharge of the duties of this Court, was easier of comprehension.

The King's Proctor was, before the Divorce Court existed, an officer of the Court, as a solicitor is now, with defined duties in the ecclesiastical jurisdiction. Probate was dealt with in the Court of Admiralty. When a new duty and new powers were put upon him his relation to those courts was a matter of common knowledge. Remembrance of that fact helps to a better understanding of the cases before Lord Penzance.

The two questions to be dealt with now are whether the services of the King's Proctor were properly required by the Court in this case, and whether a direction that he should be represented at the hearing can properly be given. Regarding the first question in the light of the statutory duty of the Court to which the King's Proctor's office is ancillary, I have no doubt that the direction given him in this case was a valid direction. Giving the effect which I ought to give to the submissions made by the Attorney-General, what seems to me proper to be done now is that particulars should be given to the petitioner of the matters deemed proper to be brought by the King's Proctor to the attention of the Court, and that at the further hearing of the cause the King's Proctor should be represented in order that such facts or matters may be duly presented and considered.

[Solicitors—The King's Proctor ; Messrs. Westbury Preston and Stavridi.]

Court of Appeal.
(Scrutton and Sankey, L.JJ., and Romer, J.)

1928.
Mar. 7.

FRANCE v. J. COOMBES AND CO.*

Master and servant—Minimum wage—Trade board—Employment both on work of "specified trade" and on other work—Claim for wages at minimum rate during whole time of employment—Trade Boards Act, 1918 (8 and 9 Geo. V., c. 32), s. 8.

The plaintiff was employed by the defendants as "working manager" of a branch shop. During about half of the business hours he was employed in working at a trade for which minimum rates of wages had been fixed under the Trade Boards Acts, 1909 and 1918. During the rest of those hours he was engaged in cleaning the shop, keeping the books, selling goods by retail and performing under his contract of service other duties for which no minimum wage had been fixed.

Held, that the plaintiff was not, by s. 8 of the Trade Boards Act, 1918, to be deemed to have been employed during all the business hours on work for which a minimum rate of wages had been fixed, since the defendants had proved that he was present on their premises during those hours for some purpose, (*a*) unconnected with the work for which a minimum rate of wages had been fixed, and (*b*) other than that of waiting for work to be given to him to perform.

Judgment of MacKinnon, J. (44 *The Times* L.R., 126 ; [1928] 1 K.B., 457), affirmed.

This was an appeal by the plaintiff from the judgment of Mr. Justice MacKinnon (44 *The Times* L.R., 126 ; [1928] 1 K.B., 457) in favour of the defendants.

Mr. Herbert France, a Manchester boot and shoe repairer, claimed from Messrs. J. Coombes and Co., boot and shoe repairers, of Harrogate, Yorkshire, £363 odd which he said was owing to him as wages.

For about three years Mr. France was employed by the defendants as "working manager" of a branch shop at Openshaw, Manchester, under an agreement by which he agreed "to do all kinds of boot repairing and other work" required by the defendants ; to be responsible for all moneys and goods at the branch; to render to the defendants all accounts as required ; to account for and pay over all moneys of the employers ; to keep all books and documents ; and to keep open the branch shop and remain in attendance at it during business hours. The parties also signed a document headed "Rules for Managers of Branch Shops," which specified the business hours and provided that the shop must be cleaned before

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

10 o'clock, that cash must be balanced and the day-book entered up nightly; and that a balance-sheet must be completed every week.

During the currency of the agreement the defendants paid to Mr. France the full amount of the wages provided for in it. After he had left their employment, however, he brought an action, alleging that the amount of wages due to him was regulated by the Trade Boards Acts, that he had not received the sums provided by those Acts, and that the defendants were liable to pay him the balance.

The primary purpose of the branch shop of which Mr. France was manager was to repair boots and shoes brought there for that purpose by customers but there was also a retail trade of selling blacking, laces, and other "sundries." Mr. France was employed, on the average, during about half the business hours in actually repairing boots and shoes. During the rest of the time he served in the shop, attended to it, kept the books and accounts, and performed his other duties under the contract.

The boot and shoe repairing trade was a trade for which minimum piece rates and time rates had been fixed by the trade board for the industry under the Trade Boards Acts.

Mr. France based his claim on section 8 of the Trade Boards Act, 1918, which provides:—

"For the purpose of calculating the amount of the wages payable in the case of a worker employed on any work for which a minimum rate of wages has been fixed under the [Trade Boards Act, 1909], the worker shall be deemed to have been employed during all the time during which he was present on the premises of the employer, unless the employer proves . . . that he was so present for some purpose unconnected with his work and other than that of waiting for work to be given him to perform. . . ."

He said that, in view of that section, during the whole time that he was in the defendants' shop he was to be "deemed to have been employed" there in repairing boots and shoes, and that he was entitled to time and overtime minimum rates in respect of all the business hours which he spent at the shop.

The defendants contended that Mr. France was not to be deemed to have been acting as a boot and shoe repairer during all the time when he was at the shop, but that he was only employed on that work during the actual periods in which he was repairing boots and shoes, and for that he had been paid the full legal rates.

Mr. Justice MacKinnon held that the plaintiff was not, by section 8 of the Trade Boards Act, 1918, to be deemed to have been employed during all the business hours on work for which a minimum rate of wages had been fixed, since the defendants had proved that he was present on their premises during those hours for some purpose—(*a*) unconnected with the work for which a minimum rate of wages had been fixed; and (*b*) other than that of waiting for work to be given to him to perform.

The plaintiff appealed.

Mr. Schiller, K.C., and Mr. Malcolm Hilbery appeared for the appellant; Mr. Neilson, K.C., and Sir Robert Aske for the respondents.

Lord Justice Scrutton.—There are undoubtedly some difficulties in this case, and the fact that the Government department concerned has changed its mind in the course of years shows that the matter is not an easy one, but having listened with due care to the argument of Mr. Schiller, I am not convinced that the judgment of Mr. Justice MacKinnon was wrong, in fact I think it was right; and I would have been quite content to adopt that judgment, but in deference to the argument which has been addressed to us, and in order to show that I have formed an independent view of my own, I will deal with the substance of the matter.

The plaintiff is a workman named Herbert France. He brings this action and says that for a period of nearly three years he was paid less than he ought to have been paid under the Trade Boards Acts and rules made thereunder, and he says that he is short paid by a very substantial amount because, looking at the figures on his writ, for 15 weeks he was paid £2 15s. a week, for 13 weeks he was paid £2 18s., and for 12 weeks he was paid £3 3s. a week, and he says: "The result of that is that I was short paid by no less a sum than £363," which forces upon one's attention this fact, as appears by the figures, that the total takings of the shop in which he was working were for the greater part of the time that he was there only between £4 and £5 a week. His case is that the Trade Boards Acts entitle him to have 55s. or 58s. a week plus 48s.—rather more than £5 a week in wages alone—which, in addition to what the employers have to pay for materials, would have this result, if the plaintiff is right, that the shop would not show any profit, but a loss, during those three years when the plaintiff was there.

The nature of the case is this. The employers admit that the plaintiff was employed in boot repairing, and, further, I think that the workman is entitled to say that part of his work was that of a foreman or manager and boot repairer as defined by the Act. The employers say that the plaintiff was also employed in another capacity, that he was clerical manager, and financial manager, and an accountant or clerk, and a financial manager or clerk is not a boot repairer. They say that the plaintiff was there to do two things, that his wages for a full week of boot repairing are so much, and if he worked at boot repairing for a less period than a full week of 48 hours then his wages were to be proportionately reduced. The plaintiff himself was, according to his own evidence, only employed at boot repairing work for about four hours a day. Now, if the employers had added some infinitesimal amount of work which was not boot repairing, simply to evade the provisions of the Trade Boards Order, I hope the Courts would be clear-sighted enough to see through that and strong enough to defeat the attempt to evade the Act in that way. But it seems to me on the facts here, that it is quite impossible to say that that is the state of things revealed by the evidence.

The defendant firm, James Coombes and Co., and, if Mr. Schiller is right, a number of other employers, run their business in this way. They have a number of small shops, many of which, I gathered, only employ one man, and the man in that small shop has to do, firstly, the repairing that comes in; secondly, he has to keep all the accounts of the shop; and, thirdly, (this may or may not be substantial, according to the neighbourhood), he has to sell small sundries which are very often bought by people who bring boots for repair, and which do not constitute repairs. The result is that you have a composite servant who is devoting part of his time to repairs, a servant who is devoting part of his time to clerical and financial work and sales which do not come within the Boot Repairing Order.

The trade which is the subject-matter of this Trade Boards Order fixing rates is defined in this way: "The boot and shoe repairing trade, that is to say, the repairing, wherever carried on, of boots, shoes, slippers, and all kinds of leather footwear, including

the making of bespoke handsewn, riveted or pegged leather footwear"—I suppose no one would call making boots ordinary repair, but in this case they have called the making of boots repair—"but excluding the manufacture of leather footwear on a large scale, the repairing of saddlery and leather goods other than leather footwear, and the retailing of leather footwear." One does not quite see why anybody should have thought that saddlery came within boots and shoes, but the Department apparently did think that saddlery came within boots and shoes and footwear. The effect of the Order is that if you are there to sell goods you are not within the Order.

Then comes the part of the Order applying to this class of work—namely, repairing—and it says that the male workers, the journeymen, are to have for a 48-hours week wages varying according to the percentage of the cost of living from 65s. to 60s. and 57s., and a manager or foreman is to have a larger allowance, 80s., 74s., or 72s., which is the rate that the plaintiff got in this case. Then there comes a proviso as follows: "The weekly rates specified in this part of this schedule are based on a week of 48 hours and are subject to a proportionate reduction according as the number of hours of employment in any week is less than 48." That clearly contemplates that if a workman only works half of 48 hours at the specified work—24 hours—his fixed wages will be only half the figures that are mentioned.

There is in the Order a definition of a foreman or manager. It is as follows: "A foreman or manager is a worker who is employed in any branch of the trade specified in the Trade Boards (Boot and Shoe Repairing) Order, 1919, and (*a*) who exercises sole supervising authority over all journeymen exceeding three in number"—that is not this man's case because he alone was in the shop and only exercised supervision over himself and nobody else—or "(*b*) who (whether working alone"—that is this man's case, as he was working alone—"or with any other worker) under the terms of his employment, in addition to any work which may be required of him as a journeyman, fits up, or supervises the fitting up of the work and has control of the repairing or making and the technical direction thereof." Now that seems to me clearly to point only to a foreman who is doing technical direction, who is technically directing the work of boot repairing. It is not necessary for me in this Court to go fully into the mysteries of what fitting up work is, as any attempt to illustrate it only produces contradiction from the counsel concerned; at any rate, it is something which is a skilled part of boot repairing in the sense that it is directing the journeymen with regard to the repairing—the technical direction—and there is nothing whatever in the Order about the work of the shop manager, who manages the finance and accounts and the clerical work. That is treated as not being the work of boot repairing. The work of financing and boot repairing are quite different.

If you put a man into a shop where there are a dozen journeymen workers, and all he had to do was to book the orders, and see that the orders were paid for, to keep the accounts, to keep the lists of stock, to pay the money into the bank, to give information to the inspector who came round, and generally to do clerical and accountancy work, it seems to me quite clear that such a man would not be within the Repairing Order. Of course, these are questions of degree. It might be that the man did so little in this respect, that the Court would not trouble about it, as he was substantially a boot repairer. But when one looks at the agreement which regulates this kind of work, one sees that the plaintiff has a very substantial amount of clerical and financial work to do. Every day, as I gather, he has to prepare and fill up a form of the work which is finished during the day, and the wages for the day, the number of hours employed on the work; and every week he has to fill up another and rather complicated form, a form which does not appear to be very easy to fill up, because in this particular form which has been handed to me of this particular man the inspector has found three mistakes, and has had to correct them. I can quite see that it is a form in which it is very easy to make mistakes when you fill it up. There are a number of matters that have to be filled up of various sorts, and that has to be done every week. Every week that form has to be filled up, the money has to be checked and paid into the bank, and every fortnight a further form has to be made out of stock in hand, repairs in hand, finished and unfinished, and consequently there appears to me to be a very substantial amount of clerical work to be done by this man which does not come within the Boot Repairing Order at all.

In addition to that, there is a class of work which Mr. Schiller says in this case is small, but which, according to the district, may be small or large; that is to say, this man has to act as salesman of a number of articles apart from repairs, and he has to keep his shop open for a certain time in order to sell these things, which are called sundries. When you understand that that is the position, it appears to me that you have got a man who is doing two distinct kinds of work, not substantially one kind of work with a colourable addition to defeat the Trade Boards Order, but two distinct kinds of work, and this man comes and says: "My boot repairing work takes up only four hours a day." It seems to me, subject to the consideration of section 8, to which I am now coming, that if once you get a case where he cannot say: "I am entitled to the full wages for boot repairing" because, on his own evidence, he is not working 48 hours a week, or anything like it, on boot repairing, but is working only about half that time—namely, 24 hours—if that is the correct view, then there is no dispute that he has not been underpaid.

Now comes the only question which, in my mind, raises any difficulty, and that is the question in regard to section 8 of the Act of 1918. That is the only point on which we desired to hear Mr. Alexander Neilson. The section provides: "For the purpose of calculating the amount of the wages payable in the case of a worker employed on any work for which a minimum rate of wages has been fixed under the principal Act, the worker shall be deemed to have been employed during all the time during which he was present on the premises of the employer, unless the employer proves that he was so present without the employer's consent express or implied"—that does not arise here, because no doubt he was in the shop by the employers' consent—"or that he was so present for some purpose unconnected with his work and other than that of waiting for work to be given to him to perform. . . ."

The only question is: Does the employer prove, when he proves that the man has to be there so many hours a day for clerical work, financial work, and for the purpose of selling sundries, that he is present for some purpose unconnected with his work? I think he does. I agree that it is a nice question, but I do not think that when Parliament was using that phrase it was thinking that if the workman is on his

employer's premises for some purpose which is not boot repairing, but which has some remote connexion with it in the sense that if the workman sells a bootlace, or anything that relates to the same subject matter, namely, a boot, therefore it is connected—I do not think that Parliament was thinking of anything so remote as that. I think Parliament was thinking of work which could be really said to be connected with the technical work of repairing, involving manual labour. One knows that, fortunately or unfortunately (I do not express an opinion which it is), clerical work is paid at a much lower rate than skilled manual work. If you compare the wages of a skilled manual labourer with the wages of a teacher, or the wages of a curate, or the wages of people who do skilled head work, you will find that the skilled manual labourer has very much the best of it, and the sort of work added here does not seem to me in any degree work connected with the technical work, but it is work of quite a different character. That seems to me to answer the only question left. It is said that this man must stay in the shop because he is waiting in case a repair comes in. That is true, but he must also stay in the shop because he has been engaged to do that work which is not repairing, and he could not, if he knew that no repairing was coming in, shut up the shop, go away, and say : "I shall not stay any longer," because he has contracted to stay in the shop for work which appears in the agreement that he has entered into.

That disposes of the main question in this case. The man was there employed in doing work not within the Boot Repairing Order, and, having regard to the provision that if it does not occupy 48 hours a week his fixed wages are to be reduced, he has not been underpaid, in the amount that he has had.

It is strictly unnecessary to consider the remaining matter which was mentioned, and that is whether, assuming that you are to take the whole amount into account, you could not deduct the time occupied for meals. The provisions relating to meal times are that the workman has six hours for meal times during which he is not to do any boot repairing, he is not to sell sundries, and the only thing he can be required to do is to take an order if it comes in for boot repairing, or take payment from a person who comes in to get finished repairs. That not being work which is, in my view, within the Order, it follows that if there were any question of underpayment at all he could not have claimed for the meal hours mentioned in this agreement.

For these reasons I think that the appeal fails, and I am the more confident in coming to that conclusion because I think it would be rather a scandal that a man could stay at his work for three years, and then at the end claim this amount as underpayment, whereas if he had claimed for underpayment at the beginning of his work, or if his Union had claimed it at the beginning of his work, the shop would have been shut up at once, and he would have lost the whole of his employment. I think that, besides being according to law, the decision that Mr. Justice Mackinnon came to worked substantial justice.

Lord Justice Sankey said :—The plaintiff's claim is against the defendants for a sum of £363 10s. 6d., being the balance of wages which he alleges is due and owing by them to him in accordance with the Trade Boards Acts, 1909 to 1918, in respect of his employment with the defendants as manager of the defendants' boot repairing business at Ashton Old-road, Openshaw, in the City of Manchester. To that claim the defendants put in a defence, one of the paragraphs of which is this :—They say : "The plaintiff was employed by the defendants on the terms of an agreement in writing between them dated January 3, 1923, and not otherwise. The defendants refer to the said agreement for its terms." Then they say : "The defendants have paid to the plaintiff all wages and other moneys payable under the said agreement." The plaintiff in his reply admitted the agreement, but said that by reason of section 6, subsection 5, of the Trade Boards Act, 1909, that agreement is void. Section 6, subsection 5, of that Act is in the following terms : "Any agreement for the payment of wages in contravention of this provision"—that is, of that Act—"shall be void." The plaintiff also said that the agreement was in contravention and was void, and, therefore, could not be relied upon.

Now it is necessary to look at the agreement in question. It is stated to be between Messrs. James Coombes and Co. of the one part and Mr. Herbert France of the other part, and it provides in paragraph 1 : "The employer shall employ the employee and the employee shall serve the employer from the date hereof as working manager at the branch shop of the employer at Ashton Old-road, Openshaw, Manchester," and it refers to the printed rules and conditions for managers which are annexed to the agreement and signed by both parties, and which are alleged to form part of the agreement. Now when you look at the agreement itself as distinct from the printed rules and conditions for managers which are to form part of the agreement it is obvious that Mr. France has a number of duties of very different kinds to perform. First and foremost he agreed in paragraph 2 (*a*) "To do all kinds of boot repairing and other work required by the employer and devote the whole of his time, ability and attention to the employer's business." Now stopping there for a moment, it is clear that in respect of that paragraph 2 (*a*) he is to do manual work—he is to do all kinds of boot repairing and other work required by the employer. It may be that he does it merely with his hands ; it may be that he does it sometimes with the assistance of some machinery, but in addition to that work, under sub-paragraphs (*f*), (*g*), and (*h*), he has a very different sort of work to perform. Under sub-paragraph (*g*) he has "To keep all business books and documents on the premises at which he is employed," and under (*h*) he has "To keep open the branch shop and remain in attendance thereat during business hours."

Upon the agreement itself, it is therefore clear, as it appears to me at any rate, that Mr. France is engaged in a dual or double capacity ; he has the manual work of repairing all kinds of boots, he also engages to keep the branch shop open and to remain in attendance during business hours, and to keep all business books and documents on the premises at which he is employed. There is evidence, too, that a small amount of sales of accessories went on.

Now turning to the rules to which I have referred, they are headed : "Rules for Managers of Branch Shops," and those rules contain a variety of obligations with regard to keeping books and accounts, paying money into the bank and so forth. I am not going to read all of them, but I will read two as a specimen, and refer to others. Rule 7 is : "Cash and tickets must be balanced and day book entered nightly. In case accounts do not balance when official checks same or if any boots are found in the shop which are not entered in the repairs book, or

incorrect charges made or wrong class or size of sole leather used according to price charged, managers will be liable to instant dismissal or suspension." Similar rules are 10, 11, and 15. Rule 18 refers to how to dress the shop window. It is headed : "Window dressing." Rule 19 is with regard to the amount to be charged for repairs. There, again, it is obvious that Mr. France is employed in two capacities, namely, the capacity of boot repairing and the capacity of keeping the accounts and keeping open the shop at the place in question.

It is necessary, before turning to the law, to look for a moment at the evidence. Mr. France, the plaintiff, was there for three years. He left at the end of three years, and then brought this action. What he said in his evidence was : "On the average when I was there the hours when I was at the bench were less than those when I was not at the bench. Of my 63 hours in a week, 24 hours would be at the bench and 39 hours not." I read that as saying that he was employed in his clerical work, as distinguished from the manual work, rather more than half his time. Now, turning to the various Orders and Acts of Parliament which govern this case, it is necessary first to refer to the Order which brings this particular trade within the Trade Boards Acts. It is "Statutory Rules and Orders, 1919, No. 543." The then Minister of Labour, Sir Robert Horne, under the powers that he had, added this to the trades to be governed by the Trade Boards Acts : "The boot and shoe repairing trade, that is to say, the repairing, wherever carried on, of boots, shoes, slippers, and all kinds of leather footwear, including the making of bespoke handsewn, riveted or pegged leather footwear, but excluding the manufacture of leather footwear on a large scale, the repairing of saddlery and leather goods other than leather footwear and the retailing of leather footwear." That being the Order which brought this trade within the operation of the Trade Boards Acts, various regulations were issued from time to time, and the one with which we are concerned now was called D (19), D (20), and D (21), which was effective from August 28, 1922. That lays down certain rates of wages, and certain definitions relating to the various people employed in the trade. Section 6 of that Order provided as follows : "The weekly rates specified in this part of this Schedule are based on a week of 48 hours"—this is the important part—"and are subject to a proportionate reduction according as the number of hours of employment in any week is less than 48." Then section 3 of Part IV. defines what a foreman or manager is. It says : "A foreman or manager is a worker who is employed in any branch of the trade specified in the Trade Boards (Boot and Shoe Repairing) Order, 1919, and (*a*) who exercises sole supervising authority over all journeymen exceeding three in number (excluding the foreman or manager) working in the same shop or department ; or (*b*) who (whether working alone or with any other worker) under the terms of his employment, in addition to any work which may be required of him as a journeyman, fits up or supervises the fitting up of the work, and has control of the repairing or making and the technical direction thereof." Now stopping there for a moment, I desire to point out, although my Lord has already done so, that that appears to refer to the manual part of the work. It says : "In addition to any work which may be required of him as a journeyman, fits up or supervises the fitting up of the work, and has control of the repairing or making and the technical direction thereof."

Now those being the relevant Acts of Parliament, Rules and Orders, and the facts applicable to this case, what are the contentions of the parties ? On the one hand, Mr. France says : "The agreement is void, the defendants cannot rely upon it because it is in contravention of the Act of Parliament, and I rely upon section 8 of the Trade Boards Act, 1918." He also says : "By that section I must be deemed to have been employed at the minimum rate of wages during all the time that I was present at the premises of the defendants. I was present a great many hours ; it is perfectly true that during part of that time I was doing very little as distinguished from manual work, but I must be deemed to have been employed at the minimum rate of wages during all the time that I was present on the premises of the defendants unless they prove (1) that I was present for some purpose unconnected with the work, and (2) for a purpose other than that of waiting for work to be given me to perform" ; and he adds "while I was not employed on the actual repairing of boots I was attending to customers, and was keeping the books and minding the shop" ; and he says further : "This cannot be purposes unconnected with my work as a boot and shoe repairer."

Now the contention on behalf of the defendants is this : They say that the real question is during what time he was acting as an actual boot and shoe repairer, not during what time he was a member of the boot and shoe repairing trade. They go on to say that he was only actually engaged in repairing boots and shoes during about half the time for which he was paid at the shop, and he has been paid the minimum rate of wages in respect of that time.

Those being the two contentions of the parties, it appears to me that you may have a case where, beyond all question, the man was employed at work which comes within the Trade Boards Acts. On the other hand, as it appears to me, you may have a case where the man was employed for part of his time on such an employment, but for the remainder of his time had nothing at all to do under that employment. Between those two extremes you may have a border line case, and border line cases always lead to difficulties. In my view this is a border line case, and I think it is a difficult case, but the learned Judge, in my view, has come to a correct determination with regard to it. He says in his judgment : "The real question here, I think, is whether the plaintiff can say that he was employed in this trade of boot repairing during the whole time that he was in that shop, or whether the defendants can say to the plaintiff : You were only employed during part of it, during the time when you were in fact repairing boots and shoes."

We are not concerned, as I think, here, on the evidence, with any question of waiting for work, and the real difficulty in the case is the application of section 8 of the Trade Boards Act of 1918, to which my Lord has already referred. I agree with the learned Judge in the Court below that that contemplates the case of a man who is definitely employed during the whole of his time to do boot and shoe repairing, and to do it all the time, so long as there are boots and shoes to be repaired.

Then we have to deal with the difficulty in section 8, which is concerned with the onus of proof which is placed upon the employer, because the man is "deemed to have been employed during all the time during which he was present on the premises of the employer, unless the employer proves . . . that he was so present for some purpose unconnected with his work, and other than

that of waiting for work to be given to him to perform, and in the case of a worker employed on piece work shall be deemed during any time during which he was so present and was not doing piece work to have been employed at the general minimum time-rate applicable to workers of the class to which he belongs."

Having regard to the dual capacity in which the plaintiff was engaged, and to which I have already referred, having regard to the numerous stipulations in the agreement which are closely connected with boot repairing simply, and having regard also to all those various stipulations to which I have referred, which are of a wholly different character, and which compel the employee to do all clerical work, and to keep the books—we have had the advantage of seeing specimens of the wages list which a gentleman in his position has to prepare and send up, and also the balance-sheet which he has to prepare and send up—I have come to the conclusion that there was an entirely different employment here in respect of part of the man's time from that which comes within the regulations of the Trade Boards Acts.

There was the obligation on him, moreover, to keep the shop open during business hours. It is, to some extent, a question of degree, and, to some extent, a question of fact, but having regard to the proper interpretation of the sections of the Act of Parliament, and giving the best consideration that I can to the documents in the case, and to the facts as found by the learned Judge, with regard to the hours of this gentleman's employment, I have come to the conclusion that the employers have discharged the onus placed upon them by section 8 of the Act of 1918. In my view the judgment was right, and the appeal should be dismissed.

MR. JUSTICE ROMER.—I agree that the appeal should be dismissed for the reasons that have been given by the Lords Justices, and I only desire to add a very few words.

It may, I think, be taken that the plaintiff was a foreman or manager within the meaning given to the words of section 3 of Part IV. of the Order in question, because he was a worker employed in the trade specified in the Order, and he, as he was working alone, fitted up or supervised the fitting up of the work, because there was no one else to do it, he had control of the repairing, or making the things in relation thereto, because nobody else had that control, but I think it is reasonably plain that all the work that the plaintiff did as foreman and manager must have been done within the hours during which he was—to use the phrase used in the evidence—at the bench.

The other observation that I wish to make is one in relation to section 8 of the Act of 1918. It is to be observed that, in order to escape from the provisions of that section, the employer has not to prove that the employee was present exclusively for some purposes unconnected with his work, and other than that of waiting for work to be given to him to perform. It is sufficient, as I read the section, if the employer proves that one of the purposes (that means one of the substantial purposes) for which the employee was present on the premises was a purpose which was both unconnected with his work, and other than that of waiting for work to be given to him to perform. Now if the question is asked : For what purpose was the plaintiff present on the premises during the hours when he was not working at the bench, the answer must be that he was present for the purpose specified in his agreement of service. When one looks at the agreement of service, one finds that he was employed, not only for the purpose of discharging the duties of foreman and manager but also for the purpose of discharging the duties which, in my opinion, were wholly unconnected with his work as foreman and manager.

[Solicitors—Messrs. Church, Adams, Tatham, and Co., for Messrs. Cobbett, Wheeler, and Cobbett, Manchester ; Messrs. T. D. Jones and Co., for Messrs. Topham and Phillips, Harrogate.]

K.B. Div. (Wright, J.) 1928. Mar. 23.

SUNDERLAND AND SOUTH SHIELDS WATER COMPANY v. HILTON AND OTHERS.*

Water — Supply — Premises consisting of two unconnected floors — Whether each floor a separate house—One communication pipe—Failure of one occupier to pay water rate—Cutting off water from both floors—South Shields Water Act, 1921 (11 and 12 Geo. V., c. xlvii.), s. 36.

By s. 36 of the South Shields Water Act, 1921, "The company shall not be bound to supply more than one house by means of the same communication pipe and they may if they think fit require that a separate pipe be laid from the main into each house supplied by them with water."

Certain premises in South Shields consisted of a building of two floors wholly unconnected and let to separate occupiers, who had the common use of a yard with a washhouse and other conveniences. A single pipe brought water into the premises.

Held, that as the common user of the yard was essential for the reasonable enjoyment of the premises they were not separate houses for the purposes of the section, and the water company was not entitled to cut off the supply to both floors if the occupier of either floor failed to pay his water rate.

In this case a dispute had arisen between the Sunderland and South Shields Water Company and the owners and occupiers of certain premises in South Shields. By agreement between the parties a special case had been stated for the opinion of the Court.

Mr. W. T. Monckton appeared for the owners and occupiers ; Mr. W. Hedley for the water company.

By a private Act, the Sunderland and South Shields Water Act, 1921, the Waterworks Clauses Acts, 1847 and 1863, were incorporated in the private Act so far as they were not inconsistent with the Sunderland and South Shields Water Acts, 1852 to 1921. By section 36 of the Act of 1921 it was provided that :—

"The company shall not be bound to supply more than one house by means of the same communication pipe and they may if they think fit require that a separate pipe be laid from the main into each house supplied by them with water."

The premises in question consisted of a building of two floors, each floor having its own separate

* Reported by W. B. THOMPSON, Esq., Barrister-at-Law.

entrance and being entirely without connexion with the other floor. At the back of the building was a yard, to which each floor had a separate access. In the yard were a washhouse and other conveniences, which were used in common by the occupiers of the separate floors. On the farther side of the yard was a wall in which there was a door leading into a back street. The water main passed along the back street, and a single pipe brought water into the premises. A branch from the pipe supplied the conveniences and a tap in the yard, which was used by the occupiers of both floors. The pipe went on to the scullery on the ground floor and passed up to the scullery on the floor above.

In November, 1926, the occupiers of both floors were in arrears with their water rates, and the company, under section 74 of the Waterworks Clauses Act, 1847, cut off the supply of water. On January 10, 1927, the occupier of the ground floor left the premises and the arrears then due from him had never been paid. The ground floor was then relet by the owners. On January 17, 1927, the occupier of the upper floor paid up his arrears of water rate and half the cost of cutting off and disconnecting the supply. On January 24, 1927, the occupiers of both floors applied to the company for a supply of water, but the company refused to give it. On March 4, 1927, the company informed the owners of the premises that the water had been cut off and that the supply would not be renewed unless they installed at their own expense a separate pipe to each floor, or undertook to be responsible for the water rates instead of the occupiers.

On May 11, 1927, the occupiers made a formal demand for a supply of water, but the company refused to supply it until their demands had been complied with, contending that each floor was a separate house within the meaning of section 36 of their Act of 1921, and that persons entitled under section 53 of the Waterworks Clauses Act, 1847, to demand a supply could only do so subject to the provisions of section 36 of the Act of 1921.

On the hearing of this special case the company claimed a declaration that the two floors were separate houses within the meaning of section 36 and that they were entitled to cut off the water supply to the premises by the common communication pipe if and when the occupier of either floor failed to pay his water rate.

Mr. Justice Wright delivered the following considered judgment*: This is an action brought by the Sunderland and South Shields Water Company, as plaintiffs, against certain defendants. The defendants are, first, the owners of certain premises in South Shields, Nos. 254 and 256, South Palmerston-street, and, in addition, the two occupiers of those premises at the present time. The writ was issued by the plaintiff company claiming certain declarations, but the matter comes before me on a special case stated by agreement between the parties under Order XXXIV., Rule 1. The question which I have to decide, I am told, is one of considerable importance to water companies in general, because it involves the construction of a section which is found in this Act and which is also found in the model clauses for water companies and found in many Acts of water companies throughout the country.

The case was very fully argued before me by the able counsel on either side, but, as I was told that the intention of the parties was not to appeal, whatever my decision might be, I thought it desirable to reserve my judgment, as I have actually done.

The facts in question are comparatively simple. The premises are described in the special case, which is accompanied by a plan. There is one building, which in ordinary parlance would be called a house under a single roof, and it consists of two floors, the ground floor and the first floor. Each floor is quite separate, so far as access or communication is concerned, from the other floor. The ground floor has its own door of entrance from the front street, and the first floor also has a separate door opening from the front street and leading up a flight of stairs to the rooms on the first floor. On each floor there are a bed room, a living room, and a scullery. On the first floor there is also a pantry. At the back of the building there is a yard, there is a separate door on the ground floor into that yard, and from the first floor there is also a separate door leading down a flight of steps into the yard. The yard has an outer wall with a single door opening on to a back street. In the yard there is a washhouse with a copper; that washhouse is common to the occupiers of both flats. There is also a w.c. which is common to both occupiers. There are two coal-houses, one for each occupier. The yard is enjoyed in common by both occupiers, and the only mode of exit for both occupiers to the back street is through the single door out of the yard.

The water supply is arranged in this way. The main is in the back street, and the company have a branch from the main which goes towards the premises and stops just short of the back wall of the yard; there it is joined up to a communication pipe belonging to the premises; that is a single pipe which goes through the yard, and there are branches from it, first of all to the w.c., secondly to a tap in the yard which is in the common use of both occupiers, and then there is a further branch which goes to the scullery on the ground floor and which is also continued up through that floor into the first floor and is carried to a tap in the scullery on the first floor. It follows from that description that so far as the supply of water is concerned there is one communication pipe communicating with the main; there are two branches from that pipe, common to both flats (as I shall call the two floors of the building), and then there are two separate water supplies drawn from the common communication pipe, one to the scullery on the ground floor, the other to the scullery on the first floor. I think that is all that is material for me to refer to in the description of the premises.

In November, 1926, the then tenant of the ground floor was one Ward, and the tenant of the first floor was the defendant Robertson. They had both fallen into arrears in the payment of their water rate, and the plaintiff company thereupon, under their powers under their Acts, cut off the water supply by disconnecting the pipe at a point in the back public street outside the premises. On January 10, 1927, Ward gave up his tenancy, and he has not paid to the plaintiff company the arrears of water rate due from him. The ground floor was thereupon relet by the owners to the defendant Calder. On January 17, 1927, the defendant Robertson paid all arrears of water rate, together with a sum in respect of the expense of cutting off the water supply and of reconnecting the supply, and thereupon an application was made to the plaintiff company by the defendants Calder and Robertson, as the occupiers of parts of a house, for a supply of water to the premises. That application was refused. On March 4, 1927, the

* Reported by J. W. Hall, Esq., Barrister-at-Law.

plaintiff company sent to the defendants, the owners of the premises, a notice informing them that the water supply had been cut off and stating that the plaintiff company were not prepared to reconnect the supply unless the owners either installed a separate communication pipe to each of the said dwellings or flats, at their own expense, or agreed to be themselves responsible for the payment of the water rates in respect of the premises instead of the occupiers. I ought to say that these premises are each of greater annual value than £10, and, therefore, the water rate under the Acts is payable by the occupiers and not chargeable to the owners. On May 11, 1927, a formal tender of one quarter's water rate in advance for each of the said dwellings or flats, together with a sum sufficient to meet the balance of the plaintiffs' costs of cutting off and reconnecting the water supply to the said premises, was made to the plaintiff company on behalf of the defendant Calder, the defendant Robertson having already paid his share, and a formal demand was made on their behalf for a supply of water to the said premises on the same date, but the plaintiffs refused to reconnect the said communication pipe to the main or to give the defendants Calder and Robertson a supply of water for the premises, on the grounds which have now to be considered.

They issued their writ, and in the writ and in the special case, their contentions and claims are set out in this way. I think I must read them. They claim, in effect, the following declarations : " (1) That each of the said two separate dwellings or flats is a separate house within the meaning of section 36 of the Sunderland and South Shields Water Act, 1921, and that the said premises comprise two houses within the meaning of the said section. (2) That the persons who under section 53 of the Waterworks Clauses Act, 1847, are entitled to demand a supply of water from the plaintiff company are only entitled to receive such supply subject to the provisions of the said section 36 of the Sunderland and South Shields Water Act, 1921. (3) That the defendants Calder and Robertson in the circumstances of the case are not entitled to have the said common communication pipe reconnected to the plaintiffs' said main. (4) That the plaintiff company are entitled to cut off the supply of water to the said premises by means of the said common communication pipe if and when either of the said tenants fails to pay his water rate." The plaintiff company's right to these declarations is contested by the defendants, and I must now consider what the result of these respective contentions is.

The section which I primarily have to consider is section 36 of the Sunderland and South Shields Water Act, 1921, which is in these terms : " The company shall not be bound to supply more than one house by means of the same communication pipe and they may if they think fit require that a separate pipe be laid from the main into each house supplied by them with water." The question, therefore, which I have to determine is whether these premises, Nos. 254 and 256, South Palmerston-street, being such as I have described, constitute for the purposes of the Act one house with two parts separately occupied, or whether they constitute two houses within the meaning of the section.

It will be convenient to refer to some other sections of the Acts under which the plaintiff company carry on their undertaking. The principal Act of the company is the Sunderland and South Shields Waterworks Act of 1852. That Act incorporates, with an immaterial qualification, the Waterworks Clauses Act of 1847. By section 60 of this principal Act it is provided that " the company shall, at the request of the owner and occupier, furnish to every occupier of a private dwelling-house or part of a dwelling-house within the limits of this Act in any street or place near to which any service pipe of the company shall be laid, a sufficient supply of water for the domestic uses of every such occupier," at certain rates ; and section 62 deals with the supply of water to water-closets.

Certain sections of the Waterworks Clauses Act, 1847, have been referred to. Section 43 imposes penalties on the plaintiff company for failing to furnish a supply of water to any owner or occupier entitled under the Acts to receive a supply of water, subject to the corresponding obligations on the part of such owner or occupier. Section 48 deals with communication pipes, and it provides that any owner or occupier of any dwelling-house or part of a dwelling-house within the limits of the Special Act who shall wish to have water from the waterworks brought into his premises and who shall have fulfilled the obligations resting upon him, may, by taking the appropriate steps, obtain communication with the pipes of the plaintiff company ; and the sections which follow contain provisions for giving effect to that right. Section 53 provides that every owner and occupier of any dwelling-house or part of a dwelling-house within the limits of the Special Act, shall, when he has laid such communication pipes as are dealt with in the previous sections, and has paid or tendered the water rate payable in respect thereof, according to the provisions of the Acts, be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes. Section 69 provides that, when several houses or parts of houses in the separate occupation of several persons are supplied by one common pipe, the several owners or occupiers of such houses or parts of houses shall be liable to payments at the same rates for the supply of water as they would have been liable to if each of such several houses or parts of houses had been supplied with water from the works of the undertakers by a separate pipe. Then there are further provisions with respect to the recovery and payment of water rate, but I need not further refer to them.

One other section of the plaintiff company's system of Acts, however, I think I ought to mention ; that is section 30 of the Sunderland and South Shields Water Act, 1868, which provides : " All water rates or sums due to the company, and all damages, costs, and expenses by this or the company's former Acts, or any Act incorporated therewith, directed to be paid, and the amount whereof shall not be disputed, may be levied by distress, and any justice on application may issue his warrant accordingly after the defaulter has been duly summoned." That is a right of distress ; but there is a further right which is very material to this case, and which is set out in section 74 of the Waterworks Clauses Act, 1847. That entitles the plaintiff company, on neglect or failure of the persons supplied to pay the water rate, to stop the water from flowing into the premises in respect of which such rate is payable, by cutting off the pipe to such premises and, in addition, gives them the right of recovering the expenses of so doing. That is a right, obviously, of very great importance in addition to the right of distress, because it enables the plaintiff company to withhold a supply of water from occupiers who have failed to pay the water rate, and in such a case, when the water has been cut off by disconnecting the pipe, the plaintiff company are not bound to restore the communication and

restore the flow of water except on being paid the arrears and the other expenses which are due to them.

That being the general position apart from section 36 of the Act of 1921, I have now to consider whether the plaintiff company are justified in the contention which they are setting up, and which in effect is a contention that the premises in question constitute more than one house, in fact, two separate houses within the meaning of section 36, and that they are not bound to supply any water to these premises except on the basis that they are separate houses and with a separate communication pipe to each house. I have been referred to certain cases and to certain statutes which it has been suggested throw some light upon the decision of this question; but in my judgment the guidance which these cases give, or these other statutes give, is somewhat remote. The word "house," it is said, is an ambiguous word. It is perfectly true that in different contexts it admits of several different meanings; that, however, does not make the term ambiguous. A term is not ambiguous merely because it requires careful consideration and some investigation to know what is its true meaning in any particular connection. In this particular case what I have to determine is the meaning of the word "house" in this section, having regard to the purposes of the section and the other phrases and expressions in which the term is used in other parts of the Acts of the plaintiff company.

I adopt, as the method by which I have to approach this question, the language of Lord Halsbury in the case of *Grant v. Langston* (16 *The Times* L.R., 415; [1900] A.C., 383, at p. 390), where he says, with reference to the word "house": "The word is no longer the expression of a simple idea; but to ascertain its meaning one must understand the subject-matter with respect to which it is used in order to arrive at the sense in which it is employed in a statute." To the same effect, Sir George Jessel, M.R., in the case of *Attorney-General v. Mutual Tontine Westminster Chambers Association, Limited* (1 Ex. D., 469, at p. 476), said this, also with reference to the meaning of the word "house": "Now the line of argument adopted on the part of the appellants was this: It was said that the Court in construing other legal instruments, other Acts of Parliament, directed to a different subject-matter and with another context, had come to the conclusion that a portion of what in ordinary language is a house—a set of apartments in a house, or a room or two in a house—might properly come within the description 'house' as used in those other legal instruments or Acts of Parliament. That argument seems to me inadmissible, because it is attempting to construe the instrument in question, not, as we ought to do, by reference to its own meaning and contents as a whole, but by reference to other instruments and other Acts of Parliament to which it has no relation." Bearing these statements of principle in mind, I have to ask myself, What is the meaning to be attached to the word "house" in the Acts of this water company? Now the subject-matter of these Acts is the supply of water, and I have to ask myself whether, taking the premises as they are, and as they have been described, they constitute for the purposes of water supply one single unitary system which can only be fed by one single communication pipe, or whether they can be split up and divided into two separate and distinct premises each of which can be called a house and each of which can be the subject of a separate and distinct water supply by means of a separate pipe. It was contended for the plaintiffs that I ought to hold that each flat was a separate house, on the ground that each flat was divided from the other flat completely, though horizontally, and was entered and left by separate modes of entrance and egress, and was as much a self-contained whole as if the two flats instead of being superimposed were built side by side; and that each had its own water supply—namely, in the scullery—and that each such water supply was capable of being made the subject of a separate communication pipe and ought so to be made under section 36 of the Act. If these were all the relevant considerations I would be well disposed to accept these contentions; but these arguments ignore what is an essential and integral part of the problem—namely, the fact that the premises enjoyed by each tenant were not limited to the two separate flats, each of which is enjoyed by one of the tenants, but that the premises also included the common yard with its common mode of egress into the back street; the washhouse, which required a separate supply of water and had a separate supply of water provided for it from the adjacent common pipe; the w.c., which was enjoyed in common and, again, had a separate water supply; and, in addition, the whole area of the yard, which is a necessary appurtenance of the premises. Having regard to these considerations I find it impossible to divide the tenements (if I may so call them) into separate, distinct, and self-contained portions, each the subject of a separate water supply. The yard, the washhouse, the common tap, the w.c. are all essential parts of the tenements enjoyed. They are held in common, but they are necessary, according to the ordinary requirements of life in such a dwelling, for domestic purposes and for the reasonable and necessary enjoyment of the premises which are the subject of the occupation. It would be impossible to cut off the water supply of one tenement without cutting off the water supply of the other; and that would be so, even though there was a separate communication pipe from the main to each flat, because each occupier would still be entitled under the plaintiff company's Acts to the use of water for the ordinary domestic purposes which are involved in the use of the washhouse and the w.c. In those circumstances I am quite unable to find that there are here two separate and distinct houses for the purpose of the plaintiff company's Acts.

I have been referred to part of a section in the Public Health Act, 1875, as supporting the contention that the presence of the common w.c. was not material and did not affect the decision of the question whether the two flats were separate and distinct houses; that is the proviso to section 36 of the Public Health Act, 1875, which is in these terms: "Provided that where a water-closet, earth-closet, or privy has been and is used in common by the inmates of two or more houses, or if in the opinion of the local authority a water-closet, earth-closet, or privy may be so used, they need not require the same to be provided for each house." That, no doubt, recognizes the fact that the existence of a common water-closet may not turn two separate houses into one house, and that is perfectly true under the Public Health Act, 1875. But the Public Health Act, 1875, is merely concerned with sanitation and questions relating to sanitation, and throws no light, in my judgment, on the problem which has to be construed with reference to the supply of water under the Acts of this company.

I ought, perhaps, to refer to some of the cases which have been cited to me. I shall only refer to four. I have already referred to the case of *Grant v. Langston* (*supra*), where it was held under the Inhabited House Duty Acts, that a building of two

storeys under one roof, the ground floor of which was occupied as a licensed publichouse and the upper storey of which was occupied by the licensee as his dwelling-house, constituted for the purposes of those Acts two houses and not one, the two premises being entirely separated and horizontally divided; but, quite apart from the fact that the Acts there were different in character, it is noticeable that Lord Halsbury expressly points out, as regards these premises, that as between the two flats there was nothing which was held in common; the one structure was superimposed upon the other, and that was all. As I have pointed out, there is much more, there is a most essential part of the accommodation held in common in the present case.

The case which I have already referred to, *Attorney-General v. Mutual Tontine Westminster Chambers Association, Limited* (*supra*), was also a case under the Inhabited House Duty Acts, and it was there held that a block of flats with a common staircase and certain other common conveniences was only one house for the purposes of those Acts, and that case would, so far as it is relevant at all, appear rather to support the conclusion at which I have arrived on the construction of the Acts before me.

There are two other cases which have been cited, both of which refer to the construction of restrictive covenants on the sale of land for building purposes. The earlier one is the case of *Kimber v. Admans* (16 *The Times* L.R., 207; [1900] 1 Ch., 412). That was a decision of the Court of Appeal. It was there held that "a building containing several residential flats constitutes only one house within the meaning of the word 'house' in a covenant not to erect more than a certain number of houses, unless there is some context which cuts down or alters the popular interpretation of the word." Lord Lindley, M.R., in that case said this: "The house is the whole amalgamation. We know, of course, that a portion of a house may for some purposes, such, for example, as rating and franchise, be a house; but when the word is used in connection with a covenant of this description, I cannot agree that that is the meaning. It applies, not to the interior portions of the building, but to the whole building." That illustrates how the same word in a different context may receive, and necessarily receive, a different meaning. There was one other case referred to; that is the case of *Ilford Park Estates, Limited v. Jacobs* (19 *The Times* L.R., 574; [1903] 2 Ch., 522), which also is a case of a covenant relating to building. It was there held, under somewhat different language and in different circumstances, that where there was a building structurally divided into two tenements on different floors, with no internal communication, common staircase, or common front door, each was a house within the meaning of a covenant not to erect more than one house on the site. The facts were that the tenements were quite distinct and complete in themselves and had no communication with each other. That was held to be a case of two houses; but, there again, the difference in the facts as compared with the facts which I have before me, must, I think, be the *ratio decidendi*, and that would go to support, to some extent, the conclusion at which I have arrived. But I do not attach any great importance to any of these authorities, and still less to certain other Acts to which I have been referred, because, as I have already said, my problem is to construe the word "house" in this Act and in this context.

The conclusion at which I have arrived is that the premises, Nos. 254 and 256, Palmerston-street, constitute one house for the purposes of the plaintiff company's Acts, and that the tenants are not occupiers of two separate houses but are, within the meaning of the Acts before me, the occupiers of parts of a dwelling-house. That being so, it follows that the plaintiff company's contentions are, in my judgment, ill-founded. I therefore refuse each one of the four declarations which are asked for. I need say no more about declarations 1, 2, and 3; as to declaration No. 4, I will only say this, that if I am right in concluding that each of the tenants is the occupier of part of a dwelling-house, then each tenant has his own separate right, under the sections of the Acts to which I have referred, to a separate supply of water, so long as he fulfils the conditions imposed upon him by the Acts, and that right cannot be affected, in my judgment, by the fact that the tenant of the other part of the dwelling-house has made default. I therefore refuse all four declarations, and I give judgment for the defendants with costs.

[Solicitors—Messrs. Gibson and Weldon, for Messrs. Mann, Longden and Mann, Sunderland; Messrs. Ward, Bowie and Co., for Messrs. J. S. Tindle and Bullen, South Shields.]

K.B. Div.
(Lord Hewart, C.J., Salter and Roche, JJ.)

1928. Mar. 6.

ASHBY-DE-LA-ZOUCH GUARDIANS v. SUMMERS AND ANOTHER.*

Poor Law—Relief granted by way of loan—Time for recovery—"Complaint"—Poor Law Amendment Act, 1834 (4 and 5 Will. IV., c. 76), s. 59—Summary Jurisdiction Act, 1848 (11 and 12 Vict., c. 43), s. 11.

An application for an order under s. 59 of the Poor Law Amendment Act, 1834, that an employer should pay to the poor law guardians wages due to a man to whom the guardians have granted relief by way of loan is a "complaint" within the meaning of the Summary Jurisdiction Act, 1848. Such a loan does not become due and payable until application for repayment is made to the person relieved, and therefore the period of six months limited by s. 11 of the Summary Jurisdiction Act, 1848, does not begin to run till the date of such application. *Quaere* whether it begins to run till there is actually an employer against whom an order can be made.

This was a case stated by justices of Leicestershire.

An application and information was preferred, under section 59 of the Poor Law Amendment Act, 1834, by Willie Samuel Bacon, relieving officer, on behalf of the appellants, the Ashby-de-la-Zouch Guardians, against the respondents, Harry Summers, a miner, and the Measham Collieries, Limited, to show cause why any wages then due or which might from time to time become due from the Measham Collieries, Limited, to Harry Summers, a poor person chargeable to the Ashby-de-la-Zouch Union, should not be paid over, in whole or in part, to the guardians in payment and discharge of £5 0s. 6d., being the cost price of the relief given by way of loan to

* Reported by J. W. Hall, Esq., Barrister-at-Law.

Harry Summers in the form of orders on tradesmen for food and necessaries.

The relief was given to Harry Summers during the coal strike of 1926. On various dates between June 5 and October 16, 1926, Harry Summers obtained relief on loan from the guardians to a total amount of £5 3s. 6d., and on each occasion he signed a document acknowledging that the relief was by way of loan. He had repaid 3s. by three instalments of 1s., on May 30, July 5, and July 9, 1927, leaving a balance of £5 0s. 6d. due.

The appellants, on February 10, 1927, made application in writing for repayment, and thereafter their collector made frequent calls on Harry Summers, but was not successful in obtaining any further sum. On June 4, 1927, the appellants passed a resolution instructing their relieving officer to begin proceedings in respect of the repayment. On August 6, 1927, applications for summonses against the respondents and 14 others were granted, and summonses were issued on the same day. On the hearing of the summonses on August 20, 1927, the justices dismissed them, on the ground that they had no jurisdiction to deal with the cases inasmuch as the proceedings were not begun within six months from the date on which the last instalment of the loan was advanced.

Section 58 of the Poor Law Amendment Act, 1834, provides for the giving of relief by way of loan, and section 59 states :—

"In all cases where any relief shall have been given by way of loan, or where any relief, or the cost price thereof, shall be treated as a loan . . . it shall be lawful for any justice, upon the application of the overseers or guardians of the parish or union providing such relief, and upon proof of the same having been given to or on account of any such person . . . and of the same, or any part thereof, still remaining due, to issue a summons, requiring such person, as well as the master or employer of such person, or some person on his behalf, to appear before any two justices, at a time and place to be named in such summons, to show cause why any wages due, or which may from time to time become due, from such master or employer, should not be paid over, in whole or in part, to such overseers or guardians. . . ." [The section then provides for the making of orders on the employer to pay over the whole or part of the employee's wages to the overseers or guardians, and also for proceedings for the recovery of any amount ordered to be paid from an employer neglecting or refusing to pay it.]

By section 11 of the Summary Jurisdiction Act, 1848 :—

"In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

The following cases were referred to before the justices :—*Labalmondiere v. Addison* (22 J.P., 767), *Grece v. Hunt* (2 Q.B.D., 389), and *Harpin v. Sykes* (1 *The Times* L.R., 307).

Mr. Maurice Healy appeared for the appellants ; Mr. D. F. Brundrit for the respondents Measham Collieries, Limited. The respondent Summers was not represented.

The Lord Chief Justice.—At a Court of summary jurisdiction what was called, and deliberately called, an "application and information" was laid by the present appellants. His Lordship read it, and continued :—It was dismissed, evidently on the ground that the justices were of opinion that they had no jurisdiction to entertain it by reason of section 11 of the Summary Jurisdiction Act, 1848, and the question for the Court is whether the justices were right in that view. That question really involves two questions :—(1) Is it true to say that this application was a "complaint" within the Summary Jurisdiction Acts ? (2) If it was a "complaint," were these proceedings begun within the statutory period ? After reading the facts set out in the case, his Lordship said : The appellants made application for repayment earlier than the earliest of the three repayments. It is clear, therefore, that if the period of six months applies, and if the time runs, as the form of the application suggests, from the day on which the last advance was made, then the time had expired, but if the time runs from the demand in writing, then the application was in time.

As to the question whether the application was truly to be described as a "complaint," in my opinion it was for the reasons given in *In re Dillon* (11 Ir. C.L.R., 232). A person seeking to recover money under the Summary Jurisdiction Acts is a person making a "complaint," just as a person seeking to recover money in the civil Courts is a "plaintiff," and in the County Court begins his proceedings with a document called a "plaint."

It is necessary, then, that proceedings should be begun within six months after the matter of complaint arose. When did the matter of this complaint arise ? Section 58 of the Poor Law Amendment Act, 1834, provided that such relief as the Poor Law Commissioners might direct should be given by way of loan ; and the current rules and regulations are to be found in Article 13 of the Relief Regulation Order, 1911 (S.R. and O., 1911, No. 1295). This particular relief was so given, and for each instalment Summers gave a receipt.

When was the loan to be repaid ? *Ex hypothesi*, these are loans given to impoverished persons for the very reason that they are impoverished, because in the opinion of the guardians they are unable to provide themselves and their dependants with the necessaries of life. Nothing is said in the statute as to the time of repayment. Section 59 provides for the recovery from the master by the guardians of sums "still remaining due." That section, in various parts of it, assumes that when the machinery is turned to account there is money due and unpaid, but it throws no light on the question when it becomes due and begins to remain unpaid.

It seems repugnant to reason to hold that because the statute is silent the money is instantly repayable ; and that the poor person receiving "in meal or in malt" the necessaries of life is instantly liable to repay each instalment. I am quite unable to follow the argument that it becomes repayable on the date of the last instalment. The true contest is whether the money is payable immediately or after the full amount is ascertained and application for payment made.

Some light is to be derived from the case of *Labalmondiere v. Addison* (22 J.P., 767), though it was a decision under a very different statute. When one compares and contrasts the circumstances of that statute with the statute in question in the present case, the language of that case is applicable *a fortiori* to the present case. If that be so, the proceedings were in time. For those reasons, I think that the justices have misdirected themselves and the appeal should be allowed.

MR. JUSTICE SALTER.—I agree, and desire to add one word only on the second point—when the subject-matter of the complaint arose. I think it arose as soon as the complainant had a cause of action—*i.e.*, as soon as he could, by proving the necessary facts, establish his legal right to the relief claimed. In another case it may be necessary to determine whether the right arises when the demand is made, or not until there is an employer against whom an order can be made.

MR. JUSTICE ROCHE.—I agree, and have two observations to add. First, I think the application is, or involves, a complaint. Secondly, it is an application for a summons for two persons to appear and show cause why the employer should not pay the wages direct to the guardians. For myself, I think that the right does not arise until there is a master or employer in existence. But for the purpose of this case it is enough to say that by necessary implication it does not arise until a demand for repayment is made.

[Solicitors—Messrs. Andrew, Wood, Purves, and Sutton for Messrs. Fishers, Ashby-de-la-Zouch; Messrs. Corbin, Greener, and Cook.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P., and Hill, J.) } 1928. Mar. 23.

THE ROYAL STAR.*

Ship—Shipping casualty—Court of Inquiry in British Possession—Shipmaster censured—Appeal—Allowance of appeal—Costs—Shipping Casualties and Appeals and Re-hearings Rules, 1923, r. 20 (*i*).

In allowing an appeal by a shipmaster from the finding of a Court of Inquiry at Singapore that he had been guilty of negligence causing the stranding of his ship the Divisional Court refused to make an order against the Board of Trade for the costs of the appeal but granted to the appellant an order against the Board for the costs of a previous argument of the question whether he had a right of appeal.

This was an appeal by Mr. John MacLeod, master of the Blue Star liner Royal Star, from the finding of a Court of Formal Investigation held at Singapore on January 25 and 26, 1927, to inquire into the stranding of the Royal Star in the Straits of Singapore on January 13, 1927. That Court had found the appellant guilty of negligence causing the disaster, and, while not deeming it necessary to deal with the master's certificate, had severely censured him.

Mr. C. R. DUNLOP, K.C. (with him, Mr. R. F. HAYWARD), appeared for the appellant, and said that the Singapore Court had found that the casualty, which resulted in very serious damage to the Royal Star, was caused by the negligence of the master in omitting to satisfy himself personally that his charts were up to date, in neglecting to read the instructions of the *Malacca Strait Pilot*, 1924, and in neglecting to have any bearings taken or the position of the vessel fixed between 6.14 a.m. and 9.5 a.m. He submitted that the casualty was not caused by those alleged acts or defaults, that the master was not guilty of negligence or professional misconduct in not doing what the tribunal had found that he did not do, and that, in any event, the alleged omissions did not justify the severe censure passed on the appellant.

It was clear from the annex to the report of the Court that they accepted the evidence from the ship as to her position at the material times, and also as to the course steered and bearings taken. It was, therefore, inaccurate to state that no bearings were taken between 6.14 a.m. and 9.5 a.m., because the third officer took a bearing at 7 a.m. As stated in their finding, the Court were unable to determine whether the obstruction encountered by the Royal Star was a rock known as the "two fathoms mark" (which was discovered in 1923, and was shown on the latest Admiralty charts, but was not marked on the chart carried by the Royal Star), or was some other still uncharted rock or reef in the vicinity. It was clear, however, from the fact that the damage was all on the starboard side of the ship's bottom, and at a part where she had a draft of more than 27ft. 6in., that she could not have stranded at the two fathoms mark.

That was also clear from the evidence of the position of the ship, because on the courses and bearings accepted by the Court below she must have passed to the northward of Batu Beranti Light, and well clear of either the two fathoms or five fathoms shoals marked on the latest charts.

As to the findings of the Court below with regard to charts and sailing directions, the master, before the ship began her voyage from Liverpool, had taken all proper steps to have his charts corrected up to date. He had also read the sailing directions in the *Malacca Strait Pilot*. The alleged omissions on which the Court below had based its findings were, however, quite immaterial, because, as the master had plainly stated, even if he had been aware of the submerged rock at the two fathoms mark, or even if he had read and re-read the sailing directions, he would still have steered the course he did steer, which was a course that would take him clear of all danger from the rock, and one with which the Court below did not find fault.

The advice given in the sailing directions to keep to the north of the Straits on account of tidal streams, eddies, and overfalls was intended for sailing vessels, and not for steamships of the size and power of the Royal Star.

Mr. ALFRED T. BUCKNILL, for the Board of Trade, pointed out that the inquiry into the stranding of the Royal Star was ordered by the Governor of the Straits Settlements, and not by the Board of Trade. The Board were, therefore, quite impartial. It was no business of the Board to inquire whether the censure on this master was justified or not. The broad question on the appeal was whether the master of the Royal Star was negligent in so navigating his ship as to pass so near to Batu Beranti Light. The latest Admiralty chart showed that at the position given by the master soundings gave a depth of 34 to 60 fathoms. If in the midst of such very deep soundings there existed an uncharted rock it was surprising that the Admiralty had not yet located it.

The PRESIDENT, in giving judgment, said that the question for decision lay in a narrow compass. It was whether, accepting, as the Court below had done, the evidence from the ship as to the things which were done, it was negligent navigation or bad seamanship on the part of the appellant to take and maintain the course which he had taken and maintained. Having discussed the matter with the Elder Brethren, he ventured to suggest to masters and officers navigating in those Straits that they

* Reported by A. W. GRANT, Esq., Barrister-at-Law.

would find more safety in taking a course more to the northward of the channel, but that was not the question now before the Court. The findings of the tribunal below amounted to a finding that the course set and maintained by the appellant was not negligent and improper, and that finding could not be disturbed. As to the three grounds on which the appellant had been held negligent, they could not be upheld, and, therefore, the appeal must be allowed.

MR. JUSTICE HILL, in concurring, said that however desirable it might be for navigators in the future, in the light of the present case, to steer a more northerly course, that was a very different thing from censuring the appellant in the light of knowledge gained after the event.

Mr. DUNLOP asked that the motion should be allowed with costs. He contended that the Court had power to allow costs against the Board of Trade under rule 20 (*i*) of the Shipping Casualties and Appeals and Re-hearings Rules, 1923. He also relied on *The Famenoth* (7 P.D., 207) ; and *The Chelston* (36 *The Times* L.R., 688 ; [1920] P., 400).

Mr. BUCKNILL said that the question of costs was discussed at length in 1902 in the unreported case of *The Grecian*, where a master who successfully appealed against the suspension of his certificate had been refused costs.

The PRESIDENT.—I am glad that this matter has been discussed. I think that on principle the appellant is entitled to the costs of the previous argument on December 9 last to determine his right to appeal (44 *The Times* L.R., 163), but I do not think that it would be proper in this case to make any order against the Board of Trade for payment of the costs of this motion. The Board of Trade did not order the inquiry at Singapore. There is no litigation between the Board and the appellant, and the Board merely appears now in discharge of a public duty. There will, therefore, be no costs of this motion.

[Solicitors—Messrs. G. F. Hudson, Matthews and Co. ; the Solicitor to the Board of Trade.]

Chan. Div. (Clauson, J.) } 1928. Mar. 22.

IN RE APPLICATION OF CRANBUX, LIMITED.

IN RE APPLICATION OF LINGNER-WERKE AKTIENGESELLSCHAFT.*

Trade Marks — Assignment — Registration — Goodwill — Territorial limits — Refusal to register — Trade Marks Act, 1905 (5 Edw. VII., c. 15), ss. 22, 33, 35.

If the Registrar of Trade Marks can satisfy himself that on the true construction of a document it appears to be, within the meaning of s. 22 of the Trade Marks Act, 1905, an assignment of trade marks in connexion with the goodwill, within the territorial limits to which the Act extends, of the business concerned in the goods for which the trade marks have been registered, he will adequately discharge his function under s. 33 of the Act and must register the assignees as proprietors.

These were motions by the applicants, Cranbux, Limited, and Lingner-Werke Aktiengesellschaft, appealing from a decision of the Deputy Registrar of Trade Marks, who refused to register Cranbux, Limited, as the proprietors of the "Odol" trade marks under an assignment from Lingner-Werke Aktiengesellschaft (hereinafter referred to as "the German company").

In May, 1927, the managing director of the German company came to this country and concluded an agreement between his company and Coleman and Co., which provided that Coleman and Co. should form a subsidiary company with a capital of £50,000. When formed that company were to take over and adopt the agreement with Coleman and Co., and the agreement provided that on the shares in the new company being subscribed to the amount of 2s. per share the German company should give them the secrets and receipts of manufacture. All these things were done. The new company, known as Cranbux, Limited, were incorporated on October 11, 1927, and on October 15, 1927, they entered into an agreement adopting the original agreement with Coleman and Co., and on October 17, 1927, the German company executed an assignment of their trade marks in England to Cranbux, Limited.

The assignment of the trade marks was lodged with the Registrar of Trade Marks for registration. The Deputy-Registrar in a reserved judgment refused the application by the assignees for the registration of the trade marks in their name on the ground that the public would be prevented in future from buying "Odol" made abroad and imported into this country, which it could not at that moment be prevented from doing.

The German company had many subsidiary companies operating in different European countries.

Sir Duncan Kerly, K.C., and Mr. J. H. Evans-Jackson appeared for the applicants, Cranbux, Limited ; Mr. James Whitehead, K.C., and Mr. Donald Cohen for the applicants, Lingner-Werke Aktiengesellschaft ; and Mr. Stafford Crossman for the Registrar of Trade Marks.

MR. JUSTICE CLAUSON.—The first of these matters is a motion by Cranbux, Limited, by way of appeal under section 33 of the Trade Marks Act, 1905, as amended by section 11 of the Trade Marks Act, 1919, from a decision of the Deputy Registrar refusing to register the applicants as proprietors of certain trade marks. The present registered owner of the trade marks may for the moment be treated as being Lingner-Werke Aktiengesellschaft. The second matter is a motion by Lingner-Werke Aktiengesellschaft under section 35 of the Act of 1905 asking in effect that Cranbux, Limited, be substituted for the applicants as proprietors of the trade marks. In my view a question whether an assignment from the existing proprietor is one which gives a good title to an applicant for registration ought normally to be raised by way of appeal from the Registrar's decision under section 33, and ought not to be raised by an application by the assignor under section 35. However, in the present case, I need not go into this point further. The applicants will in each case have to bear the Registrar's costs, and the order for payment of those costs will be the only order on the second motion.

On the first motion the question for determination arises on an indenture of October 17, 1927, by which the existing proprietors of the trade marks, whom I will call the assignors, assigned to the applicants, whom I will call the assignees, the goodwill of the assignors in, among other countries, Great Britain, in connexion with the assignors' business as proprietors and manufacturers of and dealers in a dentifrice known as "Odol," and other articles and preparations

* Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.

of a proprietary nature, together with the trade marks now in question, which are registered in respect of the appropriate classes of goods. The question is whether, within the meaning of section 22 of the Trade Marks Act, 1905, the document in fact, as well as in terms, assigns the trade marks in connexion with the goodwill of the business concerned in the goods for which the trade marks have been registered.

On the face of it there can, as it seems to me, be no question that the assignment is good and effective within the Act. It must be borne in mind that the Act operates within certain territorial limits, being the limits to which it is expressly or impliedly confined by the Legislature. It operates so as to give the registered proprietor under section 41 of the Trade Marks Act, 1905, the exclusive right to use the trade mark within those territorial limits, as to which it is material only to say that Great Britain is, of course, included. The Act makes it essential, by section 22, that the trade marks should be assigned only in connexion with the goodwill of the business concerned in the goods for which it has been registered, but goodwill in this section must mean goodwill within the territorial limits to which the Act extends; the Act is in no way concerned with goodwill outside those limits. It is such goodwill which is assigned by the document now in question. The existence of a goodwill within Great Britain is, of course, perfectly consistent with the possibility of the owner of the business having no place of business within Great Britain.

The difficulty which the Deputy Registrar felt in the matter was this. He ascertained that the goods in question have hitherto, or at all events recently, been manufactured abroad, and he felt doubts as to whether the assignment might not involve some alteration in the business as heretofore carried on, which would jeopardize the identity between the goodwill heretofore enjoyed in England by the assignors and the goodwill to which the assignees have become entitled by the assignment. The facts raising these doubts seem to have been ascertained by the Deputy Registrar partly from information volunteered by the assignees and partly from information which had been communicated to the Registrar or his predecessor in connexion with an earlier application by a third party for registration of a trade mark somewhat similar to the main trade mark now in question, an application which had failed. I do not propose to consider whether these doubts were or were not well founded. Neither the Registrar nor this Court seems to me, for the purpose of the matter now in hand, to have any concern with these suggested facts nor indeed to have any evidence of them upon which they can rely. The Registrar is bound, under section 33, in investigating the title of the assignee, to satisfy himself that as between the assignor and the assignee (who are, of course, bound by the document of assignment) there is on the true construction of the document an assignment of the trade marks in question in connexion with the goodwill, within the territorial limits to which the Act extends, of the business concerned in the goods for which the trade marks are registered; but the Registrar will, in my opinion, adequately discharge his function under section 33 if he satisfies himself that this appears to be so on the true construction of the document which binds the assignor and the assignee. It may be (as was found ultimately to be the position in regard to the trade mark which was the subject-matter of the proceedings in *Lacteosote, Limited v. Alberman*, 43 *The Times* L.R., 336; [1927] 2 Ch., 117) that an assignment which is on its true construction effective as between assignor and assignee will turn out when the true facts are ascertained (and they are not likely to be fully ascertained except in proceedings brought by some third party) to have the indirect or even the direct result of destroying the trade mark by causing it to become deceptive. It does not appear to me that in the present case the Deputy Registrar had before him, or that this Court has before it, any evidence which either binds or enables him or this Court to go behind the terms of the assignment. If there are any facts which will enable the case to be made out that the result of the assignment has been or will be to destroy the trade mark, the registration of the assignees as proprietors under section 33 will not prevent these facts from being brought out in the proper manner in proceedings by an aggrieved party.

I am thus of opinion that the Deputy Registrar ought to have accepted the assignment as sufficient in respect of the trade marks of which the Lingner-Werke Aktiengesellschaft are proprietors. One of the trade marks is apparently registered in some other name, and it remains for the Deputy Registrar to be satisfied in regard to the title to that trade mark.

It seems to me that a convenient order to make will be an order reciting that the Court is of opinion that as between Cranbux, Limited, and the Lingner-Werke Aktiengesellschaft the document of October 17, 1927, is a valid and effective assignment, within section 22 of the Act, of the trade marks expressed to be thereby assigned, and directing that the matter be referred back to the Deputy Registrar for further hearing, and ordering Cranbux, Limited, to pay the Registrar's costs of their motion. On the second motion there will be no order except that the applicants pay the Registrar's costs.

[Solicitors—Messrs. Bull and Bull; Messrs. Collisson, Prichard and Barnes; the Solicitor to the Board of Trade.]

House of Lords.
(Lord Buckmaster, Viscount Sumner, Lord Wrenbury, Lord Carson, and Lord Warrington of Clyffe.)
1928. Mar. 22.

INLAND REVENUE COMMISSIONERS v. COUNTESS OF LONGFORD.

INLAND REVENUE COMMISSIONERS v. PAKENHAM AND OTHERS.*

Revenue — Supertax — Infant — Liability of trustees and guardian to make supertax returns — Representative assessments — Income Tax Act, 1842 (5 and 6 Vict., c. 35), s. 41—Finance (1909-10) Act, 1910 (10 Edw. VII., c. 8), ss. 66, 72—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 7; All Schedules Rules, rule 4.

Representative assessments to supertax cannot be made upon the trustees or the guardian of an infant beneficiary, either in respect of the actual total income of the infant, or in respect of a total income limited, as regards the particular trustees or guardian, to that income with which the trust or guardianship is concerned.

Decision of the Court of Appeal (43 *The Times* L.R., 835; [1928] 1 K.B., 118) affirmed.

These were appeals from orders of the Court of Appeal (43 *The Times* L.R., 835; [1928] 1 K.B.,

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

118) affirming orders of Mr. Justice Rowlatt (43 *The Times* L.R., 157 ; [1927] 1 K.B., 594) upon cases stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The question for determination was whether an infant whose income was admittedly liable to supertax could be assessed to that tax (*a*) in the name of his guardian or (*b*) in the names of his trustees. This question depended primarily upon whether upon the true construction of section 72 of the Finance (1909-10) Act, 1910, the provisions of section 41 of the Income Tax Act, 1842, were thereby made applicable to the collection and assessment of supertax so as to enable persons under disability (including infants and lunatics) to be assessed in the names of persons representing them, such as guardians, trustees, or committees.

The Earl of Longford was born on December 29, 1902. During the minority of the Earl the Commissioners made assessments for supertax in respect of his total income in three different forms for different years : (*a*) on the Countess of Longford, the guardian of the Earl, which assessment was the subject of the first appeal, (*b*) on the trustees of one of the settlements producing income to the Earl, which assessment was the subject of the second appeal, and (*c*) on the Earl directly, as to which there was no appeal. On the death of the Earl's father in August, 1915, the Earl became legal tenant in tail of the property comprised in a settlement dated August 22, 1899. The respondents in the second appeal were the trustees of this settlement.

The settled property consisted in part of realty in Ireland and in part of personalty held as capital moneys.

After the Earl had become entitled to the settled property the trustees of the settlement (the respondents in the second appeal) paid yearly during the minority of the Earl a sum of £2,500 for his maintenance and education, such payment being made to his mother, the Countess of Longford, the respondent in the first appeal, as his guardian.

Following on her failure to comply with a request to make a return of the total income of the Earl for the year ending April 5, 1917, the Special Commissioners assessed her as the guardian of the Earl to supertax for that year in the sum of £12,000.

On an appeal against that assessment, the Special Commissioners held that the Countess was not liable to be assessed to supertax in respect of any income of the Earl which did not pass through her hands and, it being agreed that the income so passing was below the limit of total income upon which supertax was then payable, the Special Commissioners discharged the assessment.

Mr. Justice Rowlatt affirmed the decision of the Special Commissioners and his decision was unanimously affirmed by the Court of Appeal (the Master of the Rolls, Lord Justice Scrutton, and Lord Justice Sargant).

On the death on January 22, 1918, of Selina Dowager Countess of Longford, the Earl also became legal tenant in tail of the property comprised in a settlement dated November 8, 1862. This property consisted of land in Bedfordshire. The trustees of this settlement were not parties to these proceedings.

After the Earl became entitled to the settled property comprised in this settlement the trustees paid yearly to his guardian during the minority of the Earl a sum of £500 for his maintenance. This was in addition to the yearly payment of £2,500 made by the trustees of the settlement of 1899, the respondents in the second appeal, for the same purpose. The balance of the income under both settlements was accumulated.

Following on notices to make returns of the income of the Earl from all sources for supertax purposes for the years ending April 5, 1918, April 5, 1919, and April 5, 1920, the trustees of the settlement of 1899 (the respondents in the second appeal) made returns of the income on the footing that there was to be included therein only the sums paid by the respective trustees of the two settlements for maintenance in the respective previous years. Assessments were made on these respondents on the basis that they were liable to be assessed in respect of the total income of the Earl of Longford for each such previous year, including in respect of the years ending April 5, 1919, and April 5, 1920, the income arising under both settlements, and in the case of all three years the income arising from the settled property whether applied for maintenance or accumulated.

On an appeal against such assessments lodged by these respondents they were content to be assessed to supertax in respect of the amounts included by them in their returns, but otherwise disputed their liability in respect of the supertax upon the Earl's income and contended that they were not liable to assessment. The Special Commissioners decided in favour of the respondents and reduced the assessments accordingly.

Mr. Justice Rowlatt affirmed the decision of the Special Commissioners and his decision was affirmed by the Court of Appeal by a majority (the Master of the Rolls and Lord Justice Scrutton, Lord Justice Sargant dissenting).

The Attorney-General (Sir Douglas Hogg, K.C.), Mr. J. H. Stamp, and Mr. Reginald Hills appeared for the appellants ; Mr. Latter, K.C., and Mr. Andrewes-Uthwatt for the respondents.

Lord Buckmaster.—My Lords : I am of opinion that these appeals must fail, and I had prepared and reduced to writing the reasons that have led me to that conclusion, but since doing so I have had the advantage of reading the judgments of my noble and learned friends Lord Sumner and Lord Warrington, with which I entirely agree ; and there is no need that those judgments should be repeated. The question involved is of no great principle of law ; it is nothing but the construction of clumsy and ill-fitting clauses in Acts of Parliament. When, therefore, the result that has been reached is one in which there is common agreement, there is no need to expatiate upon the process of reasoning which has been used in order that it should be determined. I am therefore of opinion that these appeals should fail and I shall move the House that they be dismissed.

Viscount Sumner.—My Lords : The respondents have all been charged with supertax under General Rule 4 of the Income Tax Act, 1918, or under the words of section 41 of the Income Tax Act, 1842, which enacts that "the trustee, guardian, tutor, curator, or committee of any person, being an infant, or married woman, lunatic, idiot, or insane, and having the direction, control, or management of the property or concern of such infant, married woman, lunatic, idiot, or insane person, . . . shall be chargeable . . . in like manner and to the same amount, as would be charged if such infant were of full age," &c. If this provision of the Income Tax Acts is not applicable to supertax within section 7 of the Act of 1918 or section 72 (6) of Part IV of the Finance

(1909-10) Act, 1910, they cannot be charged and the appeals fail.

There are, however, two further respects, in which, as I think, some of the assessments were bad and were rightly discharged. (1) The Countess of Longford, as guardian of the infant Earl, had not the control or management of his property at all. She simply laid out for his benefit such sums as his trustees thought fit to assign for his maintenance and placed in her hands, to be disbursed for them in that behalf, but the money remained vested in them in trust and was subject to their control or management. (2) After an interest in the Bedfordshire estates vested in the Earl in 1918, he was beneficially entitled to the income of two trust properties, the Irish estates, in which his interest had taken effect in 1915, and the Bedfordshire estates, the trustees in each case being different persons, separately assessed. "The management of the property of the infant" means grammatically the management of all the property of the infant, in respect of which the trustees are charged, and these words are part of the description of the persons chargeable. Such really is the position with regard to income-tax. As applied to supertax, charged on a trustee of a part of the whole income, to which the beneficiary is entitled, the matter is otherwise. If persons having the management of some of the property of the infant were intended to be included in this description, the definite article "the" must have been omitted. In connexion with supertax such an intention would have been entirely out of place. The imposition of personal liability for an additional duty of income-tax, levied on the total income of the beneficiary as ascertained by a complete enumeration of all sources subject only to certain authorized deductions, upon a trustee, who held a part only of the beneficiary's entire property and that part possibly only a small one, or a part yielding no income, would be a travesty of rational taxation.

These considerations, however, do not apply to the trustees of the Irish estates before the Earl's interest in the Bedfordshire properties took effect and their case in the earliest years of these assessments must be specially considered. While section 66 of the Finance (1909-10) Act, 1910, defines what supertax is and imposes the charge, it is section 72 that provides by a series of subsections for the mode of assessment and the machinery of collection. Subsections 1 to 5 inclusive deal only with assessment. It is not till subsection 6 is reached that provision is made for charge, collection, and recovery of duty and this is accentuated by the fact that subsection 2 authorizes the requirement of returns from persons (including those who represent incapacitated, non-resident or deceased persons) whether or not they are chargeable with supertax, so that in some of such cases that provision is only for the purpose of obtaining information.

Subsection 6 is framed as an omnibus incorporation of pre-existing provisions upon an indefinitely selective plan: "All provisions of the Income Tax Acts relating to persons who are to be chargeable with duty, assessments, and appeals against those assessments, and to the collection and recovery of duty . . . shall, so far as they are applicable, apply to the charge, assessment, collection, and recovery of duty under this section. . . ."

In deliberately adopting this terse and compressed form of enactment the Legislature was, no doubt, fully alive to the fact that its merits and convenience are attended by some disadvantages. The risk of this had, however, to be run. By using the words "so far as they are applicable," Parliament handed over to others what it might have prescribed itself, and those others were persons who were not legislators but Judges. The income-tax provisions were not made applicable, so that they could be enforced, but were to be enforced only so far as they were applicable. Nothing corresponding to *mutatis mutandis* or any other labour-saving but indefinite phrase is to be found here. The distinction is material. An administrator might hold a provision to be applicable, which avoids a loss of revenue, even though the taxpayer loses the benefit of the form of the statute, but Judges have to determine the applicability of a regulation by asking how far it is consistent with justice to the subject and with proper construction of the enactment. Accordingly we must not feel constrained to pronounce this section applicable, merely because the contrary construction may involve the use of cumbrous and defective machinery for collecting the tax or even may lead to the escape of some who have quite money enough to pay with.

My Lords, viewed in this way I do not think section 41 is "applicable" to supertax. The application would, I think, make the section read much to the following effect. "The trustee of any infant, whether resident here or abroad, who has the control or management of the chargeable property of that infant, shall himself be chargeable, as the infant would be charged if of age, both as to the extent of his chargeability and as to the manner of enforcing it." Let us see what the effect would be and whether it does or does not pass the bounds of application.

In the case of income-tax the extent of the liability, depending as it does on the various schedules and cases under which the particular part of the property is being assessed, is limited to the income of the property, which is under the trustees' control and is assessable within the particular assessment area. If the trustee returns and pays on that, he is not further chargeable, although the infant may be beneficially interested in other taxable property, over which that trustee has no control at all. The manner in which he is made liable is by the method of local and separate assessments provided for income-tax. Exemptions and deductions are the subject of a separate manner of reclaiming tax already paid, with which the trustee is not, as such, in any way concerned.

In the case of supertax it is far otherwise. The person who is chargeable, whether in a representative capacity for another person or on his own account, has to return the whole of the income, which is subject to supertax, and he has to make the deductions which the Act allows, if there are any, before his return, on which the tax is to be computed, is complete and ready for enforcement of the tax. In the case of a return by a person representing someone else, the supertax, duly computed, is wholly and as a whole chargeable on him. For supertax purposes there is no provision for making piecemeal assessments or for levying the tax in part on one person and in part on another. The person, who is made liable to charge at all, has to bear the entire burden of it.

My Lords, I think this comparison at once shows that, in the case of supertax, charging a trustee "in like manner" as the beneficiary would be charged, if of age, is a totally different scheme of charge from that enacted for income-tax. The case is not one of selecting such parts of the income-tax scheme as are applicable to the scheme of the supertax, and making use of them, but of introducing provisions, which are applicable to supertax and correspond to the income-tax provisions but are not already enacted

anywhere. That is not a problem for courts of justice. It involves substituting the words "with suitable modifications" for the words "so far as applicable," and that is not for us to do.

Further, it could be done only to the grave and unjust prejudice of the trustee to be charged. Whatever he may happen to know or be able to ascertain in a particular case, he is not as trustee seized of any information outside the limits of his trust. He does not know that there may not be other trustees of other trust property, or that the infant is not making something here or abroad. Instances of such precocious industry are not uncommon and are sometimes on a considerable scale. The Act has to be read as applicable to all cases falling generally within its words, whether or not in particular, and perhaps numerous, cases the trustee is so circumstanced as to meet with no such difficulties. He cannot know whether he is chargeable or not, or whether he should contest his liability or not, for, so far as he is aware, he may be in control of all the chargeable property of the infant, and, having made the return, he may have to pay on an excessive amount, because in his ignorance he did not make deductions, which ought to have been made, before arriving at the net sum chargeable to supertax. If he refuses to make the return, on the ground that there may be other chargeable property of the infant over which he has no control, he does so at his peril. If he pays, he may be unable to indemnify himself, or may be only able to enforce his rights at the cost of litigation, which at best will leave him with costs to bear himself.

For these reasons, my Lords, I think these assessments were rightly dealt with by the Special Commissioners and the appeals fail. It is not necessary to point out how the infant or other incapacitated person is to be made amenable, though section 72 (2) furnishes the Inland Revenue with means of obtaining extensive information, more than many trustees could get. All that I can say is that I agree with the Court of Appeal in thinking that the argument for the Revenue makes a greater call on the words "so far as applicable" than those words can bear.

I think that it is irrelevant to refer to the cases in which it has been said that sections merely providing a machinery for collection of a charge, imposed in general terms elsewhere, cannot restrict the attachment of the charge, being "in aid and not in derogation of it," *Tischler v. Apthorpe* (1 *The Times* L.R., 344 ; 2 Tax Cas., 89) and *Werle and Co. v. Colquhoun* (4 *The Times* L.R., 396 ; 20 Q.B.D., 753), because here the express words, "so far as they are applicable," of themselves limit the application of the collection sections for all purposes, and direct an enquiry and a discrimination between those which apply and those which do not. The latter cannot aid the charge of supertax, since they do not apply to it.

My Lords, I am desired to add that in the opinion I have just read to your Lordships my noble and learned friends Lord Wrenbury and Lord Carson concur.

Lord Warrington of Clyffe (read by Lord Buckmaster).—My Lords : These are two appeals raising the question whether an infant can be assessed to supertax in the one case in the name of his guardian and in the other in the name of trustees who have the control and management of certain property to the income of which he is entitled.

The infant (the 6th Earl of Longford) was born on December 29, 1902, and attained the age of 21 years on December 29, 1923. The respondent the Countess of Longford became on the death on August 21, 1915, of the 5th Earl the guardian of his son the infant. The infant on his father's death became entitled as tenant in tail male to certain lands and hereditaments in Ireland and to certain personalty which represented the proceeds of sale of realty under a settlement dated August 22, 1899, of which the respondents in the second appeal are the trustees. The trustees were by the settlement appointed trustees for the purposes of section 42 of the Conveyancing and Law of Property Act, 1881.

Upon the death on January 22, 1918, of his grandmother Selina Dowager Countess of Longford the infant became entitled as tenant in tail male to certain estates in Bedfordshire under a settlement dated November 8, 1862, the trustees whereof are not the same persons as the trustees of the settlement of 1899.

Apparently—though the fact is not expressly stated in either of the two cases hereafter mentioned—the infant was not, until January 22, 1918, entitled to the income of any property other than that comprised in the settlement of 1899.

After the death of the 5th Earl the trustees of the last-mentioned settlement paid yearly during the minority of the infant the sum of £2,500 for his maintenance, the residue of the income under that settlement being accumulated.

For the year ending April 5, 1917, the Special Commissioners of Income Tax made an assessment upon the respondent the Countess as guardian of the infant in a sum of £12,000, being the estimated amount of the total income of the Earl under the settlement of 1899.

On appeal this assessment was discharged, it appearing that the only income passing through the hands of the guardian was the above-mentioned allowance for maintenance, and that this was below the supertax limit.

A case stated by the Special Commissioners for the opinion of the High Court was heard by Mr. Justice Rowlatt on December 20, 1926. The learned Judge dismissed the appeal of the present appellants and confirmed the discharge of the assessment. His judgment was on July 27, 1927, affirmed by the Court of Appeal (Lord Hanworth, M.R., and Lords Justices Scrutton and Sargant).

As regards the appeal in the case of the Countess, it is enough to say that I agree with the judgments in the Court of Appeal and particularly with that of Lord Justice Sargant, and that this appeal should be dismissed with costs. I now turn to the other appeal—that against the trustees of the settlement of 1899.

The years in question in this case are the years of charge ending respectively on April 5, 1918, April 5, 1919, and April 5, 1920. It will be observed that the first of these years was that in which, viz. on January 22, 1918, the infant became entitled to the property comprised in the settlement of 1862, but none of the income of this property accrued to him during the year preceding the year of charge.

Assessments having been made upon the trustees of the settlement of 1899 in respect of the total income of the infant for each of the said three years of charge, the trustees appealed to the Special Commissioners, who, being of opinion that the trustees were not liable to be assessed to supertax, reduced the assessments to certain agreed sums in each of the three years.

A case was stated for the opinion of the High Court and was heard by Mr. Justice Rowlatt, who, on December 20, 1926, made an order confirming that of the Special Commissioners and dismissed the

appeal. An appeal to the Court of Appeal was on July 27, 1927, dismissed by a majority (Lord Hanworth, M.R., and Lord Justice Scrutton, Lord Justice Sargant dissenting).

In subsequent years of charge the infant himself, while still a minor, was assessed to supertax, and there was no appeal as to this assessment.

The question turns on the true construction and effect of the provisions as to supertax contained in Part IV. of the Finance (1909-1910) Act, 1910. It is true that in the last year the Act in force was the Income Tax Act, 1918, but the provisions of this Act are practically identical with those previously in force, and it will be convenient to pursue the course adopted in the argument and deal with the old Acts alone. It is, however, necessary to bear in mind that the original limit for supertax has been lowered in amount and the tax itself is charged according to a graduated scale.

By section 66 (1) of the Act of 1910 there is to be charged in respect of the income of any individual the total of which exceeds a fixed sum an additional duty of income-tax (in the Act referred to as a supertax) at the rate of 6d. for every pound of the amount by which the total income exceeds so much.

By subsection (2) "For the purposes of the supertax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts; but," and then there follow directions as to particular deductions applicable only to supertax. Section 72 (2), omitting immaterial words, is as follows: "Every person upon whom notice is served . . . requiring him to make a return of his income from all sources or, in the case of a notice served upon any person who is chargeable with or liable to be assessed to income-tax under section forty-one of the Income Tax Act, 1842, . . . as representing an incapacitated, non-resident, or deceased person, . . . shall, whether he is or is not chargeable with the supertax, make such a return in the form and within the time required by the notice."

In subsection (5) provision is made for an assessment by the Special Commissioners if no return or an unsatisfactory one is made; subsection (6), again omitting what is immaterial for the present purpose, is as follows: "All provisions of the Income Tax Acts relating to persons who are to be chargeable with duty, assessments, &c. . . . shall, so far as they are applicable, apply to the charge, assessment, &c. . . . of duty under this section. . . ."

Before proceeding to consider the provisions of the Income Tax Acts referred to in subsection (6) it is well to call attention to certain fundamental differences between income-tax and supertax. Income-tax is chargeable under certain categories as to some of which no assessment on the tax-payer is made, *e.g.*, the case of income from securities the tax on which is deducted at the source. No assessment of total income is made, nor is any return of such income required except where a claim is made for exemption or abatement. For this purpose certain payments out of income may be deducted before the total is ascertained.

In the case of supertax the assessment itself is in respect of the total income from all sources, a form of assessment for which there is no provision in the Income Tax Acts.

Section 41 of the Income Tax Act, 1842, reading it shortly and omitting what is immaterial is as follows: "The trustee, guardian, tutor, curator, or committee of any person, being an infant, or married woman, lunatic, idiot, or insane, and having the direction, control, or management of the property or concern of such infant, married woman, lunatic, idiot, or insane person . . . shall be chargeable to the said duties in like manner and to the same amount as would be charged if such infant were of full age, or such married woman were sole, or such lunatic, idiot, or insane person were capable of acting for himself." Provision is made for the charging of a non-resident person in the name of such trustee, &c., as above, or of any factor, agent, or receiver, having the receipt of any profits or gains arising as mentioned in the Act and belonging to any such person "and every such trustee," &c., "shall be answerable for the doing of all such acts, matters, and things, as shall be required to be done by virtue of this Act in order to the assessing of any such person to the duties granted by this Act, and paying the same."

Provision is made (section 44) for the indemnity of the persons described in section 41 in respect of any duty which they may pay.

The provisions relating to claims for exemption and abatement and statements of total income from all sources for that purpose are contained in section 164. It is unnecessary to state them.

As to section 41 it is to be observed that the chargeability of the trustee depends upon his having the control or management of "the property" of the incapacitated person. "The property" there seems to me to be not the entire property of the incapacitated person, but that property as to which the trustee, &c., has the control and management.

The application of the section is further limited to that part of the property as to which the incapacitated person would be chargeable if not under incapacity. It would not, for example, include property the income of which was taxed at the source. In short the section does not make the trustee chargeable in respect of the total income of the incapacitated person or even in respect of the income of the whole property under his control or management but only in respect of that income as to which the incapacitated person would be directly chargeable.

Under the provisions relating to supertax the position is fundamentally different. This tax is charged on the total income from all sources of the subject, and that income is a technical term; it is not merely the sum total of the several amounts of income charged with income-tax under the different categories specified in the Income Tax Act, but it is that income after certain deductions and adjustments which are not permissible under that Act.

Is then the provision in section 41 of the Act of 1842 as to the chargeability of a trustee "applicable" to supertax so as, under section 72 (6) of the Act of 1910, to render him chargeable to the latter tax? I agree with Mr. Justice Rowlatt and the majority of the Court of Appeal that in the absence of special directions to that effect it is impossible to apply the provisions in question to circumstances so different from those in respect of which they were enacted.

Taking the facts of the present case, the effect of the application of the provisions of section 41 in the last two of the years in question would be to render the trustees chargeable not only in respect of the income they themselves receive but in respect also of that received by the trustees of the settlement of 1862, and they have in fact been so charged in the assessments now in question. It may be that as between themselves and the latter trustees the burden

might be apportioned, but there are no provisions in the statutes for any such arrangement.

As regards the first year it is true that the only income included in the assessment was that received by the trustees of the settlement of 1899, but even so there is the same difficulty that the "total income" is not the same as the income in respect of which the trustees would be chargeable under section 41, and I cannot think that the mere accident that there is not included in the total income any item of receipt not derived from the trusts of the settlement can make such a difference as to bring into application a provision which, if there were even the most trifling additional item of receipts, would be inapplicable.

Great reliance was placed by the appellants on the provisions of section 72 (2) of the Act of 1910 as to returns. I do not think this subsection affects the question; it contains, it is true, a substantive provision that a person chargeable to income-tax under section 41 as representing an incapacitated person may be required to make a return of the total income from all sources of the incapacitated person. But it does not follow that, because the statute requires in express terms information from such representative person, he is therefore to be chargeable, by words of reference such as are contained in subsection 6, to an extent to which he could not be charged under section 41 and in respect of a tax so different in its nature as supertax is from the tax mentioned in that section.

On the whole, for the reasons I have given, which are I think substantially those given by the majority in the Court of Appeal and by Mr. Justice Rowlatt, I think this appeal fails and ought to be dismissed with costs.

[Solicitors—The Solicitor of Inland Revenue; Messrs. Walfords.]

House of Lords.
(Viscount Sumner, Lord Warrington of Clyffe, and Lord Atkin.)

1928.
Mar. 22.

GREAT WESTERN RAILWAY COMPANY v. J. DURNFORD AND SON, LIMITED.*

Contract—Indemnity—Undertaking to indemnify against all claims—Whether inclusive of claims by the persons giving the undertaking.

The plaintiffs took a lease of premises from the defendant railway company, and, by an agreement supplemental to the lease, the defendants gave the plaintiffs permission, on certain terms, to use for the transport of materials a portable gangway which could be moved over certain of the defendants' railway lines. One of the terms was that the plaintiffs "agree and undertake to indemnify the said [railway] company against all claims and demands or liability whatsoever whether in respect of damage to person or property arising out of or in connexion with the existence or user of the said gangway." When the plaintiffs were using the gangway some trucks were shunted down the line, and a lorry standing on the gangway was damaged. In an action for damages for negligence and/or breach of duty the defendants denied liability and pleaded the aforesaid term of the supplemental agreement. On a preliminary point as to the construction of the agreement,

Held, that the undertaking was only one to hold the defendants harmless against claims by third parties, and the preliminary point must be decided in favour of the plaintiffs.

Decision of the Court of Appeal (43 *The Times* L.R., 679) affirmed.

This was an appeal by the Great Western Railway Company from a decision of the Court of Appeal (43 *The Times* L.R., 679) affirming a decision of Mr. Justice MacKinnon (43 *The Times* L.R., 527).

The action was brought by the respondents, J. Durnford and Son, Limited, against the appellants, the Great Western Railway Company, for damages for negligence whereby a lorry belonging to the respondents was damaged.

By a lease of May 9, 1914, the appellants demised to the respondents premises adjoining certain sidings of the appellants' railway for a term of 14 years, and, by a subsequent memorandum endorsed on the lease, the appellants granted permission to the respondents to use a portable gangway with brackets recently erected by the respondents on the demised premises and projecting over the appellants' premises for the purpose of loading traffic into trucks on the sidings adjacent to the demised premises. In consideration thereof the respondents agreed

"to indemnify the said company against all claims and demands or liability whatsoever, whether in respect of damage to person or property, arising out of or in connexion with the existence or user of the said gangway and brackets."

The respondents by their statement of claim alleged that, while the lorry was standing on the gangway for the purpose of discharging a load of lime into a railway truck on the appellants' siding below the gangway, the appellants' servants negligently put in motion some other trucks on the siding and thereby caused a box van to strike the gangway and lorry, with the result that the lorry was thrown to the ground and damaged.

The appellants, while denying negligence, counterclaimed for a declaration that they were entitled to be indemnified by the respondents against all liability on the respondents' claim.

The case came before Mr. Justice MacKinnon on a preliminary point of law as to the construction of the memorandum. The learned Judge was of opinion that the language of the memorandum was wide enough to include claims arising out of negligence of the defendants' servants. He also held that the damage to the lorry arose out of and in connexion with the user of the gangway, but that the memorandum did not require the respondents to indemnify the appellants against a claim made by the respondents themselves, and that it should be construed *contra proferentem.* He accordingly decided the point of law in favour of the respondents.

The Court of Appeal, by a majority (the Master of the Rolls and Lord Justice Scrutton, Lord Justice Sargant dissenting), affirmed the decision of the learned Judge.

Mr. W. A. Greene, K.C., Mr. Wilfrid Lewis, and Mr. J. A. Stainton appeared for the appellants; Mr. Rayner Goddard, K.C., Mr. E. H. C. Wethered, and Mr. Erskine Harper for the respondents.

VISCOUNT SUMNER.—My Lords: In 1914 the appellants leased to the respondents, who are

* Reported by H. B. HEMMING, Esq., Barrister-at-Law.

contractors' merchants, some land abutting on their railway sidings at Bristol. In 1921 the respondents, wishing to load heavy materials on to wagons standing on the sidings alongside, proposed to instal a moveable gangway, that could be made to project over the line above the level of ordinary open trucks, so that, by running a lorry on to it and tipping it up, they could fill the wagon with as little labour and delay as possible. As this involved some overhang of the lorry over the line, the appellants' licence was required and was obtained under the agreement endorsed on the lease which is in question.

In August, 1926, while a lorry was tipped up to shoot a load of lime into railway trucks on the siding, one of the appellant company's engine-drivers shunted some trucks further along the line in such a manner that they struck and set in motion other trucks and a box van, which were on the siding and nearer to the gangway, so forcibly that, when the box van, which was higher than the level of the open trucks, reached the gangway it caught the lorry and knocked it off. The respondents sued for damages for this negligence and the railway company pleaded, first in defence and then by way of counterclaim, the following words contained in the agreement for the licence :—

"In consideration of the within-named company permitting the within-named lessees to use the portable gangway with brackets recently erected by the said lessees upon the premises within described and projecting over the company's premises for the purpose of loading traffic into trucks on the sidings adjacent to the within-described premises, the said lessees hereby agree and undertake to indemnify the said company against all claims and demands or liability whatsoever whether in respect of damage to person or property arising out of or in connexion with the existence or user of the said gangway and brackets and to remove the said gangway when not in actual use to such a position that the same shall not project from the premises within described."

Master Baker made an order that the points of law arising thereupon should be heard and disposed of before the trial of the issues of fact in the action. They were heard accordingly by Mr. Justice MacKinnon on the assumption that the facts alleged against the railway company could be proved, and his judgment in favour of the present respondents was affirmed by the Court of Appeal, Lord Justice Sargant dissenting. Hence this appeal. It raises a pure question of construction.

Wide as many of the terms of the clause certainly are, they are, in two respects at any rate, brought within much narrower limits. Though the "indemnity" is to be against "all claims and demands or liability whatsoever," the claims are only (*a*) claims "in respect of damage to person or property" and (*b*) such as "arise out of or in connexion with the existence or user of the said gangway and brackets." There would, therefore, be no indemnity against fines or penalties, nor, I suppose, against a contractor's claim for payment, if the railway company found it necessary to employ one to strengthen their road-bed so as to bear the thrust of the loaded wagon, when tipped. Wide as the words look at the outset, their context and purpose evidently subject them to several restrictions.

With regard to the circumstances to which the agreement refers, I note, firstly, that the use of the gangway or brackets, which is not specifically confined to the tip lorry but would be available for other modes of loading, is itself part of a joint operation, in which the respondents furnish the materials to be carried and the vehicle which delivers them, and the appellants furnish the trucks and the motive power by which they are removed, while there is benefit out of it on both sides, the respondents getting their goods carried and the appellants their railway rates paid. I note, secondly, that the clause does not deal with any claims to be made against the plaintiffs by the defendants for damage done to their property, in connexion with the gangway or otherwise, these being left to the common law, and it only deals, at most, with such claims for damages to be brought by the plaintiffs against the defendants as arise out of or in connexion with the gangway. If the plaintiffs stacked their builders' materials along the edge of the leased premises, so that they fell over on to the line, or if the defendants had a collision on the siding, which sent things flying on to the leased premises, so as to damage the stacks of builders' materials there, the clause would not apply in either case. It would accordingly seem to be a departure from the scheme to bring under the clause any questions arising on the simultaneous user of the gangway and of the sidings, and still more so if the effect of the clause be to throw on one party all the liability so arising instead of leaving them, as the other questions are left, to be settled by the ordinary law. There is no doubt that an abundant content for the clause can be found in third-party liabilities without having recourse to liabilities between the contracting parties themselves. It is, therefore, on the wording of the clause and not on its scheme, that the appellants must rely.

At your Lordships' bar it was recognized that the indemnity here is not matter of defence but of counterclaim, for it assumes liability which as such will fall on the railway company, that is, a claim to which no defence is available, for otherwise no occasion would arise for calling on the plaintiffs to hold the company harmless under the indemnity. This distinction figures largely in the dissentient judgment of Lord Justice Sargant, but hardly receives mention in any of the others, whether because it was not pressed or because its technical character seemed to make it of little weight in construing a working arrangement, I do not know.

My Lords, I think that the business object of the clause, if such a cause of action as the present was intended to come within it, must have been simply to ensure that the railway company should not be troubled with claims. This could have been accomplished, in more ways than one ; by granting the licence at the licensees' risk exclusively ; by inserting an undertaking not to sue, as a part of the consideration for the licence ; or by making the grant of the licence an accord and satisfaction for any torts thereafter to be committed by the railway company ; but in all forms the object is to stop the action on the claim, and to provide for a complete defence *in limine*. To resort to the circuitous course of including provision for a counterclaim against the licensees in words primarily directed to enabling the railway company to bring them by third-party notice into an action brought against them by third parties is not a thing to be reasonably regarded as part of the subject-matter of such a clause.

The results of such a provision for a counterclaim for indemnity are odd. The indemnity would be one to which the insurer's right of subrogation could not be applied since the plaintiffs could not stand in the shoes of the railway company to sue them as the real tortfeasors, for they would have to do so in the railway company's own name. If the plaintiffs were insured elsewhere against their own liability to their servants, and the insurers, having paid, sued the

railway company as the negligent cause of the injury, the word "indemnity," now relied on, would defeat them, if they had not previously used it as a ground for defending the original claim on the policy. If the railway company were sued by a third party, injured in an accident by the negligence of both the present parties, it could by third-party notice bring in the plaintiffs and throw on them the whole burden of the claim, although if it had sought for contribution it would have failed, there being no contribution between joint tortfeasors. Even if the mere word "indemnity" would suffice for the appellants' purpose, the whole subject-matter appears to negative such an application of the word.

Again, the liability may arise out of or it may arise in connexion with—but it must still arise and for legal purposes that must mean arise causally, and, since the matter dealt with is a legal liability, that must mean in such causal connexion as is required to make somebody liable, who has to be answerable for the apparatus. It is contemplated that the railway company is liable and that its liability has been caused by the presence or the use of the gangway. In the present case the action of the engine-driver was what caused the railway company to be liable. It is said that if the lorry had not been there—*a fortiori* if it had not existed—it would not have been knocked off the gangway, but for legal purposes the lorry was not a contributing cause of the injury to it, but only a *causa sine qua non*. Moreover it was there pursuant to the terms of the licence for use in a joint operation with the railway company and, as the clause in question is not a clause of defeasance or of exception but only a foundation for an independent cross-claim, I think that there was an implied contractual obligation on the railway company to be reasonably careful not to injure it. Hence the negligence in itself formed a cause of action, and the damage to the lorry was merely the measure of the amount recoverable. The liability was, as a matter of causation, wholly due to the acts and defaults of the railway company and did not arise at all out of or in connexion with the presence or the user of the gangway.

My Lords, if the appellants' construction be adopted I think it must follow that, however reckless the negligence of the engine-driver might be, all the liability thus arising would be covered by the plaintiffs' indemnity. If shunting was carried on in such a manner that the lorry was frequently put out of action or that the plaintiff company could not prudently use the gangway, except when shunting was not going on at all, the business object of the licence would be greatly prejudiced, if not wholly defeated. The licence to place the lorry and use it in an overhanging position rests, as a practical matter, on the assumption that it will not be prevented from doing so by the mode in which the railway company does its work. When such prevention is caused by carelessness of workmen injunctions are of no use, and the only way to get it stopped is by suing for and recovering damages. The doctrine of *The Moorcock* (5 *The Times* L.R., 316; 14 P.D., 64) is, I am aware, apt to be overworked, but in this case I do not think I am straining it when I say that, even if the words of the clause, as words, would enable the counterclaim to succeed, such a construction in this case would defeat the manifest intention and object of the parties in entering into this arrangement and that accordingly the construction should be rejected.

For these reasons, and without relying on rules of construction applicable to contracts to carry subject to exceptions or to contracts to carry safely at all events, I am of opinion that the appeal should be dismissed and I move your Lordships accordingly.

Lord Warrington of Clyffe (read by Lord Atkin).—My Lords: Under a lease dated May 9, 1914, the respondents are the lessees under the appellants of a piece of land adjoining other land of the appellants alongside of certain sidings of theirs at Bristol.

The respondents are merchants and dealers in builders' materials and they send considerable quantities of such goods for conveyance by the appellants' line.

In the year 1921, being desirous of obtaining an easier access to the appellants' sidings for the purpose of transferring materials for carriage from their own lorries into the appellants' trucks, they obtained from the appellants permission to erect a portable gangway with brackets over a piece of the appellants' land lying between their sidings and the land in the occupation of the respondents, and to use the gangway so erected by running their lorries along it and then tipping the contents directly into a truck upon the siding. When the gangway was thus in use the end of the lorry projected over the siding.

In consideration of the privilege so conceded the respondents signed a memorandum dated September 24, 1921, endorsed on their lease. So far as it is material the memorandum is in the following terms:—

"In consideration of the within named company permitting the within named lessees to use the portable gangway with brackets recently erected by the said lessees upon the premises within described and projecting over the company's premises for the purpose of loading traffic into trucks on the sidings adjacent to the within described premises the said lessees hereby agree and undertake to indemnify the said company against all claims and demands or liability whatsoever whether in respect of damage to person or property arising out of or in connexion with the existence or user of the said gangway and brackets and to remove the said gangway when not in actual use to such a position that the same shall not project from the premises within described."

On August 26, 1926, in the course of certain shunting operations, the appellants' servants negligently—as is assumed for the purpose of argument—caused a box truck to be moved along the siding over which the end of the respondents' lorry was projecting. The box truck struck the lorry, which was thrown to the ground and seriously damaged.

The present action was brought by the respondents to recover damages for the injury to their lorry.

The appellants in their defence, amongst other grounds, set up the above-mentioned memorandum as negativing any liability to the respondents.

They also pleaded it by way of counter-claim and thereby claimed a declaration that they were entitled to be indemnified by the respondents against all liability on their claim including liability in respect of damages, if any, awarded to the respondents, costs, if any, awarded to them, and their own costs as between solicitor and client incurred in defending the claim.

The points of law raised by the defence and counter-claim were ordered to be set down and disposed of before the trial of the issue of fact, and the matter came before Mr. Justice MacKinnon on May 17, 1927.

Three points were argued:—

1. Whether the memorandum covered claims against the appellants by the respondents themselves.

2. Whether—if this were answered in the affirmative—it covered a claim founded on the negligence of the appellants.

3. Whether under the circumstances of the case the damage to the lorry is to be treated as damage "arising out of or in connexion with the existence or user of the said gangway."

The learned Judge decided the second and third points in favour of the appellants and the first point in favour of the respondents.

The Court of Appeal by a majority (Lord Hanworth, M.R., and Lord Justice Scrutton, Lord Justice Sargant dissenting) affirmed the judgment of Mr. Justice MacKinnon on the first point. They did not express an opinion on the second and third points inasmuch as in view of their opinion on the first point the others did not arise.

In the argument in this House counsel for the appellants based their case wholly on the counterclaim, viz., granting that the terms of the memorandum did not afford an answer to the action, they rendered a judgment in favour of the respondents of no practical effect inasmuch as they would be bound to repay to the appellants the amount of any damages and costs and further to pay the costs of the defence as between solicitor and client.

As to the point No. 2 above mentioned I agree with Mr. Justice MacKinnon that if the memorandum covers claims by the respondents themselves it is wide enough to include claims founded on negligence.

As to point No. 3, whether on the facts alleged the damage arose out of or in connexion with the existence or user of the gangway and brackets, I have come to the opposite conclusion.

The damage certainly did not arise out of or in connexion with the existence of the gangway and brackets. If the gangway had not been in use, even if it had been in position ready for use, the box truck would have passed clear and no damage would have been done.

Did then the damage arise out of or in connexion with the user of the gangway or brackets? Inasmuch as the respondents alone and persons authorized by them can lawfully use the gangway, the words seem to me to assume that it is an act of the respondents themselves in the course of or in connexion with the user of the gangway from which the damage arises. In the present case the damage arose not from any act of the respondents in the course of or in connexion with the user, but from that of the appellants' servants in driving the box truck against the overhanging lorry. It is true that if the lorry had not been there the damage would not have arisen, but on the other hand but for the act of the appellants' servants the lorry, though in its actual position, would not have been injured, and it seems to me that in determining the present question it is the *causa causans* alone which has to be regarded.

If my view on this last point is correct it is sufficient to entail the dismissal of the appeal, and on the more general question I will only add that I agree with the views expressed by my noble and learned friend Lord Sumner whose judgment I have read.

For these reasons I am of opinion that the appeal fails and should be dismissed with costs.

LORD ATKIN.—My Lords, for myself I have read the judgment of my noble and learned friend Lord Sumner and I agree with it.

[Solicitors—Mr. A. G. Hubbard; Messrs. Calder Woods and Sandiford, for Messrs. Wansbroughs, Robinson, Tayler, and Taylor, Bristol.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)
1928. Mar. 21.

GREEN v. J. GLIKSTEN AND SON, LIMITED.*

Revenue — Income-tax — Insurance of timber against fire—Money received by insured—Whether an ordinary trading receipt.

Where a timber merchant insures his timber against fire and the timber is destroyed by fire, the amount received by him from the insurance companies, in respect of the timber so destroyed, is to be taken, for the purpose of income-tax, as an ordinary trading receipt, and it is not sufficient to value the timber destroyed at cost or market value, whichever may be the lower, and to enter that amount in the profit and loss account and to put to reserve the balance of the money received from the insurance companies.

Decision of Rowlatt, J. (44 *The Times* L.R., 153; [1928] 1 K.B., 475), affirmed.

This was an appeal by J. Gliksten and Son, Limited, from a decision of Mr. Justice Rowlatt (44 *The Times* L.R., 153; [1928] 1 K.B., 475) in a case which raised the question how money received by a trader from his insurers in respect of damage done to his stock by fire should be entered in his trading account.

The appellant company was assessed to income-tax for the year ending April 5, 1924, in the estimated sum of £100,000.

The company was incorporated in 1905, and carried on business as timber merchants at Stratford, E. On August 8, 1921, a large quantity of timber, which was stored in the company's timber yard, was destroyed by fire. In respect of the timber so destroyed the company received in February, 1922, £477,838 from various insurance companies.

The timber destroyed consisted mainly of the best class of hardwood, which was bought by the company seasoned, unseasoned, or partly seasoned. A large quantity of seasoned wood, which had been taken into stock before the War, was destroyed.

The company's accounts were made up to June 30 in each year, stocks being valued (following the usual practice) at cost or market value, whichever was the lower. For that valuation large sums were in the last two years of account before the fire written off the original cost prices of the stock in respect of depreciation to arrive at the closing stock values, and the reduced sums so arrived at were adopted each year to ascertain the company's profits for income-tax purposes. In respect of the stock on hand at June 30, 1921, which was the subject matter of the appeal, the sums from time to time written off the stock values amounted in the aggregate to £107,000 or thereabouts, and the total stock on hand at that date was valued in the company's accounts at £266,831, after writing off £107,000.

For many years the company had kept its stock-in-trade insured against loss or damage by fire, and had, in computing its profits for income-tax purposes, been allowed to deduct the premiums paid by it in respect of the policies of insurance as an expense of its business. For the purposes of fire insurance the stock-in-trade of the company was valued at replacement value. At the date of the fire the value of timber of the kind which constituted the greater part

* Reported by G. T. WHITFIELD-HAYES, Esq., Barrister-at-Law.

of the company's stock was very high, and the company accordingly claimed from the insurance companies concerned, and was paid by them, in respect of the replacement value of the stock so destroyed, £477,838. Out of that sum £160,824 (being part of the sum of £266,831, the value of stock in hand at June 30, 1921), estimated by the company to be the written-down value of the timber so destroyed, had been brought into the company's accounts for the year ending June 30, 1922, as a trading receipt.

After deducting £2,845 for law charges, £1,000 for expenses of clearing the yard, and £160,824, the balance of the moneys received from the insurance companies in respect of the destroyed timber, amounting to £313,168, was carried into the balance-sheet for the year ending June 30, 1922, as a reserve, but was not brought into the profit and loss account.

During the War the greater part of the company's trade consisted in supplying seasoned and specially selected timber of various kinds to Government Departments and various aircraft contractors. The timber required for these purposes was of a special character, and had to be, and was, picked out from the company's stocks. The whole of the company's stocks of the required types of timber, such as silver spruce, mahogany, walnut, and English ash, had (before the fire) been gone over in this way, and the company was, at the date of the fire, left in possession only of such portions of these stocks as had not been found suitable for the purposes mentioned. Since the Armistice the company had done an increasing business with the motor body-building and like industries, and that class of business had led to demand for, and the company had stocked, timber of types and qualities different from those stocked by the company during and before the War. For that reason only a small portion of the timber destroyed by the fire had been replaced—namely, to an amount of £18,400 or thereabouts.

At the date of the fire there was a "boom," which was being prolonged by the adoption on the part of the larger timber merchants of a policy of "holding up" stocks. The high prices obtaining at that time, on the basis of which the insurance companies paid the company's claim, were due to that "boom." The timber destroyed was of such a character that it would have been practically impossible to have put it on the market without causing a glut and destroying the market for the time being.

On an appeal by the company to the Special Commissioners of Income Tax against the assessment, it was contended on behalf of the company (*a*) that no part of the sum received by the company from the insurance companies in respect of the destroyed timber constituted a trading receipt; and (*b*) that no part of the difference between the £160,824 and the £477,838 constituted a trading profit.

It was contended on behalf of the Crown (*a*) that the whole sum received from the insurance companies in respect of the destroyed timber—namely, £477,838—constituted a trading receipt, and should have been brought into the company's profit and loss account for the year in question; and (*b*) that the amount of the assessment should be £84,227, less £373 for wear and tear.

The Special Commissioners decided that the £477,838 recovered from the insurance companies did not represent a trade receipt, and that no part of it was assessable as trade profits under Case I. of Schedule D, and they expressed the opinion that the burned timber which had been replaced should be brought into stock at the original cost price of the timber. That replacement need not be a purchase of timber precisely similar to that burned. It was sufficient if it were timber suitable for similar purposes. The Special Commissioners fixed the amount of replacements at £18,400, and reduced the assessment under appeal to *nil.*

On appeal by the Crown, Mr. Justice Rowlatt reversed that decision. He held that the amount received from the insurance companies in respect of the timber so destroyed was to be taken, for the purpose of income-tax, as an ordinary trading receipt, and that it was not sufficient to value the timber destroyed at cost or market value, whichever might be the lower, and to enter that amount in the profit and loss account, and to put to reserve the balance of the money received from the insurance companies.

The company appealed.

Mr. Maugham, K.C., Mr. Latter, K.C., and Mr. Cyril King appeared for the appellant company.

The Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills, for the Crown, were not called upon to argue.

The MASTER OF THE ROLLS (Lord Hanworth), in giving judgment, said that the case was an interesting one, but the Court could only come to the conclusion that Mr. Justice Rowlatt's judgment was right. It was said by the timber company: "We are dealers in timber, but we do not carry on a trade in fires; this misfortune is no part of our business; we do not contemplate fires. Therefore this sum received from the insurance company is an indemnity in respect of the amount standing against the timber destroyed in our books; the surplus is a windfall, a nugget of gold dug up on our premises, and it does not fall into our trading accounts for the purposes of income-tax."

He had looked at the trading account and it showed, as in other businesses, that to effect insurance against any risk whatsoever was a part of the ordinary duty. It might be true to say that the company did not trade in fires, but it was still mindful of the fact that untoward events did occur, and it was in the ordinary course of business that it took steps to guard against perils by land or sea.

The company had relied on Rule 3 of the Rules applicable to Cases I. and II. of Schedule D of the Income Tax Act, 1918, which said that:—

"In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of . . . (*k*) any sum recoverable under an insurance or contract of indemnity."

The company contended that these words seemed to contemplate that there had been a loss in respect of which there was an indemnity recoverable; in other words, it forbade the taxpayer to treat as a loss a sum which in fact was recoverable under a contract of indemnity. He was, however, unable to find in that rule any definite guide for the determination of the present appeal.

Mr. Justice Rowlatt had treated the case from the right point of view. The appellant company, as a trader in timber, had, as part of its business, to insure against certain perils. It had a fixed capital, and also a circulating capital used for the purchase of stock, and part of that circulating capital was invested in timber. The timber might have been sold; instead of that, it was burnt. Under the contract of indemnity a sum had been received in respect of it, and that was, in fact, a restoration to the circulating capital of a sum to replace the sum which had been invested in timber. The sum received seemed to him to be an ordinary item of the receipts, which ought to be brought into the accounts at its true value.

LORD JUSTICE SARGANT said that it was really a very plain case. The receipt in question was quite an ordinary receipt, not in the sense that it occurred every year, but in the sense that it would ordinarily be received if the peril insured against were to take place. Rule 3 (*k*) of Cases I. and II. of Schedule D had been relied upon, but, in his view, that rule did not affect the matter; indeed, if anything, these words seemed to be rather against the appellants, because they seemed to indicate that the amount recoverable in such a case was to take the place of the asset lost. He (Lord Justice Sargant) failed to follow the argument that the Court should only reckon the book value of the timber. In his view, the value of the timber was the amount received for the timber.

LORD JUSTICE LAWRENCE said that, in his view, the true effect of Rule 3 (*k*) of Cases I. and II., Schedule D, was that in arriving at the balance of profits there was to be no deduction for an insured loss to the extent to which it was covered, but that did not support the idea that, if the true value of the goods burnt were received from an insurance company, that was not a receipt of the business. Fire was certainly not an ordinary event of business; but if a fire did occur then the receipt of the insurance money was an ordinary transaction, stipulated for in the ordinary prudent course of business.

[Solicitors—Messrs. Ward, Perks, and Terry; the Solicitor of Inland Revenue.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)
1928. Mar. 19.

COMMISSIONERS OF INLAND REVENUE v. PARSONS.*

Revenue — Supertax—Principal shareholder in company — Scheme for transfer of shares to employees—Dividends to belong to principal shareholder till transfer — No transfer till total dividends amounted to par value — Liability to assessment — Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 27.

The appellant, who was the principal shareholder and held the controlling interest in a company, set aside a certain number of his shares for transfer to certain employees of the company on the terms that, until the actual transfer, he was to receive the dividends, and that when the total of the dividends on the shares set aside for an employee amounted to the par value of a share the share so paid for should be transferred to the employee. The appellant was assessed to supertax on the dividends received by him on the shares so set aside.

Held, that since the dividends, as they accrued, were dividends of the appellant, although he might be under obligations with regard to them in the future, they formed part of his income for the purpose of assessment to supertax.

* Reported by H. LANGFORD LEWIS and G. T. WHITFIELD-HAYES, Esqs., Barristers-at-Law.

Decision of Rowlatt, J. (41 *The Times* L.R., 572), affirmed.

This was an appeal from a decision of Mr. Justice Rowlatt (41 *The Times* L.R., 572), allowing an appeal by the Crown from a decision of the Commissioners for the Special Purposes of the Income Tax Acts on a question relating to supertax. The appellant, the Hon. Sir Charles Algernon Parsons, K.C.B., appealed against an additional assessment to supertax in the sum of £1,623 for the year ending April 5, 1920. The appellant was the principal shareholder in a private company, C. A. Parsons and Co., Limited (the company), and at all material times held a controlling interest in the company, and, up to the date of an arrangement made in 1918, over 90 per cent. of the shares. The shares were of the nominal value of £100 each.

In 1918 the appellant decided, in order to afford certain employees of the company holding important positions a direct personal interest in the company, to transfer to those employees a definite number of shares in the company, subject to certain conditions set out below. Therefore, in 1918, he set aside 649 shares in the company for certain selected employees, and, in 1919, 240 additional shares for the same employees, which shares were to be eventually transferred to them on the terms of a document entitled "Statement of Terms," and a letter addressed to each of the employees to whom shares were to be transferred. The terms were, shortly, that the company was to open and keep accounts in which the shares of each employee were to be credited with all dividends which, during his employment by the company, should be received by Sir Charles Parsons in respect of those shares. The employees might also pay for the shares by any instalments of not less than £10 at one time. As soon as the account, either out of dividends credited or out of payments made by the employee, reached the par value of any one or more shares, such share or shares were to be transferred to the employee. There were further provisions applicable to the case of the death of the employee, or the termination of his employment by the company. Clause 8 of the terms was as follows:—

"Until actual transfer to the employee, the shares will continue in the name and under the control of Sir Charles, and he may vote and act in respect of them as absolute owner, and without any restriction by reason of this arrangement."

The letter accompanying the terms explained them as follows:—

"Stated generally, the arrangement is that the shares shall be credited with the dividends received in respect of them, and that for each £100 of accumulated dividends a share shall become yours, and so on, until the whole of the shares set aside for you have been accounted for. . . . It will be open to you to accelerate your ownership by payments of your own moneys. . . ."

The dividends for the year ending April 5, 1919, so set aside amounted to £1,622 10s. The Special Commissioners held that those moneys were subject to a binding trust in favour of the employees, and did not form part of the appellant's income. Mr. Justice Rowlatt, on appeal by the Crown, reversed that decision.

Sir Charles Parsons appealed.

Mr. Latter, K.C., and Mr. Cyril King appeared for the appellant; the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills for the Crown.

Counsel contended for the appellant that this was

an effectual trust of certain dividends, forming a trust fund to purchase shares for the employees. Even if that were not so, the dividends so earmarked were an "annual payment" within the meaning of section 27 of the Income Tax Act, 1918, whereby the appellant's income was diminished.

Counsel for the Crown were not called upon to argue.

The MASTER OF THE ROLLS, in giving judgment, said that he felt the force of the argument for the appellant, and he was sorry to put what might seem like an embargo on such a generous scheme, but the Court must construe the legal effect of the arrangement, and two facts stood out very clearly. First, the dividends on these blocks of shares, or on the shares not already transferred to employees, were being paid directly to the appellant in his own right; and, secondly, at no time could any of those employees have turned round to Sir Charles Parsons and said: "You are receiving a portion of a dividend which is my dividend, and I direct you to deal with that portion in a particular way." In other words, while the appellant received dividends on those blocks of shares he received them absolutely as his own without any employee having the right to interfere with him.

It had been suggested that there was really a trust; that the shares were being paid for out of trust money. He (his Lordship) could not agree. The transaction really amounted to this. Sir Charles Parsons had undertaken to make a gift to his employees from a block of shares. The gift would be completed when the nominal value of each share transferred had been received in dividends, but meanwhile, though the amount of the dividends was entered in a book in favour of the employees, the dividends were the dividends of Sir Charles and his right in respect of them was untrammelled. It seemed impossible to argue that he received those dividends as a trustee.

Then it was said that the appellant should have relief granted to him under section 27 of the Income Tax Act, 1918, because those dividends, being for the purchase of shares for employees, were really an interest or annual payment charged on the income of the appellant and reducing that income. He (the Master of the Rolls) doubted whether the point was really a question which could be raised on this appeal; but, even if it were, the Court would still have to answer the question: Was this a trust of certain dividends so as to take them out of the appellant's income? It seemed that it was not. There was a duty upon Sir Charles Parsons to transfer shares from time to time, but meanwhile the income was his income, free and unappropriated. The appellant's case had attractive features, and the Court would have been only too glad to take the view put forward on his behalf if it had been possible to do so, but it was not, and the appeal must, therefore, be dismissed.

LORD JUSTICE SARGANT said that, in view of the generous character of the scheme, he was sorry to have to come to the same conclusion. The question really was whether there was here a valid trust, and it seemed to him that the fundamental conception of a valid trust was lacking. The appellant could receive the dividends from time to time and do what he liked with them. All that he had to do in respect of them was to make a book entry for each employee, showing the credit to that employee. The fact that each employee was entitled to have a share transferred to him when his credit reached a certain figure was not to say that any particular dividend belonged to that employee. It seemed to him (Lord Justice Sargant) that all suggestion of a trust had disappeared. As to the suggestion that these dividends were an "annual payment," the appellant would not lose any sum by the crediting of them as book entries. What would happen would be that at the end of a certain time he would lose his share. There seemed no ground for the suggestion that these sums could escape being brought into account for supertax.

LORD JUSTICE LAWRENCE said that the insurmountable difficulty in the way of the appellant was that the scheme did not contemplate the dividends being the subject-matter of any trust until the full amount of a share was credited. Meanwhile, the income was the income of the appellant for his own use. Neither did the fact that the amounts of the dividends were credited, as a book entry, from time to time, to certain employees make them an "annual payment" within the meaning of section 27 of the Income Tax Act, 1918.

[Solicitors—Messrs. Crossman, Block, Matthews, and Crossman, for Messrs. Dees and Thompson, Newcastle-on-Tyne; the Solicitor of Inland Revenue.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) } 1928. Mar. 29.

RAEBURN v. RAEBURN.*

It was announced that the parties had come to an agreement in regard to this petition in which Lady Raeburn, formerly Mrs. Olga Lucia Hatton, widow, of Overdale, St. John's, Woking, Surrey, sought a decree of judicial separation against Sir William Hannay Raeburn, Bt., a shipowner. The hearing had been preceded by the trial of an issue as to jurisdiction (44 *The Times* L.R., 384).

Mr. Bayford, K.C., and the Hon. Victor Russell appeared for the petitioner; Mr. Cotes-Preedy, K.C., and Mr. Bush James for the respondent.

Mr. BAYFORD now said that he proposed to offer no evidence as to the first set of charges in the petition, and the petitioner accepted the explanations given on behalf of the respondent as to the second set of charges.

Mr. COTES-PREEDY said that the charges were totally denied by Sir William Raeburn, who would not have agreed to the deed of separation, which had been signed, if the charges had been persisted in. The respondent felt that if the charges had been properly investigated they would never have been brought. By the deed of separation Sir William was allowing his wife precisely the amount which she would have had if this misguided action had never been brought. He said that he made this statement in fairness to his client, who had many friends in England and Scotland, as a certain amount of publicity had been given, during the trial of the issue of residence, to charges which Sir William had had no opportunity of denying.

The PRESIDENT, in dismissing the petition, said that the respondent had consented to pay the taxed costs as between party and party. As regarded what had been said by counsel about charges which were made on one side or the other, every intelligent person must be well aware that charges proved nothing. There were two sets of charges. One set was no longer made, and as to the other set it had

* Reported by WILLIAM LATEY, Esq., Barrister-at-Law.

been said that explanations had been offered and accepted.

Mr. COTES-PREEDY said that the charges were denied *in toto*, and his client had offered no explanations at all.

His LORDSHIP said that the least said the soonest mended, and made the agreed order as to costs.

[Solicitors—Messrs. Charles Russell and Co.; Messrs. Donald McMillan and Mott.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)
1928. Mar. 23.

CATTON v. ASHWELL AND NESBIT, LIMITED.*

Master and Servant—Compensation for injury by accident — Weekly payment — Alleged recovery of workman—Stoppage—Application by employers for review — Denial of liability—Payment into Court of amount up to date fixed for hearing—Alleged breach of statutory duty—Tribunal to determine question of incapacity—Workmen's Compensation Act, 1925 (15 and 16 Geo. V., c. 84), ss. 12, 21.

The plaintiff, a workman in the employment of the defendants, was injured by an accident, and the defendants admitted liability and made a weekly payment of compensation. Ultimately a doctor reported that the plaintiff had recovered, and the defendants stopped the weekly payment and applied to the county court for a review thereof, and, when a date had been fixed for the hearing, they paid into Court, with a denial of liability, the amount of all the weekly payments up to that date. While the county court proceedings were still pending, the plaintiff brought an action, alleging that he had not recovered from his injury, and claiming (1) a declaration that under section 12 of the Workmen's Compensation Act, 1925, the defendants had committed a breach of their duty by stopping the weekly payment otherwise than in pursuance of an agreement or arbitration, and (2) an injunction restraining a continuance of the breach.

Held, (1) that there was no enforceable obligation on the employers to continue the weekly payment when the issue raised by them was that the workman was no longer incapacitated, and (2) that as under section 21 of the Act the only tribunal to determine the question of incapacity was the county court, and as that question had not yet been determined by that tribunal, the plaintiff could not show that his incapacity was continuing since the date when the defendants stopped the weekly payments, and therefore the action failed.

Decision of Clauson, J. (44 *The Times* L.R., 130) affirmed.

* Reported by G. T. WHITFIELD-HAYES and H. LANGFORD LEWIS, Esqs., Barristers-at-Law.

This was an appeal from a decision of Mr. Justice Clauson (44 *The Times* L.R., 130).

The plaintiff, Mr. Joseph Catton, a pipe fitter, was injured on August 1, 1925, while in the employment of the defendants, Ashwell and Nesbit, Limited, engineers, carrying on business at Leicester. He was paid £1 10s. a week as compensation. In the action he claimed a declaration that the defendants, by stopping the weekly payments of compensation on June 24, 1927, otherwise than in pursuance of an agreement or arbitration, had committed a breach of their statutory duty under the Workmen's Compensation Act, 1925. He also claimed an injunction restraining the defendants from continuing the breach, and damages.

The plaintiff had injured his heel by falling from a platform 3ft. high. The defendants admitted liability. In May, 1927, the plaintiff was examined by a doctor, who reported that he had recovered from the injury.

On June 24 the defendants filed an application in the Greenwich County Court, in pursuance of section 11 of the Workmen's Compensation Act, 1925, for a review of the weekly payments which they were making to the plaintiff, asking that they should be terminated or diminished. On June 27 the Registrar gave notice that the application would be heard on October 14, 1927. The defendants thereupon paid into Court £24, the amount of the weekly payments up to October 14, 1927. That payment was made with a denial of liability on the ground that the plaintiff, having entirely recovered, could no longer claim to be paid compensation up to the time when an award should be made in the county court, having regard to the recent decision of the House of Lords in *Ocean Coal Company, Limited v. Davies* (43 *The Times* L.R., 108; [1927] A.C., 271).

The plaintiff pleaded that he had not recovered from his injury. He said that in *Ocean Coal Company, Limited v. Davies* (*supra*) the workman admitted that he had entirely recovered from his injury, but claimed, nevertheless, that under section 14 of the Workmen's Compensation Act, 1923, now section 12 of the Workmen's Compensation Act, 1925, the payment of compensation could not be ended until the county court Judge had made an award on the application to review.

Section 21 of the Act of 1925 provided that any question arising in any proceedings under that Act should be settled by an arbitrator or by a county court Judge. Section 12 provided that an employer should not be entitled otherwise than in pursuance of an agreement or arbitration to end or diminish a weekly payment under the principal Act except in certain cases, which did not apply here.

Mr. Justice Clauson thought that, on the authority of the decision of the House of Lords in *Niddrie and Benhar Coal Company, Limited v. Dee* ([1927] A.C., 299), the plaintiff could only succeed by showing that the defendants had failed in their statutory duty, and to do that he must prove that incapacity still existed. The proper tribunal to determine that question was the county court. The plaintiff's continuing incapacity had not been established, and, therefore, the action must be dismissed.

The plaintiff appealed.

Sir Henry Slesser, K.C., and Mr. C. S. Rewcastle appeared for the appellant; Mr. Edgar Dale and Mr. J. Alun Pugh for the respondents.

The MASTER of the ROLLS (Lord Hanworth), in the course of a considered judgment, stated the facts, and said that the action was really brought to determine whether certain *dicta* of Lord Wrenbury and Lord Carson in *Ocean Coal Company, Limited v.*

Davies (43 *The Times* L.R., 108 ; [1927] A.C., 271) afforded a good foundation for the claim now made by the workman to have the weekly payments to him continued notwithstanding that the employers contended that he had recovered from his incapacity and, consequently, that his right to weekly payments of compensation had ceased.

If the question were examined in historical sequence, the solution, in his (his Lordship's) judgment, was plain. Under the Act of 1906 a workman might become entitled to compensation in accordance with Schedule I. of the Act, and, when an employer had been ordered to make such weekly payments by an award or had agreed to do so, the employer was not entitled to end the payments unless and until there had been a review under clause 16 of Schedule I. It was decided in *Gibson and Co. v. Wishart* (30 *The Times* L.R., 540 ; [1915] A.C., 18) that a review and termination or diminution of a weekly payment related back retrospectively to the date when the incapacity ceased.

Then the Act of 1923 was passed, and section 14, which was now section 12 of the Act of 1925, took away the right of an employer to end payments which he was making to a workman, whether voluntarily, or under an award or recorded agreement, except in the manner provided by the section. It was contended that its effect was to make the employer liable to continue them down to the time when his liberty to end them was given him, either by agreement, or award, or the decision of the "Judge" in the procedure available under section 14 (3). But that view, which was adopted by the Court of Appeal in *Davies v. Glyncorrwg Colliery Company* ([1925] 2 K.B., 339) and in *Ocean Coal Company, Limited v. Davies* (135 L.T., 498), proved erroneous, the majority of the House of Lords in the latter case reaffirming the principle adopted in *Gibson and Co. v. Wishart* (*supra*) that the liability of the employer was limited to the period of incapacity.

His Lordship then referred to certain passages in the judgments given in that case and proceeded. In *Hosegood and Sons v. Wilson* (27 *The Times* L.R., 88 ; [1911] 1 K.B., 30), and again in *Niddrie and Benhar Coal Company, Limited v. Dee* ([1927] A.C., 299), decided by the House of Lords immediately after *Ocean Coal Company, Limited v. Davies* (*supra*), the opinion was expressed that employers could recover in a separate proceeding sums overpaid to workmen when the amount of the weekly payments was reduced as from an antecedent date, though they could not set off such overpayments as against payments due subsequently. Lord Wrenbury in the latter case (*Niddrie and Benhar Coal Company, Limited v. Dee, supra*) also dealt with the position where money had been paid into Court, and where the ultimate decision of the dispute was worked out by an arbitration and not by the decision of a medical referee. He said (at p. 311) :—

"The Act is obviously ill-drawn, but in my opinion it does not leave the employer exposed to the danger and injustice against which the Act protects him if there were a medical reference instead of an arbitration by order of the Court. The Court has power . . . to deal with the money in Court in such manner as is right when the arbitration is concluded."

The present action was based on the expressions used by Lord Wrenbury as to section 12 being a statutory provision that the employer should *de facto* continue to pay, though his liability to pay was not necessarily thereby enlarged, and on some observations by Lord Carson in the same case. In his (his Lordship's) judgment, both those opinions must be interpreted in close relation to the matter which was then before the House. They could not be taken as indicating that the statute imposed an obligation on the employer enforceable by action at law to make the weekly payments to the workman when the issue raised by the employer was that the workman was no longer incapacitated and no longer entitled to receive any compensation. The speeches were delivered for the purpose of emphasizing the view that the weekly payments depended on the continuance of incapacity.

If there were a statutory obligation on the employer to make those payments, and they were made pursuant to process on the law being set in motion, as suggested, they could not be recovered back. Money paid under compulsion of law, and afterwards discovered not to have been due, could not be recovered back in an action for money had and received —*Marriott v. Hampton* (2 Smith's Leading Cases, 403). That proposition had the authority of Sir James Shaw Willes and Sir H. S. Keating in the third edition. There were further difficulties for the plaintiff besides those which he (his Lordship) had dealt with. By section 21 (1) of the Workmen's Compensation Act, 1925 :—

"If any question arises in any proceedings under this Act . . . as to the amount or duration of compensation under this Act . . . the question shall . . . be settled by the arbitration . . . of an arbitrator or of a Judge of County Courts . . ."

For the reasons given he agreed that no statutory right of action for those intermediate payments was given to the workman under section 12 of the Act, and he agreed with Mr. Justice Clauson that the action failed. The appeal must be dismissed.

Lord Justice Sargant agreed. The action was, in his view, a desperate attempt to nullify the decisions in *Ocean Coal Company, Limited v. Davies* (43 *The Times* L.R., 108 ; [1927] A.C., 271) and *Niddrie and Benhar Coal Company, Limited v. Dee* ([1927] A.C., 299) and was bound to fail. Similar relief had been claimed by the plaintiff in the County Court and had failed for the reasons given by the County Court Judge in a written judgment with which he entirely concurred, with the one trifling amendment (which told in favour of the defendants) that the payment of the money into Court was made in accordance with Rule 19 of the Workmen's Compensation Rules of 1926. He desired to adopt the following from that judgment—"It is clear from the decision in *Ocean Coal Company, Limited v. Davies* (*supra*) that section 12 does not give the workman an absolute right to continue to receive the weekly payments without regard to whether he has recovered or not. His right to a continuance of those payments is dependent upon the continuance of the incapacity." Had the plaintiff desired to challenge the correctness of the decision of the County Court Judge he could have appealed in the usual way, but instead of doing so he had started proceedings *de novo* in the High Court for relief similar to that which had been refused him in the County Court, with the additional objection that the question whether the plaintiff had in fact recovered and the date of such recovery were ultimately determinable in the arbitration proceedings already commenced, and entirely outside the jurisdiction of the High Court. He was content to adopt the judgment of Mr. Justice Clauson.

Lord Justice Lawrence, having stated the questions, proceeded. Mr. Dale on behalf of the employers had admitted that as the case was not one falling under any of the exceptions specified in section 12,

the employers were not entitled to end the weekly payments, otherwise than in pursuance of arbitration, and recognizing that position the employers in discontinuing the weekly payments promptly filed an application for a review and termination of the payments on June 24, 1927 ; and they paid into Court a sum sufficient to cover the weekly payments up to the date fixed for the hearing of the arbitration. No argument had been presented to suggest that the employers were not acting strictly in accordance with the rules in making that payment into Court, or that the money so paid in would not be available for the workman if the arbitrator should find that the employers had failed to prove that the workman's incapacity had in fact ended on the day alleged. He (his Lordship) was clearly of opinion that the employers had not committed a breach of any statutory obligation under section 12. They had never claimed that they could end the weekly payments otherwise than in pursuance of an arbitration, and they had taken all the necessary and proper steps to obtain an award, and had availed themselves of the power given to them by the Rules of paying money into Court pending the decision of the arbitrator. The workman, however, was dissatisfied. His Lordship then referred to the proceedings in the present action. A more futile proceeding on the part of the workman than the action it was difficult to conceive. As the workman had failed to prove that the employers had committed any breach of the provisions of the statute, it was not really necessary to consider the question whether such an action as the present would lie, but he desired to express his entire concurrence with the opinions expressed on that point by Mr. Justice Clauson and the Master of the Rolls. He agreed that the appeal failed and should be dismissed with costs.

[Solicitors—Messrs. Mills, Lockyer, Church, and Evill ; Messrs. Carpenters.]

K.B. Div. } 1928.
(Salter and Charles, JJ.) } Mar. 23.

BELL AND ANOTHER v. BENNETT.*

Mines — Coal-mine — Checkweighers—Minority and majority checkweighers—Co-existence—Whether possible — Coal Mines Regulation Act, 1887 (50 and 51 Vict., c. 58), s. 14 (1)—Coal Mines (Weighing of Minerals) Act, 1905 (5 Edw. VII., c. 9), ss. 1, 3.

Under the Coal Mines Regulation Act, 1887, and the Coal Mines (Weighing of Minerals) Act, 1905, the co-existence of a minority checkweigher and of a majority checkweigher, even if possible under the Acts, is no defence to a claim by a duly appointed majority checkweigher against a weight-paid worker for a proportion of the majority checkweigher's wages. But,

Semble, the statutes do not contemplate such co-existence, and the appointment of a minority checkweigher is terminated by the subsequent due appointment of a majority checkweigher.

This was an appeal from a decision of his Honour Judge Greenwell, sitting at Newcastle-upon-Tyne County Court.

The plaintiffs, Mr. George Bell and Mr. Wheatley Jacobson, contended that they were the checkweighers duly appointed on January 7, 1927, by a majority, ascertained by ballot, of the persons who were employed in the Greenside Colliery, Durham, and who were paid according to the weight of mineral extracted ; and that as such they were entitled to claim 10s. 2d. as a proportion of their wages from the defendant, Mr. Peter Bennett, who was a person employed at that colliery as a hewer and paid by weight. The defendant denied that he was liable, on the ground that he had already paid contributions to Mr. Matthew Richardson Clark, who, he contended, had been duly appointed checkweigher on December 18, 1926.

Section 14 (1) of the Coal Mines Regulation Act, 1887, provides :—

"Where a checkweigher has been appointed by the majority, ascertained by ballot, of the persons employed in a mine who are paid according to the weight of the mineral gotten by them, and has acted as such, he may recover from any person for the time being employed at such mine and so paid, his proportion of the checkweigher's wages or recompense, notwithstanding that any of the persons by whom the checkweigher was appointed may have left the mine or others have entered the same since the checkweigher's appointment. . . ."

The mine in question had been closed during the coal strike, and work was resumed at the beginning of December, 1926. Before the strike all the men employed at the mine had belonged to the Durham Miners' Union, but after the strike differences of opinion existed on the questions when and subject to what terms work should be resumed, and a new and non-political union was formed called the Greenside All Grades Union, of which a Mr. Forster was secretary. On December 10, 1926, the following notice was exhibited at the pithead :—

"GREENSIDE ALL GRADES UNION.

"Mr. Matthew Golightly and Mr. M. R. Clark are the two nominations for checkweighmen. The ballot will take place in the shelter on Saturday, December 18, 1926, between the hours of 11 a.m. and 12.30 p.m.

"C. FORSTER, Secretary."

On December 18 the ballot took place. There were 217 weight-paid workers in the mine, and 84 balloted for Mr. Clark. On December 30 a statutory declaration, recording the appointment by ballot of a checkweigher who was not a majority checkweigher, was made, according to the provisions of section 1 of the Coal Mines (Weighing of Minerals) Act, 1905, and Mr. Clark began work.

On January 3, 1927, a notice headed "Weigh Fund Meeting" was posted, calling a meeting for January 5 to obtain nominations for the position of checkweighers. The "Weigh Fund" was not connected with any political union, but included all those employed at the mine. On January 5 the two plaintiffs were nominated, and, on a ballot being held on January 7, 176 men voted for the plaintiffs out of 264 entitled to vote. From that time onwards both Mr. Clark and one or other of the plaintiffs were together in the cabin where the weighing took place.

On February 2 notice was given of a meeting with regard to the appointment of Mr. Clark, and on February 5 a ballot took place on the question : "Are you in favour of Clark representing you as a checkweighman ?" The result of that ballot was that out of 350 entitled to vote 63 voted for Mr. Clark's remaining on as a checkweigher and 186 for his removal.

The County Court Judge held that the appointment

* Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.

of Mr. Clark as checkweigher was invalid on the ground that the notice of December 10, 1926, was inadequate because it was not addressed to all the workers paid by weight, and that it was not made clear to them that they were all entitled to vote. He further held that if, contrary to his opinion, the appointment of Mr. Clark was valid, he had been properly removed from office and the plaintiffs had been duly appointed in his place, and were entitled to succeed in the action.

The defendant appealed.

Mr. Fairfax Luxmoore, K.C., and Mr. A. Wilson appeared for the appellant; Sir Henry Slesser, K.C., and Mr. C. B. Fenwick for the respondents.

MR. JUSTICE SALTER.—This is an appeal from the judgment of the learned Judge of the Newcastle-on-Tyne County Court, in an action which was brought by the plaintiffs claiming to be the duly appointed checkweighers for a mine known as the Greenside Mine, in Durham, and claiming under two statutes, to which I will refer, to be paid by the defendant, a hewer employed in that mine, a proportion of their wages as checkweighers. The learned Judge gave judgment for the plaintiffs; the defendant appeals.

The question is whether upon the proper construction of the relevant parts of two statutes the plaintiffs are entitled to recover against the defendant. The matters raised are in regard to the due appointment and the rights to remuneration of checkweighers in coalmines. The statutes are: The Coal Mines Regulation Act, 1887, and the Coal Mines (Weighing of Minerals) Act, 1905. The relevant sections are: Section 13 (1) and section 14 (1) of the Act of 1887; and section 1 (2), (3), and (5) and section 3 of the Act of 1905.

Checkweighers had in fact been employed for generations. They had received some statutory designation in the Coal Mines Act of 1872. The Act of 1887 was passed to consolidate and amend that and other Acts. It is unnecessary to go behind the Act of 1887. Section 13 (1) of the Act of 1887 provides: "The persons who are employed in a mine, and are paid according to the weight of the mineral gotten by them, may, at their own cost, station a person (in this Act referred to as 'a checkweigher') at each place appointed for the weighing of the mineral, and at each place appointed for determining the deductions in order that he may on behalf of the persons by whom he is so stationed take a correct account of the weight of the mineral or determine correctly the deductions as the case may be." We were referred to the words "on behalf of the persons by whom he is so stationed." In my view that merely means on behalf of the employees of the mine who are paid by weight and are, therefore, concerned to have the weight and allowances correctly determined. I think the words mean no more than that. The power given is to station a person. Nothing is said so far in regard to the method of appointment, but the object of the section clearly is to give a statutory right to the men's representative, which the employer must respect. Section 14 (1), entitled "remuneration of checkweigher," provides: "Where a checkweigher has been appointed by the majority, ascertained by ballot, of the persons employed in a mine who are paid according to the weight of the mineral gotten by them, and has acted as such, he may recover from any person for the time being employed at such mine and so paid, his proportion of the checkweigher's wages or recompense, notwithstanding that any of the persons by whom the checkweigher was appointed may have left the mine or others have entered the same since the checkweigher's appointment, any rule of law or equity to the contrary notwithstanding." That is plainly a provision which gives a special right to a checkweigher who has been appointed by a majority, determined by ballot, of weight-paid workmen in the mine. It gives him a general right as against the weight-paid employees in the mine from time to time. The Act of 1905, by section 1, gives power to appoint deputy checkweighers and then makes provision for the proper ascertainment and notice to the employers of the appointment of checkweighers by the men. Subsection 2 of section 1 provides: "A statutory declaration, made by the person who presided at a meeting for the purpose of appointing a checkweigher or deputy checkweigher, to the effect that he presided at that meeting, and that the person named in the declaration was duly appointed checkweigher or deputy checkweigher, as the case may be, by that meeting, shall be forthwith delivered to the owner, agent, or manager of the mine, and shall be *prima facie* evidence of that appointment." Then subsection 3 provides: "Where the checkweigher or deputy checkweigher was appointed by a majority, ascertained by ballot, of the persons employed in the mine, and paid according to the mineral gotten, the declaration shall so state, and, if he was not so appointed, then it shall state the names of the persons by whom or on whose behalf the checkweigher or deputy checkweigher was appointed. Where a checkweigher or deputy checkweigher is appointed by such a majority as aforesaid, he shall be deemed to be appointed on behalf of all the persons employed in the mine who are entitled to appoint him." It is clear, therefore, that the statutory declaration which must be made by the chairman of the meeting which makes the appointment must state whether or not the person purported to have been appointed was appointed by a majority, ascertained by ballot, of all the weight-paid employees in the mine. It must say whether that was so or not. If it was so, then it is not necessary to enumerate the persons on whose behalf the checkweigher has been appointed, because he is deemed to have been appointed on behalf of all the weight-paid workmen. If he is not appointed by that majority thus ascertained, then the declaration must give the name of every person by whom or on whose behalf he has been appointed. It would seem to follow from those words that the persons by whom he is appointed are not necessarily the same as the persons on whose behalf he is appointed, but happily we are not called upon in this case to go any further into that point. Therefore, there are clearly, if not two classes of checkweighers, two methods of appointing a checkweigher, and according to the class to which they belong, or, perhaps, to the method of appointment, their rights are widely different. Subsection 5 provides: "When a checkweigher or deputy checkweigher is appointed by a majority, ascertained by ballot, of the persons employed in the mine, and paid according to the mineral gotten, he shall not be removed by the persons employed in the mine except by a majority, ascertained by ballot, of the persons employed and paid as aforesaid at the time of the removal." There are other methods of removing a checkweigher, not by the persons employed in the mine, but where it is a question of removing him by the persons employed in the mine, if he is a checkweigher appointed by a majority ascertained by ballot, he is not to be removed except by a majority ascertained by ballot, and that is a majority of all the people thus employed and paid at the time of the removal. Just as he is

entitled to be paid by persons who were not in the mine when he was appointed, so he can be removed by persons who were not in the mine at that time. Section 3 provides : "All persons who are entitled, by the principal Act or this Act, to appoint a checkweigher or deputy checkweigher shall have due notice given to them of the intention to appoint a checkweigher or deputy checkweigher, by a notice, posted at the pithead or otherwise, specifying the time and place of the meeting, and have the same facilities given to each of them for the purpose of recording their votes, either by ballot or otherwise, in such appointment."

Those are the sections and subsections which we have to consider. They were considered in a Scottish case of *Robert Addie and Sons' Collieries, Limited v. Sullivan* (53 Sc. L.R., 600). It is only necessary to refer to a few words in the judgment of the Lord President. That case was concerned with the appointment of timekeepers in mines. At page 602 the Lord President says : "The procedure to be followed in the appointment of a timechecker is by statute declared to be the same as the procedure to be followed in the appointment of a checkweigher. No express statutory procedure is enjoined. It is very easy to infer from the provisions of section 1, subsections 2 and 3, of the Coal Mines (Weighing of Minerals) Act, 1905, what the essential steps must be. There must be a meeting of those entitled to appoint, at which the appointment is made. Of that meeting due notice must be given to all those who are entitled to make the appointment. The appointment may be made by the persons present at the meeting, whose names must subsequently be given, or it may be made by a majority of those in the mine entitled to appoint, that majority to be ascertained by ballot. When the appointment at a meeting has been made, the person who presided at the meeting must forthwith deliver to the mineowners a statutory declaration to the effect that he presided at the meeting at which the person named was appointed timechecker. If the appointment was made by majority, the statutory declaration must so say. If it was made by the persons present, the names of those persons must be given. And I ought to add that when a ballot is taken, equal facilities for recording their votes must be given to all those entitled to vote." Speaking with great respect, it may perhaps be that certain qualifications and additions have to be made to that passage if it is to be quite complete, but it is, I think, a very valuable outline of the practice with regard to the appointment of checkweighers in mines. It is plain that there must be a meeting. At that meeting the appointment may take place, or it may not. There may afterwards be a ballot. If a checkweigher is appointed at the meeting in the absence of ballot it is plain that he cannot be what I will call a majority checkweigher, because, quite apart from the numbers voting for him, the majority has not been ascertained by ballot, and therefore he cannot be a majority checkweigher. If a ballot follows the meeting the result of the ballot may be to appoint a majority checkweigher, or the result may be to appoint what I will call, for convenience, a minority checkweigher, as in this case Mr. Clark was. Mr. Clark was not a majority checkweigher, but he was appointed as the result of a ballot. In order, therefore, to appoint a majority checkweigher there must be first of all a meeting of which due notice must be given, and at which nomination for the ballot must be made. Then there must be after that a ballot, and that ballot must show a sufficient majority of the persons entitled to appoint. A majority checkweigher and a minority checkweigher have both a status under the statutes. They have a right, while their office lasts, to go into the cabin and check the weighing. In each case their appointment must be notified to the employers, who must recognize it. The majority checkweigher has certain important rights which are not enjoyed by a minority checkweigher. He is deemed to represent all the weight-paid workers in the mine. He has a right to payment from them, and by agreement the employers may deduct his wages from the wages of the weight-paid men. That, I think, is a summary of the effect of these sections.

Now I come to the facts of this case. This mine had, of course, been idle during the coal strike. That strike ended on December 1, 1926, and work was gradually recommenced at the mine. On December 10 there was exhibited at the pithead a notice of the intention to appoint a checkweigher. That notice was in the following terms :—

"GREENSIDE ALL GRADES UNION.

"Mr. Matthew Golightly and Mr. M. R. Clark are the two nominations for checkweighmen. The ballot will take place in the shelter on Saturday next, December 18, 1926, between the hours of 11 a.m. and 12.30 p.m.

"C. FORSTER, Secretary."

The men working at the mine, or most of them, had belonged, before the strike, to the Durham Miners' Union (I think that is the correct title of it) and after the strike, when the men began to go back to work, there was some difference of opinion between them as to whether work should be resumed or not, and on what terms, and so forth. A new union was, accordingly, formed called the Greenside All Grades Union, of which Mr. Forster was secretary. This notice is headed as I have said, and is signed by the Secretary, as I have said, and it was exhibited at the pithead. On December 18 accordingly a ballot took place. Eighty-four persons balloted for Clark. At that time there were 217 weight-paid workers in the mine, and, therefore, Clark's appointment was not an appointment by a majority. That is common ground. On December 30 a statutory declaration was made by Mr. John Robson, who had presided. He said : "A meeting of the persons who are entitled to appoint a checkweigher and employed at the Greenside Colliery in the County of Durham owned by the Stella Coal Company, Limited, was called by a notice posted at the pithead," and then follows the notice. Then : "I was present at and presiding at a meeting held on the said 18th December, 1926, at 12.30 after noon, in the Pit Shelter, when Matthew Richardson Clark, of 9, Meldon-terrace, Greenside, aforesaid, was appointed checkweigher on behalf of the workmen who were members of the Greenside Colliery All Grades Union." Then : "The names and addresses of the persons by whom or on whose behalf the said Matthew Richardson Clark was appointed checkweigher are set out in the list hereunto annexed and marked 'A.'" Then follows a list of, I think, 84 names, of which the defendant's is one. Therefore there was a statutory declaration in accordance with the statute regarding the appointment, and, in that case, the appointment by ballot, of a checkweighman who was not a majority checkweighman. Clark went into the cabin and began work on January 3, 1927. The cabin was occupied at that time by the two plaintiffs as a matter of convenience. They had been the checkweighers of the mine, I think, for years before the strike. When the strike ended they went back into the cabin by a kind of force of habit, but it is common ground that they had no legal right there. The strike had

determined their appointment, and they had not been reappointed. On January 3 a notice was posted headed : "Weigh Fund Meeting," calling a meeting to get nominations for the post of checkweighman for January 5. The Weigh Fund is a fund which is not connected with any particular union, but is a fund through which the checkweigher is paid his wages. On January 5, accordingly, the meeting took place, and the two plaintiffs were nominated. On the 7th the ballot was held. Out of 264 at that time entitled to appoint, 176 voted for the plaintiffs, and therefore the plaintiffs were appointed by a majority of those entitled to appoint. On January 10 the statutory declaration was made. The plaintiffs, therefore, if that appointment was correct in form, were appointed on January 7 what I have called majority checkweighers. They were, no doubt, appointed as checkweigher and deputy checkweigher. After that, one or other of the plaintiffs, whichever one was on duty, was in the cabin, and Clark also was in the cabin. They were both there checking the weighing by the employers' agents on behalf of the men or some of the men. On February 2 notice was given of a meeting in reference to the election of Clark, and a ballot took place on February 5. The ballot paper is headed : "All hewers and fillers are entitled to vote. Are you in favour of M. R. Clark representing you as a checkweighman ? Yes. No. Put your cross in space beside the word you wish to vote for." The result of that ballot was that 63 voted for Clark remaining and 186 voted for his not remaining. There were at that time 350 weight-paid men in the mine. On February 7 there was another ballot. It is, I think, admitted that on this occasion at any rate all the due forms were observed. The plaintiffs were, as far as form is concerned, validly appointed majority checkweighers for that mine. In due course a statutory declaration was made accordingly. The plaintiffs' claim against the defendant begins on that day, February 7. They claim to be paid the sum—there is no question about the sum—which would be payable to them from the defendant if they are entitled to recover from him. Those are the facts of the case. The essential facts, I think, are that there was a purported appointment of Clark, with which I must deal, on December 18, and subsequently on January 5 and 7 there was a purported appointment of the plaintiffs. In the view I take of this case it is not necessary to consider what was the legal effect, if any, of the ballot which was held concerning the position of Clark on February 5. The statute contains no provision for the determination of the appointment of a minority checkweigher. My present view is that that ballot had no legal effect at all. It was no doubt held, in view of the provision that a majority checkweigher cannot be got rid of except by ballot. Clark never was a majority checkweigher. My present impression is that that ballot had no legal effect. Further, I need not consider the appointment of the plaintiffs on February 7. In the view I take that was an unnecessary form, inasmuch as, in my view, they had been duly appointed before. Therefore, the position is a purported appointment of Clark and after that a purported appointment of the plaintiffs.

Now the plaintiffs claim under section 14 (1) of the Act of 1887, which I have already read. The defendant was a person for the time being employed, and therefore, *prima facie*, the plaintiffs are entitled to recover, if they are duly appointed majority checkweighers. If so appointed they are entitled to be paid by all (section 14 (1) of the Act of 1887) and deemed to represent all (section 1 (3) of the Act of 1905). Now it is said that the plaintiffs were not duly appointed, or rather that they were not entitled to payment. It is said that they are not entitled to payment because the existence of Clark, with a following of 84 miners, who had desired that he should represent them and had appointed him for that purpose, deprives the plaintiffs of their right to a contribution from any of the persons who had appointed Clark ; and it is said further, apart from that point, that it is necessary, to entitle the checkweigher to recover under this section, that he should have acted as such. That is clearly so. It is said that they did not act as such, because, it is alleged, they refused to recognize or to check the weights, where tubs came up to be weighed, which had been got by members of the new union, the Greenside All Grades Union. That allegation was made by Mr. Forster in his evidence. It was not put to Mr. Bell, the plaintiff, when he was in the box, so that he had no opportunity of denying it. We were told that he would have denied it if he had been asked. The learned Judge does not deal with it in any way. It appears, I think, that if that was done by Bell it was done by him at the early period before he had any proper legal status in the cabin. I do not think we can deal with this appeal on the footing that the defendant has succeeded in showing any misconduct or non-performance of duty on the part of either of the plaintiffs, which would enable him to resist this claim as against either of them. I wish to say this most emphatically, that the majority checkweigher, in order to entitle him to these contributions, must, of course, act fairly for all the miners whose interests he is charged to represent, quite apart from the union to which they may belong. He is deemed by law to be appointed on behalf of all of them, and all their rights are in his hands. If it could be shown that he had failed to act fairly, or had refused to act at all, in the case of any weight-paid servant, he would certainly not be entitled to contribution from that man, and in my judgment he would not be entitled to any payment at all, because that would be a fundamental breach of his duty.

I pass from that point. The next point is this. The defendant says : I am not liable to pay the plaintiffs because I paid Clark ; Clark was duly appointed to represent me, and therefore I am not liable to pay the plaintiffs. I am not able to agree with either proposition. I have come to the conclusion that Clark's due appointment was not proved, first, because I think the notice does not comply with section 3 of the Act of 1905, which I have already read. First, I think that that was not a notice which gave proper notice of the intention to appoint a checkweigher to all the persons entitled to appoint. It was addressed to the Greenside All Grades Union. It was signed by the secretary of the All Grades Union. The evidence was that the ballot was attended only by members of the All Grades Union. The chairman's statutory declaration says that Clark had been appointed on behalf of the 84 men named, who are members of the All Grades Union. I have come to the conclusion that the appointment was not a proper one on that ground, and also on the further ground that the right to nominate is essential to an election by ballot. The election of a checkweigher is not necessarily by ballot. There must clearly be, first of all, a meeting at which election may take place, but, if not, then nomination will take place, and after that a ballot. In this case there is no evidence that any opportunity was given to anyone to take part in the nomination of Mr. Golightly and Mr. Clark. The notice states that they had already been

nominated, and that all that remains to do is to choose which of those two shall be checkweigher. I have already referred to the Scottish case, and I think, therefore, that the election of Mr. Clark was not valid on this ground also—that due notice was not given to all entitled to record their vote either by ballot or otherwise. They had no opportunity to record any vote except by ballot.

Then it is said that if Mr. Clark was duly appointed he was validly removed. It is not necessary to determine that question. As I have said, my present impression is that if duly elected he was not validly removed.

It is further said that if he was duly elected his appointment is avoided by the subsequent appointment of the plaintiffs. That raises the question whether it is possible under this machinery to have two checkweighers or more in the cabin at the same time representing different groups of workmen; and in this case whether it is possible to have what I have called a majority checkweigher, who is deemed to represent them all, and one or more other checkweighers representing particular groups of workmen. It is not necessary to decide that question in view of the last point which I have to mention, but, as this may be a point of some importance, I will express my own present opinion about it. By the third subsection of the first section of the Act of 1905, which I have read, the duly appointed majority checkweigher is deemed to have been appointed on behalf of all the men, that is to say, on behalf of all the weight-paid men in the mine at that time, and he is there on behalf of all the weight paid men from time to time in the mine. It is, therefore, quite clear that he is to be deemed by all persons for all purposes to represent every weight-paid man, and these plaintiffs are deemed to represent the defendant and bound to protect his interests. I ask myself whether the statute does provide for such a thing as two checkweighers, representing the men, in the cabin at the same time. The checkweighers are concerned with the weight and with the allowance for stones, and so forth. Supposing one of the plaintiffs and Clark to be in the cabin at the same time and a truck comes forward which has been brought by one of the 84 men who have appointed Clark, I am perfectly clear that the plaintiff must do his duty with regard to that truck; he represents that miner, whatever his name may be; he must deal with it. It is said that Clark must deal with it, too. Supposing when the allowance for stones comes to be considered, the owners' representative says what allowance he thinks fair, and the plaintiff majority checkweigher agrees, but Clark does not agree, what is to happen then? What are the owners to do? The man who by law is deemed to represent the particular hewer agrees. Another man, whom he has specially appointed, does not agree. It appears to me that a practical question of great difficulty would arise. My general impression is that this Act does not contemplate the existence of a minority checkweigher alongside a majority checkweigher. My present view is that the due appointment of the plaintiffs cancelled and put an end to the appointment of Clark, even if that appointment had been originally valid.

It is not, however, necessary to decide this point, because I am quite clear on the last point which remains, that even if Clark were duly appointed and if he had remained the duly appointed representative of the 84 miners, that would not have afforded any defence to the defendant against this claim. The words of section 14, subsection 1, of the Act of 1887 are, to my mind, perfectly clear. It is impossible to read into it some such words as these: He shall be entitled to a contribution from every workman unless such workman shall be specially represented by some other checkweigher, or words of that sort. The words of the statute are perfectly clear. I think that the existence of a minority checkweigher, even if it were possible, would be no sort of defence to this claim.

For these reasons I think the learned Judge arrived at the right conclusion, and this appeal must be dismissed.

MR. JUSTICE CHARLES.—I agree, and I desire to add very few words. In my view the appointment of Clark was invalid inasmuch as the notice was a bad notice, and inasmuch as no opportunity was given for nomination. I further think that had his appointment been valid his manner of removal was invalid. If it be assumed that Clark's appointment was valid and also that Clark's removal was invalid, still there would be, in my judgment, no defence to the claim which is made here by these plaintiffs. When it is admitted and proved that the plaintiffs were properly appointed by a majority on a ballot they are deemed by law to represent all the wage earners in the mine and they are, as such representatives, entitled by section 14 (1) of the Coal Mines Regulation Act, 1887, to have their wages paid by contributions from each and every wage earner in the mine.

I agree in doubting whether the co-existence of minority and majority checkweighers is possible, but it appears to me that the checkweigher appointed by a majority on ballot has a claim, and a definite claim, under section 14 (1), independently of the existence or non-existence of a checkweigher appointed by a minority.

Leave to appeal was granted.

[Solicitors—Messrs. King, Wigg, and Brightman, for Mr. Francis J. Lambert, Gateshead; Messrs. Hyman Isaacs, Lewis, and Mills, for Messrs. Patrick Bennett and Maddison, Newcastle-upon-Tyne.]

Court of Appeal.
(Scrutton and Sankey, L.JJ., and Russell, J.)

1928.
Mar. 19.

RECKITT v. BARNETT, PEMBROKE, AND SLATER, LIMITED.*

Action (Cause of)—Attorney—Cheque drawn on principal's account—Fraud on principal—Claim of principal to recover proceeds from payees.

The plaintiff gave a power of attorney to one T. and authorized him, in relation to the plaintiff's affairs, to draw cheques on the plaintiff's account at the bank without restriction. T. in fraud of the plaintiff drew a cheque on the plaintiff's account, in favour of the defendants, in part payment for a motor-car which T. had obtained from them for his own purposes on the hire-purchase system. The defendants knew that the cheque was drawn by T. as agent for the plaintiff. In an action by the plaintiff to recover from the defendants the proceeds of the cheque,

Held (Russell, J., dissenting), that the person to suffer for the plaintiff's misplaced confidence

* Reported by E. J. M. CHAPLIN and T. W. MORGAN, Esqrs., Barristers-at-Law.

in T. was the plaintiff himself and not an innocent third party, and therefore the action failed.

Decision of Rowlatt, J. (44 *The Times* L.R., 63), reversed.

This was an appeal by the defendants from a decision of Mr. Justice Rowlatt (44 *The Times* L.R., 63) in an action tried by him without a jury.

The plaintiff in the action, Sir Harold James Reckitt, Bt., of 30, Rutland Court, Knightsbridge, S.W., claimed against the defendants, Barnett, Pembroke, and Slater, Limited, automobile agents, of Alexandra Garage, Old Barrack-yard, Knightsbridge, a declaration that he was entitled to recover from them the proceeds of a cheque for £200 drawn by Lord Terrington, as the plaintiff's attorney, to the order of the defendants upon the plaintiff's banking account with Barclays Bank Limited, at Hull, and wrongfully and fraudulently paid by Lord Terrington to the defendants in respect of a personal transaction between Lord Terrington and the defendants. The cheque in question was signed "Sir Harold J. Reckitt, Bt., by Terrington, his attorney."

The defendants, in addition to denying the conversion, denied that Lord Terrington had not the plaintiff's authority, and that the cheque was drawn without the plaintiff's knowledge. They further denied that Lord Terrington's authority to draw was confined to cheques in relation to the business or affairs of the plaintiff. And they did not admit that he was acting fraudulently or wrongfully. They further set up that the plaintiff was estopped from alleging any want of authority in Lord Terrington to draw the cheque and hand it to the defendants by reason of his own conduct and by reason of his want of reasonable care.

Mr. Justice Rowlatt held that as the defendants knew that the cheque was being used to pay the private debt of the agent the plaintiff was entitled to recover. He accordingly gave judgment for the plaintiff.

The defendants appealed.

Mr. Jowitt, K.C., and Mr. Austin Farleigh appeared for the appellants; Mr. Schiller, K.C., and Mr. R. J. Willis for the respondents.

Mr. Jowitt, K.C., in opening the appeal, said that the case raised the question which of two innocent persons should suffer for the fraudulent act of a third party. The plaintiff, who was absent from this country at the material time, had appointed Lord Terrington to represent him, and in 1915 had given him a power of attorney with very wide powers. That power had been subsequently amended on an objection taken by the bank, and was then extended in 1925 so as to be framed in very wide terms going beyond those set out in the earlier power, and giving him power to draw cheques on Sir Harold's account without restriction. Under the powers thus conferred Lord Terrington had power to enter into agreements, and he had acted as *alter ego* of the plaintiff.

In January, 1926, Lord Terrington entered into a hire-purchase agreement with the defendants to purchase a Rolls-Royce motor-car by monthly instalments of £175 until a total of £2,350 was reached. He surrendered a Daimler car and made a first payment of £350 as to which there was no question. When the first instalment of £175 became due he gave the defendants a cheque in February for £200 signed "Sir Harold J. Reckitt, Bt., by Terrington, his attorney." The name of Sir Harold Reckitt was put on faintly with a rubber stamp, but Lord Terrington's signature was in ink. Of the £200, £175 was said to represent the first instalment, the balance being for garage expenses. In June, 1926, the defendants became anxious to regain possession of the car, and obtained it upon payment of £100 to Lord Terrington.

The writ in the present action was issued in October on the return of Sir Harold Reckitt from India, who found that he had been defrauded of some £200,000. Mr. Justice Rowlatt had held that the cheque was accepted *bona fide* without negligence and certainly without dishonesty, but that as Lord Terrington had signed as agent the defendants were put on notice and must therefore suffer.

Counsel said that his argument might conveniently be stated under two heads, the first dealing with the question of authority and the other as to the effect of notice.

Lord Terrington had signed the cheque in question as attorney of Sir Harold Reckitt and purporting to act as his agent. The defendants had not asked to see the authority, but they were in the same position as if they had asked. What Lord Terrington did was within the precise terms of the power, and it could not be said that he was actuated by personal motives and was not acting on behalf of his principal. And here there was a finding that the precise thing done was within the limits of the authority given. Upon the question of authority he referred to *Bank of Bengal v. Fagan* (7 Moo. P.C., 61); *Bryant, Powis, and Bryant, Limited v. La Banque du Peuple and the Quebec Bank* (9 *The Times* L.R., 322; [1893] A.C., 170); *Hambro v. Burnand and Others* (20 *The Times* L.R., 398; [1904] 2 K.B., 10).

Counsel referred to *Jones v. Gordon* (2 App. Cas., 616), *London Joint Stock Bank v. Simmons* (8 *The Times* L.R., 478; [1892] A.C., 201); *Thomson v. Clydesdale Bank, Limited* ([1893] A.C., 282); *John v. Dodwell and Co., Limited* (34 *The Times* L.R., 261; [1918] A.C., 563); *Corporation Agencies, Limited v. Home Bank of Canada* ([1927] A.C., 318).

In this case, said counsel, the authority which had been given to Lord Terrington was quite general. His authority to sign cheques was not limited to cheques drawn in favour of persons with whom Sir Harold Reckitt had business relations. Lord Terrington had power to draw cheques without any restriction. The mere misuse of an authority did not take an act outside the limits of the authority.

He referred to *Morison v. London County and Westminster Bank, Limited* (30 *The Times* L.R., 481; [1914] 3 K.B., 356); and *A. L. Underwood, Limited v. Bank of Liverpool and Martins* (40 *The Times* L.R., 302; [1924] 1 K.B., 775); and *Morison v. Kemp* (29 *The Times* L.R., 70). The question was whether what Lord Terrington did was within the limits of his authority. The Judge had answered that question in the affirmative, and he (Mr. Jowitt) submitted that the Judge was right. If Lord Terrington's authority was wide enough to cover what he did, the question of notice became irrelevant.

With regard to conversion, that depended on an absence of title, which again raised the question of authority. If Lord Terrington had authority which covered what he did, he would be giving a good title to the cheque and there would be no conversion.

Mr. Schiller, for the respondent, said that Lord Terrington used his power of attorney for his own personal purposes and not for Sir Harold Reckitt's purposes. That was conversion. There was no defence to the plaintiff's claim.

Unless actual authority could be shown for Lord Terrington's act, there could be no defence to the

action. The only authority which Lord Terrington could show in dealing with persons other than the bank was his power of attorney, and that only authorized him to transact business in the name and on behalf of his principal, Sir Harold Reckitt, and not on his own behalf and for his own purposes. Lord Terrington had no authority to draw the cheque in question in this case for his own purposes. From beginning to end of the transaction in question Lord Terrington was doing something which was outside his principal's business, and he could not give anybody any title to the money obtained by means of the cheque. Unless the defendants could make out some kind of estoppel they could show no title to the money.

The defendants ought to have looked at the power of attorney, and if they had done so they would have seen that it only authorized Lord Terrington to manage Sir Harold Reckitt's affairs. If the defendants chose to accept the cheque without making any inquiries they must take the consequences if the principal afterwards challenged the transaction. The proper interpretation of the power of attorney was that it excluded any act not done on behalf of Sir Harold Reckitt. The judgment appealed from was right.

Mr. R. J. WILLIS followed on the same side.

Mr. AUSTIN FARLEIGH replied.

LORD JUSTICE SCRUTTON, in his considered judgment, said :—This is an appeal from a judgment of Mr. Justice Rowlatt, which is said to affect a number of cases resulting from alleged misconduct of Lord Terrington. Having authority from Sir Harold Reckitt to draw cheques on the latter's banking account, Lord Terrington is alleged to have so misused this authority by drawing cheques for his own purposes that Sir Harold Reckitt has lost over £200,000. So far as Lord Terrington is concerned, allegations as to the state of his health, fortunately or unfortunately for him, detain him in France and prevent his offering any explanation of his conduct in an English Court ; but Sir Harold Reckitt is endeavouring to retrieve his losses by suing the persons to whom Lord Terrington gave the cheques which he drew on the Reckitt account. He has succeeded against the present defendants, who appeal.

The facts are comparatively simple. On February 9, 1915, Sir Harold Reckitt gave a power of attorney in favour of Lord Terrington, then Mr. Woodhouse, as his attorney, "to do all or any of the following things in my name and on my behalf" ; and then follows a long list of kinds of business which might be transacted under the power. The list did not include drawing cheques on Sir Harold Reckitt's account, and apparently some question was raised by the bank. Thereupon Sir Harold Reckitt on August 17, 1915, wrote to the bank the following letter, on the true meaning of which the case largely depends :—

"Dear Sirs,—Referring to the power of attorney which I have given in favour of Mr. Harold James Selborne Woodhouse, and which you have inspected, please note that I wish the power to cover the drawing of cheques upon you by Mr. Woodhouse without restriction.

"Yours faithfully,

"(Signed) HAROLD J. RECKITT."

Sir Harold's counsel say (1) "without restriction" only means without restriction as to amount ; and (2) no cheques should be honoured under this letter unless they were in relation to Sir Harold Reckitt's affairs. This interpretation appears to me to deprive the letter of any value to the bank. As cheques to all sorts of payees with no indication in them of the reason why they were drawn would be presented, the bank would have the necessity of inquiring into every cheque before they could safely honour it. I take the letter to be a power to Lord Terrington to draw cheques without restriction, so that the bank could safely honour them without inquiry and third parties could safely accept them without inquiry, Sir Harold Reckitt's position being : "I have full confidence in Lord Terrington, and take the risk of his abusing my confidence ; you, the bank and third parties, may safely act on his signature, without restriction, as binding me towards you. I shall have my remedy against him if he does abuse my confidence."

In the present case Lord Terrington bought a Rolls-Royce motor-car, in his own name, from the present defendants, on a hire-purchase agreement, and paid the second instalment on it by a cheque for £200 dated February 6, 1926, signed "Sir Harold Reckitt, Bt., by Terrington, his attorney." All the words except "Terrington" are impressed by a rather faint rubber stamp. The partner of the defendants who took the cheque did not notice the stamp, but the defendants are, of course, bound by the notice of procuration contained on the cheque, and their position is the same as if they had seen the power of attorney and letter amplifying it. The defendants presented the cheque and Sir Harold's bank paid it. When the frauds were discovered the defendants got back the motor-car by payment of £100, and Sir Harold sued them for the £200, which they were alleged to have converted.

Mr. Justice Rowlatt gave an oral judgment at the end of the case, as he had to leave for other work. His judgment is this : It is a fraud if the attorney uses his power to rob his principal, but if he does rob him by doing the very thing he is empowered to do, it is immaterial, for, as Lord Brougham says in *Bank of Bengal v. Fagan* (7 Moo. P.C., 61), "The abuse of authority does not invalidate the act."

I think this, so far, must be the meaning of the first page of the judgment, though the wording is ambiguous, for the learned Judge says in express terms : "The cheque as a cheque was good, there was power to draw it. It did not become a bad cheque because it was fraudulent ; it was good." The Judge then turns to the effect of the defendants' knowing that the cheque was paid to them in respect of an agreement on which Lord Terrington was personally liable. He said : "I am bound to say that when the matter was first opened to me I should have said at once : Certainly not ; I have been obliged to puzzle about it for a good many hours, but the precise authority upon the point has been produced this morning by Mr. Schiller, which was exactly what I expected. It is the case of *John v. Dodwell and Co., Limited* (34 *The Times* L.R., 261 ; [1918] A.C., 563)," and proceeded to hold that the defendant or a third person, taking from the agent a transfer of the property with knowledge of a breach of duty committed by him in making the transfer, holds what has been transferred to him under a transmitted fiduciary obligation to account for it to the principal. The finding is that, seeing the cheque is drawn on Sir Harold Reckitt's account for a personal liability of Lord Terrington, the defendants must know or be taken to know that there is a breach of duty on the part of Lord Terrington.

I do not follow why this should be so. From the terms of the letter Sir Harold Reckitt and Lord Terrington are obviously on terms of great personal confidence. Sir Harold Reckitt may be lending Lord

Terrington the money to buy the motor-car for himself, or presenting him with a motor-car ; or Lord Terrington may be buying the motor-car for Sir Harold as his principal, or to do Sir Harold's business by its help. I do not see how Sir Harold Reckitt, who places implicit confidence in Lord Terrington, as shown by the letter, can say to people who are taken to know of the letter, "You must be suspicious of Terrington, though you see I am not."

Looking at the matter apart from authority, I should have said that the letter was an actual authority, so far as the bank and third parties are concerned, to Lord Terrington to draw cheques without restriction, which the bank and third parties might act on as valid, and there was no sufficient knowledge or notice of abuse of the power to prevent third parties from keeping the proceeds of the cheque.

I have dealt with the matter so far without reference to authorities, though I quite appreciate that the two points—(1) the meaning of the letter, and (2) the effect of Lord Terrington's personal liability as notice—are points of first impression, on which other minds may take different views at sight. I think that the difference between the two points of view is this. One side starts with the proposition : "It cannot be within the authority given by a principal to his agent to rob him. If, therefore, you get an act done by an agent with his principal's property, for the agent's own benefit, it is outside his authority, and third parties cannot rely on it as binding the principal."

This view was supported by the language of Sir James Shaw Willes in *Barwick v. English Joint Stock Bank* (L.R., 2 Ex., 259, at p. 265) : "The master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit." From this it was said that if the agent was not acting for the master's benefit, but for his own, the principal was not answerable. This view was negatived by the House of Lords in *Lloyd v. Grace, Smith, and Co.* (28 *The Times* L.R., 547 ; [1912] A.C., 716) ; and I understand the other point of view to be : "The principal may be able to say to his agent : 'You have abused your authority ; account to me for the abuse.'"

But when he has put the agent in a position to do a certain class of act, and the agent has done an act of that class, apparently on behalf of his principal, but really for his own benefit, the principal cannot say to a third party who, without notice of the agent's abuse of authority, has accepted the act which the agent has been put there to do, "I am not liable, because my agent though purporting to act for me acted for his own benefit." The apparent authority is the real authority.

The difference may be tested by considering in the present case what would happen if Sir Harold Reckitt sued the bank to recover the amount which they paid on this cheque. Surely the bank could say : "You told us that Lord Terrington could sign cheques on your account without restriction. You cannot make us liable for honouring a cheque signed by him because in abuse of your confidence he was using your authority for his own benefit." But the counsel appearing before us, each of whom said that his case was too plain for argument and took a long time in arguing it, buried the Court under authorities, to a few of which I must refer.

I take the cases of *Bank of Bengal v. Fagan* (*supra*), *Bryant, Powis, and Bryant, Limited v. La Banque du Peuple and the Quebec Bank* (9 *The Times* L.R., 322 ; [1893] A.C., 170, especially the passage at p. 180), *Hambro v. Burnand and Others* (20 *The Times* L.R., 398 ; [1904] 2 K.B., 10), and *Lloyd v. Grace, Smith, and Co.* (*supra*) to decide that if the act done under a power of attorney is warranted by the terms of the power it is immaterial that the agent is in fact abusing the power by using it for his own purposes. Lord Brougham said in *Bank of Bengal v. Fagan* (*supra*) that the apparent authority was the real authority ; and though the endorsee's title must depend upon the authority of the endorser, it could not be made to depend upon the purposes for which the endorser performed his act under the power.

In the first two cases the fraudulent agent endorsed, but for his own purposes ; in the first case he used the endorsed bill as security for his personal debt, but his principal was held liable.

Lord Justice Mathew, in the argument in *Hambro v. Burnand and Others* (*supra*), used with great force this illustration : "I go into a bank and find a cashier behind the counter : I pay into the bank, through the cashier, money : must I ask the cashier : 'Are you receiving this for the bank, or going to put it into your own pocket ?'"

The fact that he is doing the act he has authority to do for his own purposes is immaterial to me, who see him doing an act he has apparent authority to do on behalf of his principal. It is different where, as I said in *A. L. Underwood, Limited v. Bank of Liverpool and Martins* (40 *The Times* L.R., 302 ; [1924] 1 K.B., 775, at p. 791), the agent, having done a neutral act which is consistent with proper action under his power, such as endorsing in blank in his principal's name a cheque payable to his principal, then does an independent act of paying the cheque into his private account instead of into the principal's account. But as I also said, if he does the act he is apparently authorized to do to create privity between the principal and third parties, the case falls within the authorities cited above.

Mr. Justice Rowlatt was saved from "a good many hours' puzzle," as he says, by the production at the last moment of the case of *John v. Dodwell and Co., Limited* (*supra*). It is unfortunate that the parallel case of *Corporation Agencies, Limited v. Home Bank of Canada* ([1927] A.C., 318) was not produced at the same time. In *John v. Dodwell and Co., Limited* (*supra*), the agent had authority to conduct the business of his principals and sign cheques for the purpose of the business. He signed cheques under this power and used them to pay for his private share transactions. The Privy Council held that the persons taking the cheques had notice of the terms of the power, and the nature of the business told them that the power was being abused ; so the principal recovered. In the *Corporation Agencies* case (*supra*) a director and secretary, in fraud of the company, drew cheques on the company's account as director and secretary, and they were paid into the director's private account at the defendant bank, which presented them to the company's bank, which paid the money. It was held that the company could not recover from the bank, as the director had apparent authority to sign cheques, and the fact that he paid them into his own account was not notice of irregularity, especially as the company's bank paid them. The distinction between the two cases seems to turn on the finding of notice or no notice.

On the question of conversion argued before us, in the *Corporation Agencies* case (*supra*), though conversion was raised on the pleadings, the bank was not held to have converted the proceeds. In *Morison v. London County and Westminster Bank, Limited* (30 *The Times* L.R., 481 ; [1914] 3 K.B., 356), where the

bank would have been held guilty of conversion but for their defence under the Bills of Exchange Act, 1882, the power was to draw for the purposes of the business. The cheques were drawn *per pro* and used for the private account of the agent. It appears to me that conversion would follow, but for the Bills of Exchange Act, 1882, from notice of the power and the use made of the cheques. In the present case the power is unlimited, "without restriction," and has the effect, in my opinion, of enabling the bank and third parties knowing of the power safely to take the cheques, unless they have clear notice of fraud. There are, as suggested, also several honest explanations of the transaction without assuming or suspecting fraud.

For these reasons I am of opinion that the person to suffer from Sir Harold Reckitt's excessive but misplaced confidence in Lord Terrington must be Sir Harold Reckitt himself, who allowed Lord Terrington to sign cheques without restriction, and not innocent third parties who took such cheques. In my opinion the appeal should be allowed and judgment entered for the defendants with costs here and below.

LORD JUSTICE SANKEY.—The plaintiff in this case claimed (1) a declaration that he was entitled to recover from the defendants the sum of £200, being the proceeds of a cheque dated February 6, 1926, drawn by one Lord Terrington as the plaintiff's attorney to the order of the defendants upon the plaintiff's banking account at Hull and wrongfully and fraudulently paid by the said Lord Terrington to the defendants in respect of a personal transaction between the defendants and Lord Terrington; and (2) damages for conversion.

The defendants contend that Lord Terrington had authority to draw the cheque in question, that they gave value for it in good faith and became holders in due course, and that they are not guilty of any conversion. The learned Judge decided in favour of the plaintiff and the defendants appeal.

The facts are as follow: In 1915 the plaintiff, being minded to go to France, gave a power of attorney, dated February 9, 1915, to one Harold Woodhouse, now Lord Terrington. In the following August Messrs. Barclays Bank at Hull pointed out that the said power did not authorize Mr. Woodhouse to draw cheques upon Mr. Reckitt's account. This was brought to the knowledge of the plaintiff, who thereupon wrote the letter of August 17, 1915. [His Lordship read the letter which is set out above, and continued.]

On January 4, 1926, Lord Terrington entered into a hire-purchase agreement with the defendants for the purchase of a motor-car. It is admitted now that the motor-car was for his own use. He gave to the defendants a cheque for £200, which is now in question. The cheque was signed, "Sir Harold J. Reckitt, Bt. By Terrington, his attorney."

That part of the signature which referred to Sir Harold Reckitt was stamped with a rubber stamp, but the signature of Lord Terrington was written in ink and was bold and clearly visible. When the defendants took the cheque they did not in fact observe the nature of the signature.

The learned Judge finds that the defendants took the cheque of the principal, that is, the plaintiff, from the agent, that is, Lord Terrington, in liquidation of the agent's private account. In these circumstances, he held that the case was governed by that of *John v. Dodwell and Co., Limited* (34 *The Times* L.R., 261; [1918] A.C., 563), and gave judgment for the plaintiff. Many cases were referred to in argument, the result of which may be stated in general terms.

If the agent in the course of his employment on behalf of the principal had apparent authority to draw the cheque in question, the principal is liable thereon to a person who takes it for value, in good faith, and without notice that the agent has exceeded his authority. To the above must be added that a banker has certain special protection under the Bills of Exchange Act, 1882.

Apparent authority means that the agent apparently acted within the scope of his authority and is to be gathered from a consideration of the form of the cheque itself, from any relevant documentary evidence and from the surrounding circumstances. The agent's motive in drawing the cheque is immaterial, for the fact that he abuses his authority does not destroy the authority. In such cases the apparent authority is the real authority.

With regard to the question of notice, it is to be observed that the equity doctrines of constructive notice are not to be imported into commercial questions.

It would be a dangerous ambition to try to formulate a definition of what constitutes notice. It is impossible to foresee every case and every contingency, but it may be stated that, while mere negligence to observe is not sufficient to create liability, a wilful disregard of the facts may be. Therefore, in approaching the present circumstances, two questions emerge for consideration: (1) Had Lord Terrington apparent authority to draw the cheque? (2) Was there anything in the transaction which gave the defendants notice that Lord Terrington had exceeded his authority?

Where the authority relied on is contained in a written document alone, the answer to the first question will depend upon a proper construction of it.

With regard to the cases cited, the result in each of them depended on the true answer to one or both of the questions, but the judgments must be read in reference to the particular facts of each case. *Hambro v. Burnand and Others* (20 *The Times* L.R., 398; [1904] 2 K.B., 10); and *Lloyd v. Grace, Smith and Co.* (28 *The Times* L.R., 547; [1912] A.C., 716), were both cases in which it was held that the fraudulent agent acted within the scope of his authority and so bound his principal, although he acted in his own interests and not in those of the principal. In both cases the motive of the agent was held to be immaterial.

In *Bryant, Powis and Bryant, Limited v. La Banque du Peuple and the Quebec Bank* (9 *The Times* L.R., 322; [1893] A.C., 170) Lord Macnaghten says at page 180: "The law appears to their Lordships to be very well stated in the Court of Appeal of the State of New York in *President, &c., of the Westfield Bank v. Cornen* (37 N.Y.R. (10 Tiff.), 322), cited by Mr. Justice Andrews in his judgment in another case brought by the Quebec Bank against the company. The passage referred to is as follows: 'Whenever the very act of the agent is authorized by the terms of the power, that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent, as to all persons dealing in good faith with the agent; such persons are not bound to inquire into facts *aliunde*. The apparent authority is the real authority.'"

The case of *Morison v. London County and Westminster Bank, Limited* (30 *The Times* L.R., 481; [1914] 3 K.B., 356), illustrates the protection given

to bankers in such cases by the Bills of Exchange Act, 1882. There the agent had acted outside the scope of his authority and his dealings with the cheque amounted to a conversion for which his assignee, the bank, would have been liable but for their statutory protection. See *per* Lord Reading, at page 364, quoting Lord Ellenborough in *M'Combie v. Davies* (6 East, 538, at p. 540) : "A man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it ; for what is that but assisting that other in carrying his wrongful act into effect."

A. L. Underwood, Limited v. Bank of Liverpool and Martins (40 *The Times* L.R., 302 ; [1924] 1 K.B., 775) was a different case ; the first line of defence was that the agent was acting within his apparent authority, and that line of defence failed (see *per* Lord Justice Scrutton, at pp. 791, 792), and it was held on the facts also that the act of the agent in paying his principal's cheques into his private account was so unusual as to put the defendants on inquiry, and that they lost their statutory protection.

The Common Law rules with regard to what is notice in such cases are set out in *Jones v. Gordon* (2 App. Cas., 616) ; and *London Joint Stock Bank v. Simmons* (8 *The Times* L.R., 478 ; [1892] A.C., 201).

In *Jones v. Gordon* (*supra,* at p. 629) Lord Blackburn said : "But if the facts and circumstances are such that the jury, or whoever has to try the question, came to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind—I suspect there is something wrong, and if I ask questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover—I think that is dishonesty."

In *London Joint Stock Bank v. Simmons* (*supra,* at p. 221) Lord Herschell, L.C., said : "One word I would say upon the question of notice, and being put upon inquiry. I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry."

John v. Dodwell and Co., Limited (*supra*) proceeded apparently on both grounds, (1) that the agent held a power of attorney which enabled him to conduct the business of the respondents and that in doing what he did he was not acting within the scope of his authority (*per* Lord Haldane at p. 567), and (2) that the appellants were affected with notice (*per* Lord Haldane at p. 568).

In the later case of *Corporation Agencies, Limited v. Home Bank of Canada* ([1927] A.C., 318) Lord Wrenbury points this out at page 324, where he says : "In *John v. Dodwell and Co., Limited* (*supra*), Williams, the manager for Dodwell and Co., who was authorized by Dodwell and Co., the plaintiffs (respondents), to draw, and who drew the cheques on the plaintiffs' account, employed the defendants (appellants) as his brokers and gave them cheques on the plaintiffs' account in payment for shares, and they received them with knowledge that Williams, without apparent authority, was drawing for his own purposes on the plaintiffs' funds. The case turned, as does the present case, on knowledge. If there was no knowledge, it has no application."

Now applying these principles to the present case, how does the matter stand ?

I. Upon the question of authority. This depends on a proper construction of two documents—namely, the power of attorney and the letter of August 17, 1915. Both must, I think, be looked at in order to see what powers the plaintiff gave and what powers Lord Terrington received. In this I am confirmed by the statement of claim which pleads that the power of attorney was amplified by the letter. A power of attorney is to be construed strictly. The recitals show its objects and control its meaning, and general words only refer to the special powers. Such a power gives only such authority as it expressly or by necessary implication confers, *Bryant, Powis and Bryant, Limited v. La Banque du Peuple and the Quebec Bank* (*supra*) ; and *Jonmenjoy Coondoo v. Watson* (9 App. Cas., 561), which were referred to in argument and are cited in Bowstead on Agency with other cases at page 73 of the seventh edition.

It will be observed that the power of attorney itself contains very wide authority. Nor is it confined to some particular business whose necessities might in some way control the authority. This is not, for example, a case where an agent with power of attorney to manage and draw cheques for a bootmaker's business drew a cheque to pay for many tons of sugar for future delivery. Over and above that the letter is in the very widest terms. It confers the right to draw cheques "without restriction."

It is not possible, in my view, to limit the words "without restriction" by holding that they are to be restricted to the meaning "without restriction as to amount." It is perhaps a trite observation to make that they mean what they say—they indicate that Lord Terrington has power to draw cheques on plaintiff's account for any purpose whatever.

In my view, on a true construction of the two documents, it was within the scope of Lord Terrington's authority to draw the cheque in question.

On this point Mr. Justice Rowlatt was apparently of the same opinion.

II. Had the defendants notice which ought to have put them on inquiry ? This again depends mainly, if not entirely, on two documents, (1) the cheque, and (2) the hire-purchase agreement.

It is argued for the plaintiff that the cheque showed that Lord Terrington was only agent and the hire-purchase showed that the transaction was a private one. But there are many situations in which, although the hire-purchase was in Lord Terrington's name, it really might be a transaction on behalf of the plaintiff. Suppose, on seeing the cheque made out in that form, the defendants had asked for the authority. They would have seen the very wide terms of the power of attorney, and the unrestricted authority to draw cheques. In my view, the mere fact that in this case the defendants did not ask to see and did not see the documents cannot place them in a worse position than if they had done so. It is not as if there were any evidence that they said that they would rather not inquire into the documents. If they had seen them they would have been justified in coming to the conclusion that Lord

Terrington had authority to draw the cheque and there was no obligation on them to inquire further. "It would be impossible, as it seems to me, for the business of a mercantile community to be carried on, if a person dealing with an agent was bound to go behind the authority of the agent in each case, and inquire whether his motives did or did not involve the application of the authority for his own private purposes." *Per* Sir Richard Henn Collins, M.R., in *Hambro v. Burnand and Others* (*supra*, at p. 20).

It is on this point that I part company with the learned Judge. He says: "The question here all turns upon the effect of the circumstance that it was drawn by an agent on his principal's account and the defendants knew that it was being used to liquidate the private debt of the agent."

In my opinion, there was no circumstance which ought to have put the defendants upon any further inquiry than that of asking to see the power of attorney and the letter, and if they had seen them they would have been justified in coming to the conclusion that Lord Terrington had authority. *John v. Dodwell and Co., Limited* (*supra*) is distinguishable and has no bearing on this case. In that case, on the facts, there was an absence of authority in the agent, and notice to the person taking the cheque. In this case it is just the opposite.

In my view, the appeal should succeed and judgment should be entered for the defendants with costs.

MR. JUSTICE RUSSELL, in giving a dissenting judgment, said: In this case I take a different view from that adopted by the other members of the Court. The success or failure of this appeal depends, in my opinion, upon the effect which the letter addressed to Barclays Bank at Hull, and dated August 17, 1915, had upon the power of attorney dated February 9, 1915. The letter, be it observed, is addressed by the plaintiff to the bank alone, not (as in the case of the power of attorney) to the world at large; and, although its existence and contents were known to the attorney, the original remained in the possession of the bank. The power of attorney, on the other hand, is under seal, and necessarily under seal, in view of some of its provisions. It remained, and necessarily remained, in the custody of the attorney. The letter to the bank remained in the custody of the bank, and could not have been produced by the attorney except with the cooperation of the bank.

The primary question for determination is whether, in these circumstances, Lord Terrington had power to draw cheques on the plaintiff's banking account in favour of his (Lord Terrington's) creditors; or, indeed, in favour of whomsoever he might think fit, regardless of the question whether in drawing any cheque he was acting in the management of the plaintiff's affairs. If he had such a power, then he was entitled to draw the cheque in question here; and the plaintiff can obtain no relief against the defendants either on the footing of conversion or otherwise.

If, on the other hand, his power to draw cheques only authorized him to draw cheques for the purpose of managing the plaintiff's affairs, then, in my opinion, the plaintiff is entitled to relief on the authority of *John v. Dodwell and Co., Limited* (34 *The Times* L.R., 261; [1918] A.C., 563).

It is, I think, clear that under the power of attorney (apart from the letter) Lord Terrington's powers are carefully and in terms limited to acting in the management of the plaintiff's affairs. Of the first ten clauses all except No. 9 are in terms confined to the plaintiff's affairs. Clause 9 is expressed in more general terms, but from the context it must be limited in the same way. Clause 11 is in terms limited to "the purposes aforesaid," and is the only clause under which express authority might be said to be conferred to draw cheques on the plaintiff's banking account.

The plaintiff's bankers, apparently, were unable to accept the power of attorney as sufficient authority to draw cheques, and at their request the letter of August 17, 1915, was written and sent to them. (His Lordship read the letter and continued.) It is said that the plaintiff's statement to the bank that he wishes the power of attorney to cover the drawing of cheques upon them by Mr. Woodhouse "without restriction" operates to enlarge the power conferred by the power of attorney, and that to such a sweeping extent that Lord Terrington became authorized to do what he liked with the plaintiff's money, even to the extent of applying the plaintiff's money in payment of his own personal debts. It would need words unambiguous and irresistible to enable me to attribute such a meaning and intention to a power of attorney. The primary object of a power of attorney is to enable the attorney to act in the management of his principal's affairs. An attorney cannot, in the absence of a clear power so to do, make presents to himself or others of his principal's property. Thus it has been held by the Court of Appeal that a power to mortgage does not enable an attorney to execute a mortgage of the principal's property to secure an existing debt of the principal. Such a mortgage was held to be invalid (*In re Bowles*, 31 L.T., 365).

In the present case we are asked to hold that a document under seal addressed to the world at large is completely altered in its scope by virtue of a letter addressed to the plaintiff's bankers and to no one else. We are not, in my opinion, justified in treating the matter as though a clause to the same effect as the letter had been added to the power of attorney. The letter appears to me to be only a document whereby the plaintiff's bankers would be protected as against the plaintiff in honouring cheques drawn by the attorney. Even assuming that this letter is not to be treated as a communication made solely to the principal's bank for the purpose of enabling them, without any question, risk, or liability, to honour all cheques drawn by the attorney, but is to be treated as forming part of the power of attorney, I am unable to find words which would justify me in holding that it conferred a power on the attorney to apply the principal's moneys for his private purposes. The words "without restriction" can be sufficiently satisfied by interpreting them to mean without restriction as to amount.

Powers of attorney are to be construed strictly, and where authority to do an act purporting to be done under a power of attorney is challenged, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication. *Bryant, Powis and Bryant, Limited v. La Banque du Peuple and the Quebec Bank* (9 *The Times* L.R., 322; [1893] A.C., 170). Construing the power of attorney and the letter on these principles, I am unable to find, either in express terms or by necessary implication, authority in the attorney to draw cheques on the plaintiff's bankers in favour of the attorney's personal creditors.

If I am right in this view, the plaintiff is entitled to succeed. The defendants took the cheque with knowledge that it was drawn in their favour by an attorney. They are accordingly fixed with the same knowledge of the attorney's lack of authority as they would have had if they had called for evidence of authority and had had produced to them, not only the power of attorney, but also the letter. Further, they knew that the cheque was handed to them in settlement of the attorney's private debt to themselves, composed partly of an instalment due in respect of Lord Terrington's motor-car and partly in respect of Lord Terrington's garage bill.

In these circumstances the case appears to me to be completely covered by the decision of the Privy Council in *John v. Dodwell and Co., Limited* (*supra*). In that case John and Co. (share and produce brokers in Colombo) had two accounts in their books : one with Dodwell and Co., Limited, who were merchants with a branch at Colombo, the other with one Williams in respect of dealings in shares. Williams was the manager at Colombo for Dodwell and Co., Limited, and held a power of attorney which enabled him to draw cheques on his principals' bankers for the purposes of his principals' business. For the purpose of paying his personal indebtedness to John and Co., Williams drew cheques on his principals' bankers payable to John and Co. and signed Dodwell and Co., Limited, R. H. Williams, Acting Manager [or Manager]. John and Co. received the amounts of the cheques and credited them against the personal indebtedness of Williams. Lord Haldane, in delivering the judgment of the Board, held that John and Co. were liable to refund the amounts to the principals on the ground that they received and held the money under a transmitted fiduciary obligation to account for it to the principals. He further held that according to English law there had been a conversion by John and Co., and he said : "On the face of these [transactions] Williams was, without showing authority to do so, drawing cheques for his own purposes on the respondents' funds at their bankers. If it turned out that the respondents had not allowed him to do so, and would not ratify his action, the notice which the appellants had got through the agency of their clerks of what was *prima facie* a breach of duty on his part would deprive them of all title to hold the cheques as against the respondents, if the latter should challenge the transaction. For when an agent is entrusted by his principal with property to be applied for the purposes of the latter, and to be accounted for on that footing, he is, by virtue of doctrines which apply under the law of Ceylon, as they do under the law of this and other countries, in a fiduciary position, and any third person taking from the agent a transfer of the property with knowledge of a breach of duty committed by him in making the transfer holds what has been transferred to him under a transmitted fiduciary obligation to account for it to the principal. That there is no privity of contract between him and the principal does not make any difference, for the title does not rest on contract. The property belongs to the latter in the contemplation of Courts which administer equity, whether in the form in which the Court of Chancery in this country applied it to trusts, or in the form which later developments of the Roman law have recognized. It is therefore clear that, excepting in so far as the lapse of time or some other special circumstance afforded them a defence, the appellants could not withhold the money in question from the respondents if they chose to claim it. The respondents did claim it, and commenced an action on January 10, 1913, to enforce their claim. The claim as formulated in their plaint was alternative. In the first alternative they expressed it as for money had and received ; in the second, as for a conversion ; in the third, as for cheques received with notice of Williams' fraud. In the judgments in the Courts below it was the first and second of these alternative forms of claim which received attention. Their Lordships are of opinion that the course so taken was unnecessary. It would have been, in their opinion, sufficient to have disposed of the case on the footing that the money was, in the circumstances, what may properly be called trust money, consistently with principles of jurisprudence based in part, though not wholly, on a foundation of Roman law. If the appellants received such money with notice of the trust affecting it, they would be bound to account for it to the respondents. It is on this footing that their Lordships propose to deal with the question. The case was not disposed of in this way in the judgments below, but the facts proved and the pleadings admit of its being thus dealt with. It may well be true that the principles of the English common law have been so far recognized in the jurisprudence of Ceylon as to admit of the same question being treated as one of a conversion having taken place. If so, undoubtedly there was a conversion according to these principles."

That case was distinguished in the later Privy Council decision in *Corporation Agencies, Limited v. Home Bank of Canada* ([1927] A.C., 318). The distinction between the two cases is clear. In the *Corporation Agencies* case (*supra*), cheques drawn by a company (and signed according to the company's regulations) in favour of a director (whose name appeared as one of the two signatories to the cheque) were endorsed by him and paid to the credit of his private account with the Home Bank, which collected the moneys in due course from the company's bankers. The company sought to recover the moneys from the Home Bank, but failed on the ground that the Home Bank had no notice that the company's cheques (though signed by the director as one of the signatories) were not properly drawn in his favour ; nor was there any duty on the Home Bank to inquire. In *John v. Dodwell and Co., Limited* (*supra*), and in the case under appeal, the person sued had notice of the limited authority of the attorney and of the fact that the authority was being exercised not in relation to the principal's affairs but for the purpose of paying a debt due by the attorney to the defendants.

Much reliance was placed by the appellants on the case of *Bank of Bengal v. Fagan* (7 Moo. P.C., 61), and in particular upon the remarks of Lord Brougham at page 74 : "But it is said that the power was given to do the acts in question on the donor's behalf. This is really only saying, that what the agent is to do, he is to do as representing the principal ; as doing it on behalf of, or in the place and in the right of, the principal. But it is further said that, even if the expression be read as only amounting to this, the endorsement is to be only made for the benefit of the principal, and not for the purposes of the agent. We do not see how this very materially affects the case, for it only refers to the use to be made of the funds obtained from the endorsement, not to the power ; it relates to the purpose of the execution, not to the limits of the power itself, and though the endorsee's title must depend upon the authority of the endorser, it cannot

be made to depend upon the purposes for which the endorser performs his act under the power."

In that case the power was not in terms limited to transacting the business of the principal. The attorney had endorsed certain negotiable instruments and handed them to his bankers as security for a personal loan. The question for decision was whether the endorsement passed the property in the negotiable instruments, the negligence of a party taking a negotiable instrument not fixing him with notice of defective title. The question resolved itself into this : had the attorney power to endorse ? If he had, the property passed, and it was immaterial to consider the attorney's intention in endorsing. Lord Brougham's remarks must be taken in reference to the case which he was deciding. In the case under appeal the act done is signing a cheque in favour of a payee who was a creditor of the attorney and not a creditor of the principal. That act the attorney had, in my opinion, no authority to do, and Lord Brougham's remarks appear to me inapplicable to the present case.

The authorities cited to us in the argument were very numerous. I will say a few words about such of them as appear to me relevant to the present case. *Bryant, Powis and Bryant, Limited v. La Banque du Peuple and the Quebec Bank* (*supra*), involved two decisions. In the appeal against the Banque du Peuple, the principal was held not to be indebted to the bank in respect of a loan contracted in its name by its attorney for his own purposes, because upon the true construction of the power of attorney the attorney had no power at all to borrow money on behalf of the company. In the appeal against the Quebec Bank the company was held liable to that bank in respect of two bills of exchange endorsed in the name of the company by the attorney and discounted by the bank in the ordinary course of business. The power of attorney in terms authorized the attorney " to endorse bills of exchange . . . and other documents which shall in the opinion of the said attorney require the signature or endorsement of the company." The Board held that the fact that the attorney abused his authority could not affect *bona fide* holders for value of negotiable instruments endorsed by him in accordance with his authority. That case appears to me to be of no assistance in favour of the defendants in the present case. The authority to endorse was clear ; the motive which prompted the endorsement was immaterial.

The same is to be said of *Hambro v. Burnand and Others* (20 *The Times* L.R., 398 ; [1904] 2 K.B., 10). There the authority to do the particular act, viz., to sign a guarantee policy, was, upon the facts as found in that case, clearly within the agent's authority, and the principals were bound notwithstanding that the agent abused his authority for his own purposes.

Some of the authorities cited were cases where the party sought to be made liable was a bank which had collected the proceeds of an unauthorized cheque. Such cases are complicated by additional defences which may be raised under the Bills of Exchange Act, 1882. The case of *Morison v. London County and Westminster Bank, Limited* (30 *The Times* L.R., 481 ; [1914] 3 K.B., 356) is of this class, but is of importance here. In that case the principal gave authority to Abbot to draw cheques for the purpose of the principal's business on the principal's banking account at the National Provincial Bank, and to sign them in his (Abbot's) name, *per pro.* Bruce, Morison and Co. He further gave directions to the National Provincial Bank to honour cheques so drawn. Abbot opened a private account with the defendant bank and paid into it various cheques drawn on the principal's banking account and signed by him, *per pro.* Bruce, Morison and Co., which were collected in the ordinary way by the defendant bank, and the proceeds were placed to the credit of Abbot's private account. The principal sued the defendant bank for the amount of the cheques so collected as damages for conversion of the cheques or alternatively as money had and received. The defendants were held not liable as to part of the claim by reason of section 82 of the Bills of Exchange Act, 1882, and as to the rest of the claim by reason of ratification by the principal. The actual decision appears to have no relevance here, but Lord Reading in his judgment makes it clear (*a*) that by reason of the direction and authority given by the principals to their own bankers to honour all cheques signed by Abbot, *per pro.* Bruce, Morison and Co., no claim could be made against those bankers (see p. 363) ; and (*b*) that the defendant bank had no valid title to the cheques because Abbot issued the cheques to them in fraud of Bruce, Morison and Co., and that, but for the special defences available, the defendants would have been liable for conversion of the cheques, the measure of damages being the moneys lost by Bruce, Morison and Co. and wrongfully received by the defendant bank (see pp. 364, 365). The judgment of Lord Reading appears to indicate that no valid title to the cheque would pass to the defendants in the present case. It is further of interest to observe that the direction to the principal's bankers to honour all cheques signed by Abbot, *per pro.* Bruce, Morison and Co., was not treated as operating to enlarge Abbot's authority, but only as operating to relieve the principal's bankers from liability. Reference may also be made to the decision of Mr. Justice Darling in *Morison v. Kemp* (29 *The Times* L.R., 70).

With regard to the case of *Lloyd v. Grace, Smith and Co.* (28 *The Times* L.R., 547 ; [1912] A.C., 716), no one can now dispute that a principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. The agent must, however, be acting within the scope of his authority.

In the present case there is no question of the agent defrauding a third person. The question is a very difficult one, viz., can a personal creditor of the agent retain, as against the principal, moneys paid by the agent to the creditor in satisfaction of his debt, which moneys belong to the principal and are known by the creditor to belong to the principal. No useful purpose will, I think, be served by referring to other authorities cited. None of them appear to me inconsistent with or contrary to the decision in *John v. Dodwell and Co., Limited* (*supra*). The result of this appeal depends upon the construction and effect of the plaintiff's letter to his bankers. That letter did not, in my opinion, operate to confer a power on the attorney to draw cheques in favour of his private creditors. The case is covered by the decision in *John v. Dodwell and Co., Limited* (*supra*), whether the plaintiff's claim be put on the footing of conversion by the defendants, or on the footing of a fiduciary obligation binding upon them. In my opinion, the appeal fails and should be dismissed.

[Solicitors—Messrs. Charles Humphries and Co. ; Messrs. Nicholl, Manisty, and Co.]

K.B. Div. (Talbot and Humphreys, JJ.) 1928. Mar. 23.

BERNARD v. WILLIAMS.*

Vendor and Purchaser—Deposit—Work to be done by vendor—Extension of time—Work not completed — Rescission — Recovery of deposit—When time of the essence of the contract.

The plaintiff contracted to purchase from the defendant a lease of a house and garage, and paid a deposit of £50, and a further sum of £50 on account of a premium of £150, on October 28 and 29, 1926, respectively. The plaintiff, as the defendant knew, intended to use the premises for the business of a garage proprietor, and the defendant agreed to clear away the hedge and trees in front of the house before the time for completion, which was originally fixed as "on or about December 6, 1926," but was subsequently extended to December 15. On December 10, it being apparent that the defendant could not do the work he had undertaken by December 15, the plaintiff rescinded the contract and claimed the return of the money.

Held, that in the circumstances time was of the essence of the contract, and the plaintiff was entitled to recover the money.

This was the plaintiff's appeal from a judgment given for the defendant in the Croydon County Court. The facts of the case are fully stated in the reserved judgment of the Court.

Mr. J. B. Matthews, K.C., and Mr. S. K. de Ferrars appeared for the appellant; Mr. F. P. M. Schiller, K.C., and Mr. T. F. Davis for the respondent.

The following judgment was read by MR. JUSTICE TALBOT.—This is the judgment of the Court.

This was an action for the recovery of two sums of £50, money received by the defendant to the plaintiff's use, as on total failure of consideration.

The money in question was paid by the plaintiff to the defendant in connexion with a proposed grant to the plaintiff by the defendant of a lease of certain premises at Thornton Heath. The first payment was on October 28, 1926, and the second the next day.

On that day, October 29, the plaintiff signed a document in these terms: "I, Sarah Ellen Bernard, of Railway View, Willington, near Derby, hereby agree to purchase a lease of 7, 14, 21 years of the house and garages now known as 'Homefield' for the sum of £350 per annum, and a premium of £150, possession of the premises to be given to Mrs. Bernard on or about the 6th day of December, 1926." It was common ground between the parties that the time for possession was subsequently extended by mutual agreement to December 15.

The first payment of £50 was made by way of deposit, and it is expressed to be so received in a receipt by the defendant's agents.

The place was, in October, 1926, used partly as a residence and partly as a garage or garages. It had, no doubt, until a few years ago, been an ordinary residence and grounds, and in October, 1926, there were still in front of the house a carriage drive, a hedge and some trees, shrubs, and flower beds. The plaintiff intended to develop the garage business there, and she required the defendant, and he agreed, to remove the hedge, trees, &c., and lay concrete on the space in front of the house, so that petrol pumps could be placed there. It was admitted that the plaintiff paid the second sum of £50 in consideration of the defendant's promise that he would proceed at once with this work.

On November 8, 1926, the defendant's solicitors wrote to the plaintiff as to the preparation of a lease. They were referred to Mr. Russell, then the plaintiff's solicitor, and the draft passed between the solicitors. Ultimately the form of it was agreed, but it was never executed, as the plaintiff refused to execute it on the ground now to be explained.

The plaintiff's case is that she always stipulated that the work above mentioned should be done before the time came for giving her possession, and that it was to make sure of this that she paid the second £50. The evidence was that the work would take at least a fortnight.

On November 22, more than three weeks after that payment, the plaintiff wrote to the defendant's agent as follows: "Dear Mr. Griffiths, I am writing you about the place at 267, London-road, Croydon. My husband has been over twice on a Saturday afternoon and expecting to see some alterations on the forecourt of the house, making ready for us to lay in pumps, &c., as soon as we get possession, which your agreement stated on the 1st or 6th December. This job was to be made and that was the understanding that Mr. Williams wanted another £50 before he commenced to make alterations. The time is now getting so short and my husband has his pumps all ready, and if it has to be done after we get there, well, there is a big loss just at a good time coming Christmas. It is no fault of yours, I am sure. I might as well say now that I shall not sign anything further unless I hear of the progression of the front and I must be able to have the place at date stated. My solicitor received the lease for approval and did lengthen the time to December 15, that was meeting it halfway. I am all prepared here for an early removal"—it is written from near Derby—"My notice expires as my place is taken. Hoping, dear Mr. Griffiths, that you are quite well and thanking you in advance I remain, yours faithfully, S. E. Bernard." To this there is a reply dated November 24: "Dear Mrs. Bernard, Mr. Griffiths is at present unable to attend business; he has had a very bad attack of bronchitis. I 'phoned to him to-day and he tells me he is quite sure if you have signed the lease Mr. Williams will immediately place the work in connexion with the frontage in hand. Yours faithfully, For and on behalf of Tiller and Co., Limited." On November 26, the plaintiff's solicitor wrote to the defendant's solicitors as follows: "Dear Sirs, I thank you for your letter of yesterday's date and herewith return draft lease approved. Your client's agent undertook that all front hedges and trees should be removed and the whole of the front concreted and gravelled, and it was upon this understanding that my client paid the second deposit on account of the premium. This work must, therefore, be completed before the lease is signed or a written undertaking given by your client that he will carry out the work before the end of this year."

There appears to be no evidence that he had any authority from the plaintiff to accept an undertaking to do the work by the end of the year instead of doing the work before the lease was signed, but this

* Reported by J. W. HALL, Esq., Barrister-at-Law.

seems to be immaterial, as on November 30 the defendant's agent assured the plaintiff that the contractor had actually been instructed to proceed with the work. The question of an undertaking to do it before the end of the year accordingly never arose.

On December 8 the plaintiff's solicitor wrote to the defendant's solicitors as follows : " Dear Sirs, I shall be pleased to receive lease for execution by my client and to know that all the work which your client undertook to have done has been completed." Nothing, so far as appears, was done and on December 10, it being then impossible to finish the work by the 15th, the agreed date for giving possession, the plaintiff's solicitor wrote to the defendant's solicitors this letter : " My client has been in to-day and she informs me that the arrangement was that possession should be given and the work completed on the 1st instant, and that it was expressly upon that understanding that she paid the second £50. Your client has broken the agreement, and my client is not now prepared to proceed with the matter, and has instructed me to ask for the return of the £100 that has already been paid. I return engrossment of lease." The word " 1st " in the first sentence of that letter appears to be a slip.

The question is whether the plaintiff was entitled, on December 10, to a return of the £100 which she had paid, on the footing that the consideration for the payment had wholly failed.

The Judge has decided that, time not being of the essence of the contract, it was not a condition that the work should be done by a particular date so as to entitle the plaintiff to rescind when it had become impossible that it should be done by that date.

The plaintiff says that this is wrong because : (1) A purchaser's deposit is always recoverable if there is either no valid contract or a valid contract, performance of which has become impossible by the vendor's default; (2) There has been no valid contract, the contract being for the sale of land and there being no memorandum of it sufficient to satisfy section 40 of the Law of Property Act, 1925 ; (3) If there is a sufficient memorandum, the performance of the contract has become impossible by the defendant's default ; (4) The equitable rule about time does not apply because there is no contract of which specific performance could be ordered ; (5) If the rule does apply, time was, in the circumstances of this case, of the essence of the contract.

The defendant contends that : (1) There is a sufficient memorandum of the contract ; (2) If not, specific performance of the contract can be ordered because it has been partly performed ; and he claims an opportunity, if necessary, of proving such part performance ; (3) The agreement to do the work in front of the house was not a condition of the contract, but a collateral agreement ; (4) Time was not of the essence of the contract according to the rule of equity applied by section 41 of the Law of Property Act, 1925.

We take the last point first. The learned County Court Judge lays it down, that it is " quite clear that as between vendor and purchaser . . . the time for completion has never been treated as of the essence of the contract unless in the clearest terms it is made so." In our opinion this is too strongly stated. The true rule is stated by Lord Cairns in *Tilley v. Thomas* (L.R., 3 Ch., 61, at p. 67) : " A Court of Equity will indeed relieve against "—there is clearly a clerical error in the report there, as is pointed out by Lord Atkinson in the case of *Stickney v. Keeble* ([1915] A.C., 386, at p. 402). Probably it ought to read : " A Court of Equity will indeed relieve against a breach of contract, and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps toward completion, if it can do justice between the parties, and if (as Lord Justice Turner said in *Roberts v. Berry*, 3 De G., M. & G., 284), there is nothing in 'the express stipulations between the parties, the nature of the property, or the surrounding circumstances' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract." As is said by Lord Justice Turner in *Roberts v. Berry* (*supra*) at page 292, a time is necessarily fixed for the completion of a sale " in order to give legal rights," and if nothing more appears, equity will enforce the contract although performance of it at the stipulated time has become impossible ; but if there is anything in the contract itself, or in the circumstances, which shows that there was real importance in the time fixed, and that the party who insists upon it stipulated for it not as a mere formality but with the intention of binding the other to it, then specific performance will be refused, at any rate where this was brought to the knowledge of the party claiming performance, since there is no equity in compelling a party to a contract to dispense with something for which he deliberately bargained and on the performance of which he relied.

This is the principle of all the authorities, and in our opinion it is plain from the facts of this case that the plaintiff did attach great importance to getting possession not later than December 15, 1926, and to the completion of the work in front of the house before she went into possession, and that the defendant was fully aware of this. This appears from the fact that the plaintiff paid in advance £50 of this premium for the lease (in addition to a deposit of £50) on October 28 and 29 in consideration of the defendant's promise to put the work in hand at once, and from her letter to the defendant's agent of November 22, in which the importance to her of getting possession on the day mentioned, and of having the work which the defendant had promised to do finished before that day, was forcibly stated, when there was still ample time for the defendant to do what was required. It is clear that even when time was not originally of the essence of the contract it may be made so by a later notice, either before or after the day named in the contract, requiring completion by a particular day, if the time allowed is reasonable. (See *Benson v. Lamb*, 9 Beavan, 502 ; *Parkin v. Thorold*, 16 Beavan, 59 ; *Crawford v. Toogood*, 13 Ch.D., 153.) Merely extending the time originally fixed does not waive the condition as to time when it is of the essence of the contract (*Barclay v. Messenger*, 43 L.J., Ch., 449) ; and indeed, here the substitution of a definite date, December 15, for the indefinite " on or about " December 6 is additional proof of the importance attached by the plaintiff to the time for completion. It is, in truth, rather a precise definition than an extension of the time.

Even, therefore, if there was a contract which the plaintiff could have been ordered to perform specifically if the defendant had been able to give possession of the premises with the agreed alterations on December 15, we are of opinion that, as this was impossible on December 10, the plaintiff was entitled on that day to treat the contract as at an end, and to recover the £100 which she had paid under it.

It was urged for the defendant that the learned Judge has found that the agreement to do this work was collateral to the contract for the lease, and not part of it, and that this being a finding of fact

binds this Court on appeal. We do not think that the Judge did find that this agreement was collateral in the sense alleged by the defendant. He says : "The bargain between the parties is, taking the agreement as set out in the written agreement and the collateral agreement according to the oral evidence, that possession of the premises in their repaired condition should be delivered to the plaintiff on December 15." It is evident, we think, that he uses the word "collateral" merely to distinguish the written memorandum from the agreement proved orally. In our opinion his finding, as to what the contract was, was the only one possible on this evidence. And it follows, if, as we hold, time was of the essence of the contract, that, it being impossible to give "possession of the premises in their repaired condition" on December 15, the plaintiff was entitled, as soon as that fact was ascertained, to treat the contract as at an end and recover what she had paid.

These reasons are sufficient for the decision of the appeal, and it is not necessary to discuss the question whether there was here a memorandum sufficient to satisfy section 40 of the Law of Property Act, 1925. It is enough to say that we should have very great difficulty in saying that there was.

We doubt, however, very much whether, if we took a different view of the question whether time was of the essence of the contract, the plaintiff could found a case upon the absence of a sufficient memorandum. We cannot think that a purchaser can rescind a contract and recover his deposit, as against a vendor who is willing to complete, merely because there is no writing to satisfy section 40. (See *Jones v. Jones,* 6 M. & W., 84 ; *Thomas v. Brown,* 1 Q.B.D., 714.) It appears to us from these cases, and on principle, very difficult to accept the judgment in *Casson v. Roberts* (31 Beavan, 613), cited by counsel for the plaintiff, as an accurate statement of the law. (See Williams on "Vendor and Purchaser," 3rd Edition, vol. 2, page 842.) Nor are we prepared to accept the contention that the equitable rule as to time cannot apply unless there is a sufficient memorandum to satisfy the statute. No doubt the rule will only apply when a Court of Equity would, before the Judicature Acts, have applied it ; that is, to contracts such as are within the equitable jurisdiction of specific performance, and in circumstances in which a Court of Equity would have applied the rule : *Stickney v. Keeble* (*supra*). But that case is no authority for saying that, merely because by section 40 of the statute a contract cannot be proved, the equitable rule as to time will not apply to it if the contract is such, and the circumstances surrounding it are such, that, apart from the question of evidence (with which alone this statute is concerned), specific performance of it could be decreed. It seems unreasonable that a purchaser could hold a vendor to the letter of his bargain as to time on the ground, not that time is of the essence of the contract in equity, but that if the vendor were suing for specific performance the statute would be a good defence. We do not see how, in an action for recovery of a deposit, a plaintiff can rely on the Law of Property Act, 1925, section 40, at all, if the defendant is ready and willing to complete, and is, apart from the statute, entitled to specific performance.

The appeal is allowed, and judgment must be entered for the plaintiff for the amount claimed, with costs here and below.

[Solicitors—Messrs. Gibson and Weldon, for Mr. Frederick Gowen, Croydon ; Messrs. H. Boustred and Sons.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)
1928.
Mar. 28.

GENERAL MEDICAL COUNCIL v. COMMISSIONERS OF INLAND REVENUE.

ENGLISH BRANCH COUNCIL OF THE GENERAL MEDICAL COUNCIL v. COMMISSIONERS OF INLAND REVENUE.*

Revenue — Income-tax — Charity — General Medical Council—Whether entitled to exemption—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 37.

The General Medical Council is not a body established for charitable purposes only, and therefore is not entitled, under s. 37 of the Income Tax Act, 1918, to exemption from income-tax on the income from its funds.

Decision of Rowlatt, J. (44 *The Times* L.R., 117), affirmed.

These were appeals from a decision of Mr. Justice Rowlatt (44 *The Times* L.R., 117) on cases stated by the Special Commissioners of Income Tax, who had dismissed the appeals.

The General Medical Council claimed exemption from income-tax, in respect of income on funds belonging to them, for the four years ending on April 5, 1924, under section 37 of the Income Tax Act, 1918, on the ground that they were a charity within the meaning of the Income Tax Acts.

The Council, whose full name was the General Council of Medical Education and Registration of the United Kingdom, was first established under the Medical Act, 1858, and was incorporated by section 1 of the Medical Council Act, 1862. Its composition had been altered from time to time, and it now consisted of 38 members, of whom 18 were appointed by Universities in the United Kingdom, nine by the medical corporations, and five by his Majesty in Council, while six were elected by members of the medical profession. From the establishment of the Council until April 5, 1924, all the members of the Council were members of the medical profession, but after April 5, 1924, a lay member was appointed by his Majesty in Council.

The preamble of the Medical Act, 1858, was as follows :—"Whereas it is expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners : Be it therefore enacted, &c." Section 3 of the Act established the Council, and section 6 set up branch councils for England, Scotland, and Ireland, to which branch councils the Council was empowered to delegate powers and duties, and through which the Council did a great deal of its work.

The chief duties imposed by the Act on the Council were (*a*) to keep and publish a register of qualified practitioners ; (*b*) to exercise oversight of medical studies and examinations ; and (*c*) to publish the *British Pharmacopœia.*

Every person who possessed the required medical qualification was entitled on payment of certain fees to have his name entered on the Medical Register, which was published by the Council. The name of a practitioner might be struck off the register in certain circumstances.

By section 31 of the Act of 1858 and by section 6 of the Medical Act, 1886, it was provided that any

* Reported by H. Langford Lewis, Esq., Barrister-at-Law.

person registered under the Act should be entitled, according to his qualifications, to practise medicine or surgery and to demand and recover in any Court of law reasonable charges for professional aid, advice, or visits, and for any medicines or medical or surgical appliance.

By section 34 of the Act :—"The words 'legally qualified medical practitioner' or 'duly qualified medical practitioner,' or any words importing a person recognized by law as a medical practitioner or member of the medical profession, when used in any Act of Parliament, shall be construed to mean a person registered under this Act."

An unregistered person was not prohibited from practising medicine, but he suffered certain disabilities. For example, he could not recover fees by legal process, he could not give a valid certificate, he was debarred from certain appointments, and he was unable to join in practice with a registered practitioner in such a way as to lead the public to believe that he was "covered" by the qualifications of the latter. By section 35 of the Act a registered person was, if he so desired, exempt from service on juries and at inquests.

Sections 18 to 21 of the Act gave power to the Council to require information from medical teaching and examining bodies regarding the courses of study and examinations to be gone through to obtain the qualifications granted by them and empowered a representative of the Council to be present at examinations. If it appeared to the Council that the course of study and examinations for any qualification were not such as to secure that persons obtaining the qualification possessed the requisite knowledge and skill for the efficient practice of their profession, the Council was empowered to make representations to the Privy Council and the Privy Council might order that the possession of the qualification in question should no longer confer a right on its holder to be registered under the Act. The powers given by the Act of 1858 to the Council in the matter of supervising medical examinations were expanded by sections 2, 3, and 4 of the Medical Act, 1886.

The Special Commissioners held that the Council was not established for charitable purposes only, and they refused the claim.

The Special Commissioners also refused a similar claim by the English Branch Council of the General Medical Council.

Mr. Justice Rowlatt affirmed the decisions of the Special Commissioners. The Councils appealed.

Mr. Vaisey, K.C., and Mr. Raymond Needham appeared for the appellants ; the Solicitor-General (Sir Thomas Inskip, K.C.), J. H. Stamp, and Mr. R. P. Hills for the respondents.

The MASTER of the ROLLS, in giving judgment, said that the two appeals came before the Court on two different cases, but they had both been decided in the same way, and the decision in one governed the other. The first appeal sought exemption from income-tax of part of the income of the General Medical Council. It could not be too often or too plainly stated that there was no general exemption of a charity from income-tax under the Income Tax Acts, but only in respect of certain classes of income, such as tax on the annual value of land or buildings under Schedule A, and tax on dividends and interest of public funds under Schedule C. Those exemptions were granted by section 37 of the Income Tax Act, 1918.

He had pointed out in *Brighton College v. Marriott* (41 *The Times* L.R., 165 ; [1925] 1 K.B., 312 ; affirmed in 42 *The Times* L.R., 228 ; [1926] A.C., 192) the importance of the precise exemption. It must be shown that the income was the income of a body of persons established for charitable purposes only, and it was exempted only so far as it was applicable to such purposes.

It was argued that the powers entrusted by the Medical Act, 1858, to the General Medical Council were, shortly : (1) To keep the Medical Register ; (2) to supervise medical studies and education ; and (3) to edit and issue the *British Pharmacopœia* ; and that those objects were of general public benefit, and therefore that the Council was a charity and entitled to exemption. It was not very plain how the preamble was to be read, and it was doubtful how far the duties imposed by statute on the Council could be said to be for the general benefit of the public. The Court must not overlook the fact that the Special Commissioners found that the Council was not a charity, and on a question of degree, which was a question of fact, the Court was probably bound by the finding of the Special Commissioners. But he would go farther, and, giving the Council the benefit of the doubt, say that one, at any rate, of the main objects of the Council was for the benefit of the public.

The accounts for certain years had been made part of the case, and from those of 1922 it appeared that the receipts came from a small sale of the Medical Register—an expensive book—from the £990 interest on War Loan, which was the subject of the appeal, and finally, from the contributions of the branch councils of England, Scotland, Wales, and Ireland imposed on the branches by the General Council and paid by the individual members. More than a quarter of the expenditure was paid away in fees to the members of the Council, and there was a considerable bill for printing the Medical Register. It appeared to him very difficult to say that the income of the Council was applicable, and had been applied, to charitable purposes only.

His Lordship then referred to the well-known classification of charities by Lord Macnaghten in *Special Commissioners of Income Tax v. Pemsel* (7 *The Times* L.R., 657 ; [1891] A.C., 531, at p. 583) and continued : It had often been pointed out that the last or fourth category was illustrative rather than exhaustive—a trust beneficial to the public was not necessarily a charity at all. Lord Justice Lindley observed in *In re Macduff—Macduff v. Macduff* (12 *The Times* L.R., 452 ; [1896] 2 Ch., 451) that Lord Macnaghten's classification was taken from Lord Romilly's argument in *Morice v. Bishop of Durham* (10 Ves., 522, at p. 531) but with the omission of the words—"which is the most difficult"—as introductory to the fourth category. Lord Justice Lindley said (at p. 467) : "In deciding the case we must fall back upon the Statute of Elizabeth, not upon the strict or narrow words of it, but upon what has been called the spirit of it, or the intention of it. As Lord Eldon says, this Court has taken great liberties with charities ; but the liberty is always restricted by falling back or professing to fall back upon the Statute of Elizabeth."

It was not said that the work of the General Medical Council was anywhere within the first three categories of Lord Macnaghten's judgment ; it could only be said to be beneficial to the community within the meaning of the fourth category.

What were "charitable purposes" ? He need only refer to two cases, one on each side of the line —*Society of Writers to the Signet v. Inland Revenue Commissioners* (2 Tax Cas., 257) and *Inland Revenue Commissioners v. Forrest* (6 *The Times* L.R., 456 ; 15 App. Cas., 334). In the first the society was

held to be one for the benefit of the Scottish legal profession, and not exempt ; in the other it was found that the promotion of science in the abstract was the main object of the institution, and that it was, therefore, entitled to exemption. No doubt the duties and objects of the General Medical Council were all for the public benefit ; but could it be said that they were so in the same sense as in *Forrest's* case (*supra*) ? He found it impossible to accept that contention. The public interest was served, but the professional interest was also served. Was the body formed for the promotion of objects beneficial to the medical profession ? He was bound to answer that question in the affirmative.

He was in full agreement with the judgment of Mr. Justice Rowlatt, and the appeal must be dismissed, with costs.

LORD JUSTICE SARGANT said that he was of the same opinion. Mr. Vaisey had insisted strongly that the main object of the Council was the benefit of the public, and that the benefit of the medical profession was only an incidental object. The Solicitor-General maintained the opposite view. The preamble to the Medical Act, 1858, was neutral, as the expediency to which it referred might be either public or professional. But it was quite clear that the objects of the Council as set out in the case were solely and simply professional objects, though they might incidentally be also beneficial to the general public. The first and main thing to be looked at was the keeping of the Medical Register, as an accurate list of qualified medical practitioners, free from all persons who had been guilty of improper or unprofessional conduct ; then came the duty of keeping up the standard of medical education ; and thirdly the duty of publishing the *British Pharmacopœia*—a list of drugs professionally available. The whole scheme of the Medical Acts was to regulate the profession of medical men, and if the objects of the Council were of benefit to the public that was quite a secondary result. Very much the same thing could be said of the rules which regulated the admission of other professional men to the learned professions, such as solicitors, barristers, and others. The distinction between such a body and a purely learned society such as the Institution of Civil Engineers was well expressed by Lord Watson in his judgment in *Inland Revenue Commissioners v. Forrest* (6 *The Times* L.R., 456 ; 15 App. Cas., at pp. 350, 351). Here the Court clearly had an institution of the same nature as the Society of Writers to the Signet. But even if its main object was to benefit the public, it might not and probably would not be a charity.

LORD JUSTICE LAWRENCE agreed. He thought that the case, when the Acts were investigated, was fairly plain. The main object and function of the Council was to supervise and regulate the medical profession. The business of the Council was conducted by members who were elected for that purpose and all members were paid fees for attending the annual general meetings. The funds of the Council were obtained by levying fees from the medical practitioners entered on the register. No doubt it was for the benefit of the public that the medical profession should be regulated and supervised, but it was also of the greatest benefit to the profession itself. The objects of the Council, which were mainly the protection of the medical profession, were far remote from the charitable objects mentioned in and the spirit of the Statute of Elizabeth. The plain answer to the appellants' contention was that the General Medical Council was not a charity, and that the income sought to be exempted from tax was not income to be applied to charitable purposes only. The appeal failed and must be dismissed.

[Solicitors—Mr. C. J. S. Harper ; the Solicitor of Inland Revenue.]

K.B. Div. (Wright, J.) } 1928. Apr. 2.

AUCHTERONI AND CO. v. MIDLAND BANK, LIMITED.*

Bankers—Bill of exchange—Acceptors' direction to pay—Indorsement in blank—Payment to payees' servant—Fraud of servant—Claim by payees against bank—Bills of Exchange Act, 1882 (45 and 46 Vict., c. 61), s. 59.

The plaintiffs having sold goods drew a bill on the purchasers for the price. The purchasers accepted the bill and instructed their bank, the defendants, to pay the bill when due. When the bill became due the plaintiffs indorsed it in blank and handed it to their cashier to take to their own bank for collection. The cashier, however, took it to the defendants and asked for cash over the counter. He received the cash and absconded.

In an action for negligence, breach of trust, and conversion,

Held, (1) that, as there was no privity of contract between the plaintiffs and the defendants, there was no duty to take care and therefore no negligence ; (2) that the defendants did not hold the money in trust for the plaintiffs ; (3) that, as the demand for payment over the counter was, on the evidence, not so unusual that the defendants' suspicions ought to have been aroused, the defendants were protected by s. 59 of the Bills of Exchange Act, 1882 ; and that therefore the action failed.

This case had been begun at Liverpool Assizes and had been adjourned for further hearing in London. It raised a question as to the duty of a bank in paying a bill of exchange.

Mr. Singleton, K.C., and Mr. N. J. Laski appeared for the plaintiffs ; and Mr. Kennedy, K.C., and Mr. A. J. Hodgson for the defendants.

The plaintiffs were Liverpool merchants. In December, 1923, they supplied certain goods to the Nigerian Products Company. They drew a bill for £876 9s. payable to themselves in three months, and by way of payment for the goods the Nigerian Products Company accepted the bill and gave their bankers, the present defendants, instructions to pay the bill at maturity. When the bill became due in March, 1924, the plaintiffs handed it to their cashier, one Woodward, to take it to their own bank and have it collected, but Woodward, instead of carrying out his duty, went to the defendant bank and presented the bill and asked for payment over the counter. The plaintiffs had indorsed the bill in blank before handing it to Woodward, and the defendants, without waiting to make inquiries, handed the money to him, and he absconded with it. The plaintiffs

* Reported by W. B. THOMPSON, Esq., Barrister-at-Law.

brought this action to recover the money from the bank. They based their claim on three grounds : (1) That the defendants had held the money in trust for them, or as money had and received, and had improperly parted with it ; (2) that the defendants in parting with the money without inquiry had been guilty of negligence ; and (3) that in parting with the money the defendants had been guilty of conversion.

By their defence the defendants pleaded a general denial, and said that as the person who presented the bill for payment was the plaintiffs' servant it was not negligence on their part to let him have the money. They also said that by indorsing the bill in blank and handing it to Woodward the plaintiffs had estopped themselves from denying that Woodward was authorized to receive the money.

Mr. SINGLETON, for the plaintiffs, submitted that as the defendants had the money in hand, and had been instructed by their customers, the Nigerian Products Company, to meet the bill, they were holders of the money to the use of, or in trust for, the plaintiffs. Further, there had been many previous bill transactions between the plaintiffs and the defendants, and in none of them had payment ever been made over the counter in this way. As the procedure in this case was so unusual, the defendants should have been suspicious. They were put on inquiry and were, in fact, negligent. And, further, if the document had not been a negotiable instrument there would clearly have been a conversion, and the fact that it was a negotiable instrument did not in the circumstances make any difference. The defendants did not negotiate the bill ; they merely paid the money over to a person who had no title to it, and they were accordingly guilty of conversion, *A. L. Underwood, Limited v. Bank of Liverpool and Martins* (40 *The Times* L.R., 302 ; [1924] 1 K.B., 775).

Mr. KENNEDY, for the defendants, submitted that the claim for money had and received would only lie where there was privity of contract between the plaintiffs and the defendants, and here there were no relations between the plaintiffs and the defendants. As to the allegation of negligence, there could only be negligence where there was a duty to exercise care, and here there was no duty on the part of the defendants towards the plaintiffs. With regard to the allegation of conversion, the payment made by the defendants was perfectly regular. The bill was indorsed in blank and was therefore, by section 8 (3) of the Bills of Exchange Act, 1882, payable to "bearer," who, by section 2, was defined as "the person in possession" of the bill, not, be it noted, the person in lawful possession. Section 59 said that payment in due course was payment to the holder in good faith and without notice, and by section 2 the "holder" included the bearer. The defendants here paid the bearer of the bill in good faith and without notice that he was not entitled to payment. The effect of an indorsement in blank was shown by section 34 (1) of the Act.

When a bill was presented to a banker he must make up his mind at once whether to pay it or not ; he was not entitled to wait and make inquiries (Paget on Banking, 2nd Ed., p. 99). There was nothing in the evidence to suggest any lack of good faith on the part of the defendants. Section 90 of the Act showed that good faith could co-exist with negligence ; so even if it were held that the defendants had been negligent, which was not admitted, that would be immaterial. If the plaintiffs succeeded here no bank could ever safely pay a bill in cash across the counter. If, however, the bank refused to pay, its customer could complain that it had injured his credit.

MR. JUSTICE WRIGHT, in giving judgment, said that in the ordinary course of business the plaintiffs sold goods to the Nigerian Products Company and drew a bill on that company for the price ; the company accepted the bill and instructed their bank, the defendants, to pay the bill when due and to debit their account with the amount. When the bill became due a cashier of the plaintiffs, one Woodward, put it before one of the partners in the plaintiff firm for indorsement in the usual way ; the partner indorsed it in blank and handed it back to Woodward to take it and pay it into the plaintiffs' bank and have it collected. Woodward, however, took it to the defendants and asked for cash over the counter and received a note for £500, two notes for £100, five for £20, and the balance in smaller amounts. He then absconded. He had perpetrated a similar fraud with regard to other bills and cheques, and subsequently he was arrested, tried, and sent to penal servitude.

The evidence showed that there was now a bankers' clearing house at Liverpool and that it was unusual for bills to be presented there except through a bank.

The plaintiffs in this action based their claim on three grounds :—(1) That the defendants had been negligent ; (2) that the defendants had been holders of the money to the use of the plaintiffs ; and (3) that the defendants had been guilty of conversion.

As to the claim on negligence, he held it to be ill-founded. There could only be negligence where there was a duty to take care, *Scholfield v. Earl of Londesborough* (12 *The Times* L.R., 604 ; [1896] A.C., 514) ; *London Joint Stock Bank, Limited v. Macmillan and Arthur* (34 *The Times* L.R., 509 ; [1918] A.C., 777, at p. 823) ; and in a case of this kind such a duty could only arise where there was privity of contract between the parties, and there was no privity of contract here between the plaintiffs and the defendants. That defence, therefore, failed.

The second claim, that the defendants held the money to the use of the plaintiffs, was equally baseless. The defendants never notified the plaintiffs that they had received funds from the acceptors of the bill to be held for the credit of the plaintiffs, and the defendants did not hold the money on the plaintiffs' behalf (*Hill v. Royds*, L.R., 8 Eq., 290 ; section 53 of the Bills of Exchange Act, 1882). The order given to the defendants by the acceptors to pay the bill at maturity was a matter which solely concerned the acceptors and the defendants, and the plaintiffs could not take advantage of it.

The third claim, that on which the plaintiffs had mainly relied, was based on conversion. The defendants had exercised dominion over the bill in a manner adverse to the plaintiffs, and the plaintiffs said that that amounted to conversion as explained in *Underwood's* case (40 *The Times* L.R., 302 ; [1924] 1 K.B., 775, at pp. 790-1). To that the defendants replied that as the bill was a negotiable instrument they were protected by section 59 of the Bills of Exchange Act, 1882. The plaintiffs answered that section 59 could not protect the defendants because the circumstances of the payment were so unusual that the defendants could not say that they had made the payment without notice of irregularity. The test of the standard of care required from a banker was shown in *Commissioners of Taxation v. English, Scottish, and Australian Bank, Limited* (36 *The Times* L.R., 305 ; [1920] A.C., 683). Was the demand for payment over the counter in this case so unusual that the defendants' suspicions ought to have been aroused ? The evidence showed that, though such a

course was unusual, it was not unknown, and on this point the language in the judgments in *Bank of England v. Vagliano Brothers* (7 *The Times* L.R., 333 ; [1891] A.C., 107, at pp. 127-8 and at p. 157) was material. If the contention of the plaintiffs was right, no banker could ever safely pay a bill over the counter without first making inquiries. If there were special circumstances, as, for instance, if a bill for a large sum was presented by a tramp or by an office-boy, the bank might properly wait to make inquiries, but if it did so in other cases it risked dishonouring the bill under section 47 of the Act and committing a breach of its duty to its customer, the acceptor. In this case there were no special circumstances to justify the defendants in refusing prompt payment. The plaintiffs had entrusted the *indicia* of title to their servant, and he, unfortunately, had defrauded them, but for that the defendants were not responsible. There must be judgment for the defendants, with costs.

[Solicitors—Messrs. Hall, Hawkins, and Co., Manchester ; Messrs. Hill, Dickinson, and Co., Liverpool.]

Court of Appeal.
(Scrutton and Sankey, L.JJ., and Romer, J.)

1928.
Mar. 28.

ENGLISH HOP GROWERS, LIMITED v. DERING.*

Contract—Breach—Restraint of trade—Penalty or liquidated damages—Hops pickable but not picked—Whether grown or produced.

The plaintiff company, which was formed to act as selling agents for members growing hops, made with the defendant, who was a member and a hop grower, a contract whereby the defendant agreed that he would deliver to the plaintiffs, for sale by them, all the hops "grown" by him on particular lands in certain years, including 1926, and that if he failed to deliver to the plaintiffs any hops "produced" by him, or if he disposed of such hops otherwise than through the plaintiffs, he would pay to the plaintiffs £100 per acre as liquidated damages. The defendant cultivated the 1926 crop in the usual way, and from August 10, when the hops were pickable, but not picked, he leased the lands in question for five years to a company controlled by himself. In an action for breach of contract by reason of failure to deliver the 1926 crop to the plaintiffs,

Held, (1) that although the defendant had leased the lands with the hops still growing upon them he had nevertheless "grown or produced" the hops inasmuch as they were pickable, and by disposing of them otherwise than to the plaintiffs he had broken the contract ; (2) that the contract was not an unreasonable restraint of trade ; (3) that the £100 per acre was to be deemed to be liquidated damages and not a penalty ; and that therefore the plaintiffs were entitled to recover that amount.

* Reported by E. J. M. Chaplin, Esq., Barrister-at-Law.

This was an appeal by the plaintiffs, English Hop Growers, Limited, from a judgment of Mr. Justice Rowlatt in favour of the defendant, Sir Henry Edward Dering, Bt., in an action in which they claimed from the defendant damages for breach of a contract in writing, dated August 12, 1925. The facts are fully stated in the judgment of Lord Justice Scrutton.

Mr. Jowitt, K.C., and Mr. H. L. Murphy appeared for the appellants ; Mr. Pritt, K.C., and Mr. Wilfrid Lewis for the respondent.

Lord Justice Scrutton.—This is an appeal from a judgment of Mr. Justice Rowlatt in favour of the defendant, Sir H. E. Dering, who was sued by English Hop Growers, Limited, for breach of contract, The plaintiff company were incorporated to protect the interests of individual hop-growers, members of the company, by pooling their hops produced in the year, in order, by selling through the company "as selling agents for its members" (see Prospectus, Article 23), to keep up the price of hops and prevent undue competition. The defendant had three defences : (1) that he had not broken the contract ; (2) that the contract was unenforceable, as in restraint of trade ; and (3) that the sum claimed was a penalty. Mr. Justice Rowlatt decided that there was no breach, and did not, therefore, consider the other two defences.

The contract of August 12, 1925, contained a recital : "The society has been formed to organize the marketing of home-grown hops in Great Britain by their sale through a single agency, and it is agreed by the rules of the society that each of the members of the society who is a grower of hops should enter into a contract with it in the terms hereinafter contained for the mutual advantage of all the members." Then it contained these clauses : "(2) The grower hereby agrees with the society that so far as the hop crops of the years 1925, 1926, 1927, 1928, and 1929 are concerned he will, subject to the now existing contract (if any) set out in the second part of the second schedule hereto, deliver to the society all hops grown by him to the intent that the same may be sold by the society in the manner set out in the said first schedule." Then clause 5 is : "The grower hereby agrees with the society that he will not, as regards the crops for the said years 1925 to 1929 inclusive, produce hops upon any greater acreage than that set out in the first part of the said second schedule hereto or upon such larger acreage as the society shall from time to time previously approve and consent to in writing." Seventhly : "The grower hereby agrees that if, as regards the crops for the said years 1925 to 1929 inclusive, he shall fail to deliver to the society any hops produced by him or shall by himself or an agent or factor, or in any way other than through the society, dispose of any hops produced by him, otherwise than in pursuance of a now existing contract (if any), then and in that case he will pay to the society as and for liquidated damages the sum of £100 per acre or proportionately on any less quantity than an acre calculated on the acreage set out in the first part of the second schedule hereto." It will be seen that the phrases "hop crops," "hops grown by the grower," "hops produced by him," are used apparently as synonymous. Paragraph 5 of the prospectus uses them all indifferently.

The defendant entered into the contract in respect of 53 acres at Sheerland Farm, Pluckley, and ten acres at Rooting Farm, Pluckley. No question now arises with regard to the 1925 crop on these lands,

which was marketed by the plaintiff company, though differences of opinion existed as to the results of the marketing. This action only relates to the 1926 crop. As to this, it was cultivated by the defendant in the usual way. But on July 23, 1926, the defendant leased to a company called "Surrenden Hops, Limited," Surrenden being the name of the defendant's residence, for a term of five years from August 10, 1926, certain hop gardens, being the 63 acres the subject-matter of the contract with the plaintiff company, with a covenant by the lessees: "To manage cultivate and manure the premises in a good and husbandlike manner in accordance with the most approved methods of hop-growing and husbandry in the district in accordance with the Surrenden traditions and to keep and maintain the whole of the land as hop gardens and hop land only and to keep it clean and free from weeds and not to convert any part into pasture land." Shares to the extent of £700 were issued in the Surrenden Company, of which Sir H. E. Dering held £500, his daughter £100, and a gentleman named Dybell £100. The latter's connexion with the matter is not explained, except that he was one of the two signatories to the memorandum of association for one share. Sir H. E. Dering had obviously the control of the company, and was its creator. The Judge finds as facts that on August 10, when the lease commenced, the hop vines had grown to such an extent that the hops were formed and pickable hops, though unless there was some urgency they would not be picked till a few days later, when their condition would have improved. In these circumstances the defendant said: "I have not grown any hops or produced any hops on the contract lands; no hops are grown or produced till they are picked, and these hops were picked, and therefore grown or produced, by the Surrenden Estates, Limited, who have no contract with you." This idea seems to be founded on some mistaken impression that hop clusters are part of the land till they are severed and only become "hops" or personal property when they are severed. This is a mistake. Hops while growing on the vine are *fructus industriales*, not part of the land while growing, but personal chattels which pass to the executor and not to the heir (*per* Mr. Justice Littledale in *Evans v. Roberts*, 5 B. and C., 829, who speaks of "growing crops being produced by the labour of the occupier"; and *per* Baron Parke in *Rodwell v. Phillips*, 9 M. and W., 501, and *Latham v. Atwood*, Cro. Car., 515). Mr. Justice Rowlatt very summarily took the view that if the defendant grew hops he was under no obligation to pick them; that there were no hops till they were picked; and that what the defendant had done was to lease land with hops still growing on it, which was not disposing of hops produced; in short, that in 1926 the defendant had not grown or produced any hops. I am quite unable to take this view. It appears to me that in 1926 the defendant had grown or produced a hop crop up to the point when it was pickable, though it would be better to wait a few days, and then disposed of it to persons other than the plaintiff company, so breaking his agreement with them. If the defendant had begun cultivating with hop vines more acres than his contract quantity, I cannot think he would be at liberty to say, if sued for an injunction to prevent him from breaking clause 5 of his contract, that he was not "producing" hops. This is enough to establish a breach of contract in 1926, but I wish to say (though I do not express a final opinion on it, as the crops of 1927 are not before us) that when a landlord lets land with a covenant that it shall be used and cultivated as a hop garden according to Surrenden tradition, I think he is causing to be grown and growing hops within the meaning of the present contract, and is preventing himself from keeping his contract to allow the company to dispose of his hops as selling agent, and is disposing of his hops to others than the present plaintiffs. At present I think that when A puts B under a contractual obligation to do a particular act he causes the act to be done, and breaks any contract which he may have made that he will not do that act. (See my judgment in *Falcon v. Famous Players Film Company*, 42 *The Times* L.R., 666; [1926] 2 K.B., 474.) I have myself a strong opinion as to the conduct of Sir H. E. Dering in this matter, but I think it better not to express it, and leave him to be judged by the Societies of Kentish Men and Men of Kent, and others prominent in the County of Kent, a county well known for honesty and good sportsmanship.

There being then a breach if the contract was enforceable, it was argued that it was not enforceable as in restraint of trade. It was not argued that its terms were unreasonable in the public interest, but that it was an unreasonable restraint on the individual. Oddly enough, one of the complaints was that there were not restraints enough in the conduct of the individual member, as the company ought to have taken power to compel its members to reduce their area of cultivation, and so avoid surplus production and lowered prices. It is now well established that the Courts will view restraints of trade which are imposed between equal contracting parties for the purpose of avoiding undue competition and carrying on trade without excessive fluctuations and uncertainties, with more favour than they will regard contracts between master and servant in unequal positions of bargaining. Lord Haldane states the position thus, in *North Western Salt Company, Limited v. Electrolytic Alkali Company, Limited* (30 *The Times* L.R., 313; [1914] A.C., 461, at p. 471): "When the controversy is as to the validity of an agreement, say for service, by which someone who has little opportunity of choice has precluded himself from earning his living by the exercise of his calling after the period of service is over, the law looks jealously at the bargain; but when the question is one of validity of a commercial agreement for regulating their trade relations, entered into between two firms or companies, the law adopts a somewhat different attitude—it still looks carefully to the interest of the public, but it regards the parties as the best judges of what is reasonable as between themselves." I may also refer to the well-known judgment, delivered by Lord Parker in *Attorney-General for Australia v. Adelaide Steamship Co. and Others* (29 *The Times* L.R., 743; [1913] A.C., 781), and to the judgment of Lord Justice Younger in *Attwood v. Lamont* (36 *The Times* L.R., 895 [1920] 3 K.B., 571) which deals particularly with the distinctions between contracts of service and contracts for the sale of goodwill, where much greater freedom of contract is allowed owing to the nature of the subject-matter and the equal position of the contracting parties. I have always myself regarded it as in the public interest that parties who, being in an equal position of bargaining, make contracts should be compelled to perform them, and should not escape from their liabilities by saying that they had agreed to something which was unreasonable. Here there is no allegation that the public interest is affected, and the defendant, an educated man of full age, was one of the principal

promoters of the agreement which he now says is an unreasonable restraint of trade. In view of the fluctuating character of the yearly supply of hops I see nothing unreasonable in hopgrowers combining to secure a steady and profitable price, by eliminating competition amongst themselves and putting the marketing in the hands of one agent, with full power to fix prices and hold up supplies, the benefit and loss being divided amongst the members. It may be that it would have been better to put more restraints on the individual, but the members have agreed to less restraints, and I cannot say their action was unreasonable. In my opinion this defence fails.

There remains the defence that the sum claimed is a penalty and not liquidated damages. I act upon the rules stated as the result of decided cases by Lord Dunedin and explained by Lord Parker in *Dunlop Pneumatic Tyre Company, Limited v. New Garage and Motor Company, Limited* (30 *The Times* L.R., 625 ; [1915] A.C., 79). If in a case where breach of a contract may occasion serious damage, but damage which is difficult to value exactly, people contracting on equal terms agree beforehand to value or ascertain beforehand a conventional figure which shall represent on an average the probable damage from breaches of the same kind, I see no reason to interfere with their "genuine covenanted pre-estimate of damage," as Lord Dunedin describes it. That the damages are difficult to estimate is all the more reason why the parties should make their agreement effective and easy to enforce by agreeing a measure of damage. That damages of the same kind, but difficult to value exactly, may be averaged to avoid the difficulty seems to me also reasonable. The object of the present agreement, which is not to operate unless 90 per cent. of the total acreage is a party to it, is to secure in an industry where supply varies with the vagaries of climate, and where excessive supply and competition lowering prices may ruin people who have been drawn into the industry by the lure of excessive profits from short supply, a steady and regular return for capital. This is to be secured by putting all the produce of the members in the hands of one selling agent, who can keep a steady price, and avoid forcing supplies on the market, the expense and profit of these measures being borne by all the members alike. If any member breaks his contract by not bringing his produce into the pool controlled by the selling agent, and by offering it for sale through other selling agents at uncontrolled prices, he may cause damage to the association and its members which, while very substantial, will be difficult to value precisely. A member reducing the 90 per cent. acreage by breaking his contract may destroy the whole basis of the association. A member, by forcing his hops on the market, may render it impossible to maintain a controlled price. When it is known that £100 per acre will be spent on preparing a hop garden and £100 per acre on annual cultivation, that on good ground you might get a ton of hops an acre, and that the price of a ton might go up to £240, or down to £120 or lower, I cannot see anything unreasonable in fixing the damages against a man who, having become a member, risked breaking up the whole system of the company by refusing to join in the pool and entering into individual competition, at £100 an acre brought into the scheme.

The strongest way of putting the argument against the contract is to say that if a grower only sells the produce of one acre independently, he pays the same damages as he would if he sold the produce of all his acreage. But I do not think it is practical politics to imagine a man who puts part of his produce in the pool, and sells part outside ; and his action in breaking away from the pool may have the same detrimental effect on the company, whether he breaks away in whole or in part. A similar objection was not considered valid by the Privy Council, when Lord Mersey gave the judgment in *Webster v. Bosanquet* (28 *The Times* L.R., 271 ; [1912] A.C., 394, at pp. 398 and 399), and I refer to his reasons.

In my judgment this objection to the claim also fails. The appeal must be allowed and judgment entered for the plaintiffs for £6,300, with costs here and below.

Lord Justice Sankey.—The plaintiffs in this case claim the sum of £6,300 as liquidated damages for breach of an agreement entered into between them and the defendant upon August 12, 1925.

For the defendant three points were taken : (1) that there has been no breach of the agreement ; (2) that the agreement was void as being in restraint of trade ; (3) that the sum fixed in the agreement for liquidated damages was a penalty only. The learned Judge decided in favour of the defendant on the first point, and from that judgment the present appeal is brought.

The facts are as follows : A number of persons in England, desiring to organize the marketing of home-grown hops in Great Britain, by their sale through a single agency, founded the plaintiff company in 1925. The defendant entered into an agreement with the plaintiffs above-mentioned which provided, among other things, in paragraph 2 : "The grower"—that is the defendant—"hereby agrees with the society that so far as the hop crops of the years 1925, 1926, 1927, 1928, and 1929 are concerned he will, subject to the now existing contract (if any) set out in the second part of the Second Schedule hereto, deliver to the society all hops grown by him to the intent that the same may be sold by the society in the manner set out in the said First Schedule." Then Clause 7 provides what is to happen if the defendant breaks his contract. It reads, as far as the material part of it is concerned : the defendant "hereby agrees that if as regards the crops for the said years 1925 to 1929 inclusive he shall fail to deliver to the society any hops produced by him or shall by himself or an agent or factor, or in any way other than through the society, dispose of any hops produced by him otherwise than in pursuance of a now existing contract (if any) then and in that case he will pay to the society as and for liquidated damages the sum of £100 per acre or proportionately on any less quantity than an acre, calculated on the acreage set out in the first part of the Second Schedule." Now the Schedule attached to the agreement contains the following clauses. Clause 5 deals with membership, and shows the power which it was hoped the plaintiff society would have had. It says : "Every effort will be made to bring within the society the existing growers of all hops produced in this country (except those grown by brewers) and the scheme will not finally be proceeded with unless the support is obtained of growers representing 90 per cent. of that total acreage." Then clause 16 provides : "All hops grown by members will be delivered to the society through the factors to be at its absolute disposal in the same way as they have been at the disposal of the controller." Clause 23 provides : "The society is a selling agency acting for its members. It will not aim at making profits, but at paying all moneys received for hops sold to members less the charges

of sale and administration." For reasons which are immaterial to this case the defendant desired to get out of this agreement if he could, and a company was formed on July 22, 1926, under the name of Surrenden Hops, Limited, the majority of the shares in which are held by the defendant. On July 23, the defendant granted a lease to that company of the two farms on which he grew the hops in question, to come into force on August 10, thus (without begging the question at issue) putting it out of his power to deliver hops to the plaintiffs in 1926.

The learned Judge finds that upon August 10 the defendant had grown hops to a point at which they had reached the form of pickable hops, but were not quite ready to pick, although if the threat of disease, or something else, had made it desirable, they might have been picked, and they could have been used. With the hops in this condition, he disposed of his farms to the company just formed. As to (1) : Has there been a breach by the defendant of his agreement ? It was contended that what the defendant sold (see clause 1 of his agreement) was hops grown by him, and that that meant " grown and severed by him," and the learned Judge has taken this view. He says : " Having regard to the fact that the matter of the sale was hops, if and when picked, and possibly dried, I have come to the conclusion that he did not dispose of the hops. What he did was to dispose of his estate by a lease to the newly formed company. He was not disposing of the hops produced, he was disposing of the land which had hops still growing upon it." I am of opinion that this is incorrect. It must be remembered that hops are not *fructus naturales,* but are *fructus industriales* (see *Rodwell v. Phillips,* 9 M. and W., 501, *per* Baron Parke, at p. 503) ; and having regard to the condition in which the Judge found that the hops actually were, and the contract under which the defendant agreed to deliver to the plaintiffs all hops grown by him, I have come to the conclusion that he did break his contract when he disposed of them to the new company and not to the plaintiffs.

As to (2) : Was the agreement void as being in restraint of trade ? The task of the Courts in considering contracts in restraint of trade is always a difficult one, because not only have the interests of the contracting parties to be considered, but also the interests of the public, and decisions as to the latter are always susceptible to influences of current views of public policy. What was public policy in the time of Lord Macclesfield who, as Chief Justice Parker, decided *Mitchel v. Reynolds* (1 P. Williams, 181) in 1711, may have been quite different from that which existed in the time of Chief Justice Tindal, who decided *Horner v. Graves* (7 Bing., 735) in 1831, or from that which existed in the time of Lord Macnaghten, one of the Lords who decided *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Company, Limited* (10 *The Times* L.R., 636 ; [1894] A.C., 535), in 1894. In *Mitchel's* case (*supra*) the area was a Holborn parish, in *Horner's* case (*supra*) it was an area of 100 miles from York, in *Nordenfelt's* case (*supra*) the area was unlimited. The judgment of Lord Blanesburgh, then Lord Justice Younger, in *Attwood v. Lamont* (36 *The Times* L.R., 895 ; [1920] 3 K.B., 571), draws attention to this, and that case must be regarded as an authority that contracts between master and servant in restraint of the servant after leaving the master's employ stand on a different footing from other contracts in restraint of trade (see pp. 589 and 590).

With regard to contracts of the present character, and also contracts restraining a vendor of the goodwill of a business from canvassing former customers, where the parties enter into an agreement with their eyes open the Court should not, in my view, be astute to assist those who endeavour to break it, as Sir George Jessel, M.R., said in *Printing and Numerical Registering Company v. Sampson* (L.R., 19 Eq., 462).

One has this paramount public policy to consider, that one is not lightly to interfere with the freedom of contract. There is still something to be said for the sanctity of contracts, and for the man who keeps his agreement, though it is to his own hindrance ; see *Attorney-General for Australia v. Adelaide Steamship Company and Others* (29 *The Times* L.R., 743 ; [1913] A.C., 781, at p. 796), where Lord Parker said : " The onus of showing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will lie on the party alleging it, and . . . if once the Court is satisfied that the restraint is reasonable as between the parties this onus will be no light one." In *North-Western Salt Company, Limited v. Electrolytic Alkali Company, Limited* (30 *The Times* L.R., 313 ; [1914] A.C., 461, at p. 471) Lord Haldane says : " When the controversy is as to the validity of an agreement, say for service, by which someone who has little opportunity of choice has precluded himself from earning his living by the exercise of his calling after the period of service is over, the law looks jealously at the bargain ; but when the question is one of the validity of a commercial agreement for regulating their trade relations, entered into between two firms or companies, the law adopts a somewhat different attitude—it still looks carefully to the interest of the public—but it regards the parties as the best judges of what is reasonable as between themselves. In the present case I see no reason for doubting that in entering into the contract on which this action was brought the respondents were probably acting in their own best interest. It may well be that such a contract was, in view of the powerful position of the appellants, the respondents' best way of securing a market and adequate prices. And if this be once conceded I find nothing else in the detailed provisions of the contract excepting machinery for working out the bargain. If the general object was lawful, then these provisions were, in my opinion, free from objection on the score of illegality." Looking at the position in this case, I am unable to hold that the contract was in restraint of trade, either in reference to the interests of the contracting parties or in reference to the interests of the public. In the schedule to the contract between the parties, it was stated that after consultation of the growers in the different counties they reported that in their opinion it would be in the interests of hop growers to consider seriously the possibilities of forming a growers' central selling agency, and the object of the plaintiff company was to organize the marketing of home-grown hops in this country by their sale through a single agency. I can see no evidence that such a selling agency was injurious, either to the interests of the defendant or to the interests of the public, although it might suit the defendant to try to get out of his contract in any particular year, while all those with whom he had been associated were held to be bound by it.

The Court will always be jealous to protect the public where any question arises as to a monopoly being created by a combination of buyers or sellers, but it regards the parties as the best judges of what is reasonable among themselves. The common law of England is no crystallized code—its adaptability

is one of its chief advantages—and it seeks within due bounds to facilitate, not to fetter, trade and industry.

As to (3) : Is the sum claimed a penalty and not liquidated damages ? The learned counsel for the defendant drew our attention to different contingencies under which a claim for liquidated damages arose. He pointed out the result of a breach in which the failure to deliver hops might be in respect of one pocket or a thousand pockets, and of a breach where the grower might dispose of them elsewhere.

The law on this subject is most recently discussed by Lord Dunedin in the case of *Dunlop Pneumatic Tyre Company, Limited v. New Garage and Motor Company, Limited* (30 *The Times* L.R., 625 ; [1915] A.C., 79), where the learned Law Lord, on page 86, sums up various propositions from decisions which rank as authoritative.

He points out that the question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract judged of as at the time of the making of the contract, not at the time of the breach. It is quite reasonable for parties to the contract to estimate damages at a certain figure, and it is no obstacle to the sum stipulated being a genuine pre-estimate of damages that the consequences of the breach are such as to make a precise estimate an impossibility. One of the many tests as to whether a sum is liquidated damages or a penalty is whether the damages arising from the violation of the contract cannot be exactly estimated beforehand.

Now in the present case it would be almost impossible to prove the damage caused by the defendant's breach of contract. It cannot be measured by the mere fact that he did not deliver a particular parcel of hops and that the plaintiffs were consequently unable to sell them. As was pointed out by the learned Judge and accepted by a witness, the damage is really the undermining of the market and the undermining of the existence of the plaintiff company. It will not be forgotten that in the first schedule to the agreement it is stated that the scheme would not finally be proceeded with unless the support of growers representing 90 per cent. of the total average of hops in the country was obtained. The failure of the defendant to fulfil his contract may be compared to the throwing of a stone into a pond. The effect extends to a far greater area than the mere spot into which the stone is thrown. The maintenance of an artificial price is a difficult and delicate operation. It may be upset by a trivial or unexpected occurrence—for example, by one important member deserting the combine or a small untied amount being placed on the market. The damages in such a case are impossible to foresee or forecast. In the case of *Webster v. Bosanquet* (28 *The Times* L.R., 271 ; [1912] A.C., 394) on not dissimilar facts the sum in question was held to be liquidated damages. In my view the sum in question here is also liquidated damages and not a penalty. The judgment of the learned Judge should be set aside and judgment entered for the appellants for the sum of £6,300.

Mr. Justice Romer.—The first question to be determined on this appeal is whether the hops picked on the defendant's hop gardens at Surrenden in 1926 were hops produced by him within the meaning of clause 7 of the agreement of August 12, 1925. If they were, it is not disputed that he failed to deliver them to the society, and disposed of them otherwise than through the society. It is, however, contended on his behalf, and the contention was accepted by Mr. Justice Rowlatt, that the hops were not produced by him inasmuch as they were picked by his lessees, Surrenden Hops, Limited, after the commencement of and under the powers conferred upon them by the lease of July 23, 1926. The learned Judge came to the conclusion that the obligation of the defendant under clause 2 of the agreement, whereby the defendant agreed to deliver to the society all the hops grown by him, was merely an obligation to deliver hops if and when picked and possibly dried by him, and that he did not therefore dispose of or fail to deliver hops produced by him within the meaning of the agreement. With all respect to the learned Judge, I am unable to agree with him as to this. The state of affairs as existing upon August 10, 1926, the date of the commencement of the tenancy, was found by him to be this. The defendant "had grown hops to a point when they were not quite ready to pick ; they were formed, they had reached the form of pickable hops, but they were not quite ready to pick, although, if the threat of disease or something else had made it desirable, they might then have been picked and they could have been used, although it would have been a wasteful thing to do." With this finding I respectfully agree. But it makes it clear that on August 10 there were hops in a pickable form, and that these hops had been grown or produced (for I draw no distinction between the two words for the present purpose) by the defendant, and when some three weeks later these hops were picked and dried they still, in my opinion, were in fact and could properly be described as hops grown or produced by the defendant. It was, however, urged on his behalf that the parties to the contract could not have intended to place him under an obligation to deliver to the society hops grown but not picked by him, inasmuch as the hops might in certain circumstances turn out not to be worth the picking. In that case, it was said, the fulfilment of his obligation would merely serve to throw upon the defendant a useless expense without any benefit accruing to the society. But the contract is one made between business people who at the time of making it, at any rate, may be supposed to have been trusting one another to behave in a businesslike way. If the hops were not worth picking it is almost inconceivable that the society would not relieve the defendant from his obligation to deliver them as soon as their attention was called to the fact. It is, at any rate, much more probable that the parties intended to enter into an arrangement that was capable of working quite satisfactorily on these businesslike lines, than to enter into one that would have been so extraordinarily unbusinesslike as that for which the defendant is contending. If the defendant be right he could sell his hops the day before they were picked by the purchaser from him and render the agreement entirely useless from the point of view of the society. There would, indeed, on the defendant's contention, have been no reason for the society entering into the contract at all. If the defendant was to be at liberty up to the time of picking the hops to sell them to whom he pleased, the society might just as well have saved themselves the trouble of negotiating the contract, and taken the risk of being able from time to time to compete successfully with the rest of the world for the purchase of the defendant's crops. But if this was to be the position of the society in relation to the defendant it would

be their position in relation to the rest of their members, and there would be no reason for the existence of the society at all.

I must now turn to the question whether the agreement is an illegal one as being in unreasonable restraint of trade. As to this point, on which Mr. Justice Rowlatt expressed no opinion, it is conceded by the defendant that the agreement is not unreasonable so far as the public interest is concerned. He contends, however, that the plaintiffs have not shown that it is reasonable as between the parties themselves. In my opinion this contention cannot be sustained. It was stated in evidence by Mr. Overy on behalf of the plaintiffs that, when the society was formed at the end of the period of the Government control of hops, there was a large stock and ruin to the hop-growers was in prospect; that in the year when there was no bigger surplus he had sold hops for less than the price of picking them; and that in such circumstances only the biggest men survive and make a profit out of those who are extinguished. The society was accordingly brought into existence for the purpose, as stated in its prospectus which is scheduled to the contract, of organizing the marketing of home-grown hops by their sale through a single agency. For this purpose members were required to enter into a binding contract with the society to deliver all hops grown by them for a period of five years for sale through the society, and the prospectus states how the money realized by the sales is to be distributed among the members. Shortly stated, the scheme was one by means of which it was hoped that in a year when there was a surplus of hops the loss occasioned to the members as a whole would be reduced to a minimum and the loss equitably distributed amongst them. All this is apparent upon the face of the agreement itself, which was entered into for the purpose and in pursuance of the scheme. Similar agreements were, so we were told, entered into by some 95 per cent. of the hop-growers in this county, excluding brewers. It is they who are the members of the society that in each case is the other party to the contract. How, in these circumstances, it can be said that the contracts are unreasonable as between the society and the member in question passes my comprehension. It may be safely assumed that this large body of hop-growers knew their own business best and what it was reasonable to do in the circumstances with which they were confronted. But in any case, given the circumstances and given the object which they had in view, I am unable to see how that object could have been attained by any better or fairer means than those provided by the agreement. In my opinion the agreement is entirely reasonable as between the parties.

The only point remaining to be dealt with is whether the £100 mentioned in clause 7 of the agreement is a penalty or liquidated damages. Here again it became unnecessary for Mr. Justice Rowlatt, in view of the conclusion at which he arrived upon the first point, to express any opinion. I may, therefore, without any want of respect to the learned Judge, content myself with saying that for the reasons already given by Lord Justice Scrutton I concur with him in thinking that the sum in question is not a penalty but is liquidated damages. I agree that the appeal must be allowed with the consequences stated.

[Solicitors—Messrs. Ellis and Fairbairn; Messrs. Mackrell, Ward and Knight.]

Court of Appeal.
(Scrutton and Sankey, L.JJ., and Romer, J.)

1928.
Mar. 30.

CHARLES AND OTHERS v. CARDIFF COLLIERIES, LIMITED.*

Contract — Wages agreement — Whether submission to an award.

By a Conciliation Board Agreement provision was made for the payment of a subsistence allowance to low-paid colliery workers in South Wales, and, the parties having failed to agree as to the amount and conditions of payment, the matter came before the independent chairman of the Board and he gave a decision. The parties failed to agree as to the interpretation of the decision, and the chairman gave a supplemental decision, but he declined to give any further interpretation. Representative workmen then brought an action against representative employers for declarations, (1) that on the true construction of the decision the subsistence allowance ought to be calculated for each shift separately, and (2) as to the method of reckoning overtime for the purpose of calculating subsistence allowance. The Judge in chambers, on the grounds that the wages agreement incorporating the conciliation agreement amounted to a submission to arbitration, and that the chairman's decisions were awards, made an order that the action be adjourned and that the awards be remitted to the chairman to deal with the two questions raised by the pleadings.

Held, on appeal, that the chairman's decisions were not awards but had become parts of an agreement between employers and workmen which must be construed by the Court, and the order of the Judge must be set aside.

This was an appeal from an order dated January 13, 1928, made by Mr. Justice MacKinnon, sitting in Chambers. The question raised was as to the subsistence allowance to be paid to low-paid wage workers employed at collieries in Monmouthshire and South Wales. Payment of a subsistence allowance for the coal trade of Monmouthshire and South Wales was provided for by the South Wales Conciliation Board Agreement of December 13, 1926, of which Board Sir Francis Taylor, K.C., was appointed the independent chairman. The parties having failed to agree as to the amount and conditions of the subsistence allowance, the matter came before the chairman, who issued his decision or award on June 24, 1927. The parties having then failed to agree as to the interpretation thereof, a further meeting was held and a supplemental decision or award was issued on July 9. A further interpretation having been refused, an action was begun claiming (1) a declaration that on the true construction of the award the subsistence allowance to be received by the plaintiffs ought to be calculated in respect of each shift separately; and (2) a declaration as to the method of reckoning overtime for the purpose of calculating subsistence allowance.

Mr. Justice MacKinnon made an order that the

* Reported by E. J. M. Chaplin, Esq., Barrister-at-Law.

further hearing of the action be adjourned and that the awards be remitted to Sir Francis Taylor, to deal with the two questions raised by the pleadings, on the ground that the wages agreement incorporating the conciliation agreement amounted to a submission to arbitration.

The plaintiffs appealed.

Mr. Upjohn, K.C., and Mr. A. T. James appeared for the appellants; Mr. Stuart Bevan, K.C., and Mr. Trevor H. Hunter for the respondents.

Lord Justice Scrutton, in giving judgment, said that this action by representative South Wales workmen against representative South Wales employers was intended to raise the question of the true construction of certain "decisions" of Sir Francis Taylor, the independent chairman of the South Wales Conciliation Board. Mr. Justice MacKinnon had treated the decisions as awards and had remitted them to Sir Francis Taylor, whom he treated as an arbitrator.

The Lord Justice then dealt with the constitution and powers of the Conciliation Board, and said that the decision of the chairman on the subsistence allowance was not an award of an arbitrator, but a decision akin to that of a valuer which fixed one ingredient making up the total wage to be paid, and the parties agreed to make the amount and the conditions under which such allowance was payable, when fixed by the chairman, part of their agreement with each other. It followed that Mr. Justice MacKinnon was wrong in treating Sir Francis Taylor's decisions as awards and in remitting them to him for restatement or amplification. They had become parts of an agreement between employers and workmen which must be construed by the Court.

That view was confirmed by various authorities. Mr. Justice Blackburn said in *Wadsworth v. Smith* (L.R., 6 Q.B., 332): "Where by an agreement the right of one of the parties to have or do a particular thing is made to depend on the determination of a third person, that is not a submission to arbitration, nor is the determination an award."

Lord Chelmsford in *Scott v. Liverpool Corporation* (28 L.J., Ch., 230, at p. 238) said: "Where the contract provides for the determination of the claims and liabilities of the contractors by the judgment of some particular person, this would be incorrectly called a provision for submission to arbitration."

There was also a passage from the judgment of Lord Justice Buckley in *Kennedy, Limited v. Mayor of Barrow-in-Furness* (unreported), cited in the 4th edition of Hudson on Building Contracts (Vol. II., at p. 417): "He [the engineer] is the person whose determination is required by the parties. It is not a judicial act, but it is an administrative act in the interests of the corporation who is going to pay, and he is to be the judge, or a kind of arbitrator, or a person whose decision is to be final in the matter of the execution of the works. I do not think that means that he is an arbitrator or acting in a judicial capacity at all." Lord Esher's well-known passage in *In re Carus-Wilson and Greene* (*sub nom. In re Casterton Estates*, 3 *The Times* L.R., 22 (18 Q.B.D., 7), where the person deciding was held not to be an arbitrator, was to the same effect.

That the parties here called Sir Francis Taylor's decision an award, or himself an arbitrator, seemed to him (the Lord Justice) a matter of very small importance, and by no means introduced the whole machinery of the Arbitration Act, 1889, with its special cases and powers to review the decisions of a tribunal within the Act. The result of that view was strictly that the matter should go back to Mr. Justice MacKinnon for his opinion on the construction of the agreement and decisions, but as it would obviously return to the Court of Appeal, perhaps on its way higher, the parties did not dissent from the Court's attempting to construe the agreement and including as part of it the decisions of Sir Francis Taylor.

His Lordship then proceeded to deal with the figures on which the earnings of each workman should be based, and said that in his view the plaintiffs' construction was correct—namely, that the subsistence allowance ought to be calculated in respect of each shift separately. The basis of that was to take each shift which he was entitled to consider, ascertain the wages and special allowances which would be paid for such a shift, and add the subsistence allowance, which would bring the total up to the subsistence wage. Secondly, where a shift was paid for as more than one shift, the allowance was to be calculated on each shift paid for. The decision below must be set aside and judgment entered for the plaintiffs for the relief claimed.

Lord Justice Sankey and Mr. Justice Romer delivered judgments to the same effect.

Mr. Trevor Hunter said that this was an interlocutory appeal, although it had been treated as a final appeal. If it was an interlocutory appeal he asked for leave to appeal to the House of Lords.

Lord Justice Scrutton said that it would be more likely to lead to peace in the coalfields if parties would try to settle matters mutually rather than fight cases up to the House of Lords. Leave to appeal must be refused.

[Solicitors—Messrs. Smith, Rundell, Dods and Bockett, for Messrs. Morgan, Bruce and Nicholas, Pontypridd; Messrs. Bell, Brodrick and Gray, for Messrs. Kensholes and Prosser, Aberdare.]

Court of Appeal.
(Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.)
1928. Mar. 23.

IN RE GREENE AND OTHERS.*

Lunacy—Intestacy—Settlement of property—Directions of Court—Discretion to modify rights of Crown—Benefit of lunatic—Power to provide for expenditure—Lunacy Act, 1890 (53 and 54 Vict., c. 5) s. 117 (1)—Law of Property Act, 1925 (15 Geo. V., c. 20), s. 171 (1).

The Court delivered reserved judgments in these four applications under section 171 of the Law of Property Act, 1925, for the settlement by the Court of the property of lunatics. The section was passed largely on account of the new laws with regard to intestacy, and to prevent the injustice of property passing to the Crown where there were relatives and others with a claim on the lunatic. The material parts of the section are as follows:—

"(1) The Court may direct a settlement to be made of the property of a lunatic or defective . . . on such trusts . . . as the Court may deem expedient, and in particular may give such directions—

"(*b*) where the property has been acquired under a settlement, a will or an intestacy, or represents property so acquired, or

"(*c*) where by reason of any change in the law of intestacy or of any change in circumstances since the

* Reported by G. T. Whitfield-Hayes, Esq., Barrister-at-Law.

execution by the lunatic or defective of a testamentary disposition . . . or for any other special reason the Court is satisfied that any person might suffer an injustice if the property were allowed to devolve as undisposed of on the death intestate of the lunatic or defective or under any testamentary disposition executed by him."

Mr. G. B. Hurst, K.C., Mr. Wilfrid Greene, K.C., Mr. McMullan, Mr. W. G. Hart, and Mr. Winterbotham appeared for the various applicants; the Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. Stafford Crossman represented the Crown.

The MASTER of the ROLLS, in the course of his judgment, said that the intention of the Legislature was to give power to the Court to act under section 171 where, in its discretion, it thought it wise or necessary to do so in the interests of those whose rights had been affected by the new law of intestacy, and the rights of the Crown to have property pass to it might be modified accordingly. That was borne out by section 46 (1) (vi.) of the Administration of Estates Act, 1925, by which the Crown, on taking an intestate's property, might make provision for dependants, whether kindred or not. Further, section 117 (1) of the Lunacy Act, 1890, gave the Court power to provide for "payment of any debt or expenditure incurred for the lunatic's maintenance or otherwise for his benefit."

Section 171 must, therefore, not be construed too narrowly. At the same time, as he had said in *In re Freeman* ([1927] 1 Ch., 479), it was not wise to attempt an exhaustive definition of section 171. Everything depended on the facts of each case.

Dealing with the first application, *In re Greene*, the applicant, a widow, had two children, who were both under treatment as lunatics, and who, in the ordinary course of events, would become entitled at her death to the property subject to the trusts of her marriage settlement, and also to a considerable estate under the will of her late father. There were no near relatives of those children entitled to succeed on an intestacy. She asked that a settlement might be directed under which she might, subject to provision for the children, be able to dispose of a portion of the funds for the benefit of certain charities. In this case there seemed to him to be no injustice if the property went as on an intestacy; for, if all had gone as directed, the property would in any event have passed away from the applicant and no person would be disappointed of a *spes successionis*. He would, therefore, make no order as regards the applicant's father's estate, but, as regarded her own marriage settlement funds, this was property "acquired under a settlement" within the meaning of section 171 (*b*), and, without making the case a precedent, he was prepared to agree to a settlement being drawn up whereby the funds brought into settlement should be made subject to a power of disposal by the applicant. Of course, the applicant still had her right to apply under section 117 of the Lunacy Act, 1890.

The second case, *In re Whitworth*, was an application for the benefit of second cousins of the patient. There seemed to be no hardship threatened, and there was no ground for acceding to the application.

In the third case, that of E. A., the patient was a successful business man with children and grandchildren. If he died, an early will would take effect, and operate harshly in regard to certain members of the family. There was a clear case of change of circumstances, which would probably have caused the patient, if *compos mentis*, to make a fresh will. A settlement would therefore be directed.

In the fourth case, *In re Fraser*, a settlement would also be just because, on the patient's death intestate, claims might arise from certain relatives of his father who had taken no interest in the patient's welfare.

In the last case, *In re Wood*, the Court was asked to make good the loss of a will made by the patient when sane. The Court was satisfied that the will was lost, and as to its terms, and a settlement would be ordered to carry out those terms.

[Solicitors—Messrs. Peacock and Goddard; Messrs. Rooper and Whately; Messrs. Sewell, Edwards, and Nevill, for Messrs. Hill and Norris, Halifax; the Official Solicitor; the Treasury Solicitor.]

K.B. Div. (Branson and MacKinnon, JJ.) 1928. Apr. 3.

ALEXANDER v. CITY AND SOUTH LONDON RAILWAY COMPANY.*

Negligence — Railway company — Escalator —Accident—No evidence of defect in design.

This was the defendants' appeal from a verdict and judgment for £25 entered in favour of the plaintiff, Miss Lilian Alexander, of Oldridge-road, Balham, S.W., in an action tried before his Honour Judge Harington and a jury at Wandsworth County Court. The plaintiff, who was a waitress, sued the City and South London Railway Company for damages arising from an accident to her in consequence of an alleged defect in an escalator at South Clapham Station.

Mr. E. W. Cave, K.C., and Mr. Rowland Thomas appeared for the appellants; Mr. Comyns Carr, K.C., and Mr. Avetoom for the respondent.

Mr. CAVE said that this was the first case in which it had been suggested that an accident had taken place through an escalator. In January last Miss Alexander caught her heel in the space between the platform and the metal comb at the bottom of the escalator, which was one of the newest pattern, with the result that she fell and sprained her ankle. She complained that there was too much space between the comb and the platform and her criticism was directed to the design of the machine and not to its condition.

Counsel handed to the Court the shoe which the plaintiff was wearing at the time of the accident, and contended that the space in front of the comb was, in fact, too small for the heel. There was no evidence that the escalator was in any way faulty, and the Judge should have withdrawn the case from the jury.

Mr. COMYNS CARR submitted that there was evidence that the escalator was a dangerous thing, inasmuch as there was a gap in which a passenger might trip. Shoes such as the plaintiff's were commonly worn, and the railway company ought to make it impossible for an accident such as this to happen.

MR. JUSTICE BRANSON, in giving judgment, said that there was no evidence to go to the jury of any negligence on the part of the railway company. On the evidence the gap between the comb and the platform was no more than half-an-inch and, according to the witness who gave evidence for the company, it was even less than that. There was no duty imposed on a railway company to keep everything at its stations in such a condition that nobody could by any possibility hurt himself. The appeal, therefor, must be allowed, and judgment entered for the defendants with costs.

MR JUSTICE MACKINNON concurred.

[Solicitors—Messrs. Donald McMillan and Mott; Mr. A. F. Fox.]

* Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.

Court of Appeal.
(Scrutton and Sankey, L.JJ., and Tomlin, J.)
1928.
Mar. 30.

TERRY v. VARIETY THEATRES CONTROLLING COMPANY, LIMITED.*

Contract—Actor—Appearance—Leading actor of company—Provision for substitute in case of illness of a principal—Illness of leading actor—Impossibility of appearing—Whether basis of contract gone.

The plaintiff, who was an actor, made with the defendants an agreement by which the plaintiff was to find a company, described as consisting of himself and a full company, and in the event of the non-appearance of a principal the plaintiff was to provide a deputy to the satisfaction of the defendants. The plaintiff became too ill to appear, but he provided a substitute. The defendants thereupon alleged that as the plaintiff could not appear the basis of the contract was gone. In an action for damages for breach of the contract,

Held, that the plaintiff was a principal to whom the clause as to the provision of a deputy applied and his absence was not a frustration of the contract and he was entitled to damages.

Decision of Rowlatt, J. (44 *The Times* L.R., 242), reversed.

This was an appeal by the plaintiff, Mr. Fred Terry, the actor, from a judgment of Mr. Justice Rowlatt (44 *The Times* L.R., 242) in favour of the defendants, the Variety Theatres Controlling Company, Limited, in an action in which the plaintiff claimed from the defendants damages for alleged breach of a written contract dated October 16, 1925.

By the agreement the plaintiff was to provide a theatrical company, called "Fred Terry and Company," to appear at the Hippodrome, Portsmouth, for six nights and one *matinée,* beginning on April 12, 1926, in a costume play entitled *Sweet Nell of Old Drury.* The company was to be an efficient No. 1 principal company, and in the event of the non-appearance of a principal through illness the plaintiff was to provide a deputy to the satisfaction of the defendants. There was to be no change in the cast except through illness, and a certificate of a medical practitioner had to be produced before the performance took place. The plaintiff was to receive 65 per cent. of the gross receipts up to £1,000, and 70 per cent. thereafter.

The plaintiff said that he himself was seriously ill at the time, but that he had provided a satisfactory deputy. He pleaded that the defendants had refused to perform the agreement. He claimed £800, his estimated share of the gross door receipts, or, alternatively, £308 8s. 10d., being the expenses incurred, *plus* his estimated net profits of £300.

The defendants pleaded that, owing to the plaintiff's illness and consequent non-appearance, the basis of the agreement had disappeared and that its performance was frustrated.

Mr. Justice Rowlatt held that the inclusion of Mr. Terry in the cast was of the essence of the contract, or, in other words, that the phrase "Fred Terry and Company" could not be satisfied by a company which did not include Mr. Terry. He accordingly gave judgment for the defendants.

In case his decision should be overruled on appeal Mr. Justice Rowlatt assessed the damages at £450.

The plaintiff appealed.

Mr. Pritt, K.C., and Mr. Roskill appeared for the appellant; Mr. Doughty, K.C., and Mr. St. John Field for the respondents.

LORD JUSTICE SCRUTTON, in giving judgment, said that in construing the contract he looked to see whether the absence of Mr. Fred Terry from a week's performance through illness (which did not impose any liability for breach of contract) was a frustration of the contract or whether it was a matter which the parties had provided for in the contract. The question turned on the construction of the clause in the contract dealing with the cast. That clause did provide that in the event of the non-appearance of any principal the plaintiff was to provide a deputy to the satisfaction of the defendants. Was Mr. Fred Terry a "principal" within the meaning of that provision? It was not easy to answer that question in view of the obscurity of the wording of the agreement. But the printed form of agreement was the defendants' form, and if they relied on an agreement which was ambiguous in its terms they must not be surprised if it was construed against them. On the proper construction of the clause the parties were treating Mr. Fred Terry and full company as principals, and Mr. Fred Terry was a principal to whom the clause about non-appearance applied.

Mr. Justice Rowlatt had come to a wrong view on the question, which was not an easy one, of the construction of the contract. The appeal must be allowed, and as no question had been raised about the damages, which Mr. Justice Rowlatt had assessed at £450 in case his decision should be overruled, judgment must be entered for the plaintiff for that amount, with costs. The Lord Justice added that he hoped that Mr. Fred Terry and others interested in theatrical contracts would in future take care to make their contracts clear, and thus save for the theatrical profession money which would otherwise go to another profession.

LORD JUSTICE SANKEY and MR. JUSTICE TOMLIN delivered judgments allowing the appeal.

[Solicitors—Messrs. Guedalla, Jacobson, and Spyer; Messrs. Amery Parkes and Co.]

Court of Appeal.
(Scrutton and Sankey, L.JJ.)
1928.
Apr. 2.

BOTTOMLEY v. HURST AND BLACKETT, LIMITED, AND HOUSTON.*

Practice—Single issue—Application for separate disposal—Refusal of order.

In a libel action the defendants pleaded justification and that the plaintiff had, in return for payment, undertaken in writing to indemnify them against any actions for libel. The plaintiff in his reply disputed his signature and said that he was not bound by the alleged undertaking. The plaintiff then applied for an order that the issue as to the alleged undertaking and its construction should be tried separately before the other issues.

Held, that when a plaintiff asked for an order

* Reported by T. W. MORGAN, Esq., Barrister-at-Law.

* Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.

that one issue should be disposed of before the trial of the other issues the order should be made only when there were special circumstances justifying it, and as there were none in the present case the order must be refused.

This was an appeal by the defendants, Hurst and Blackett, Limited, and Mr. Henry James Houston from an order of Mr. Justice Charles, made in Chambers, affirming an order of Master Jelf.

Mr. Comyns Carr, K.C., and Mr. Ignatius G. Kelly appeared for the appellants ; the respondent appeared in person.

Mr. COMYNS CARR, in opening the appeal, said that it was an appeal against an order of Mr. Justice Charles, affirming an order of the Master, setting down a separate issue for trial in the libel action *Bottomley v. Hurst and Blackett, Limited, and Another.* The action was brought in connexion with certain articles written by Mr. Houston and published by Hurst and Blackett, Limited, in book form. Mr. Bottomley said that the allegations made in the book meant that he was a blackmailer, and had been habitually guilty of the criminal offence of blackmailing. To that, there was a plea of justification, with particulars. The defendants further pleaded that the plaintiff had, in a letter, undertaken to indemnify them against any actions for libel in consideration of the payment of £250 towards the costs of his appeal against his conviction in 1922. By his reply, the plaintiff said that he was not bound by that letter, and he did not admit his signature. On the application of the plaintiff, the Master then made an order that the issue as to the letter should be tried separately, and this order was affirmed by the Judge in Chambers.

He (counsel) submitted that the expenses of trying the case in two stages would add considerably to the general expenses. There were no circumstances here which showed this to be an exceptional case, or one in which the plaintiff had a right to ask for such an order.

On the question of the trial of separate issues, he referred to : *Emma Silver Mining Company v. Grant* (11 Ch.D., 918) ; and *Piercy v. Young* (15 Ch.D., 475).

Mr. Bottomley said that the whole object of the jurisdiction in reference to the raising of separate issues was this, that, where a separate point had been raised by the defendants which disposed of the whole action, obviously a *bona fide* litigant would desire to have it disposed of separately. It had been said that his affairs were in bankruptcy. Quite true, but could there be a stronger argument in favour of the trial of a separate issue, which would save him from the embarrassment and expense of getting his evidence ready ? It had been said that he had signed a document which could prevent the trial from going forward. The libel consisted of charges of persistent and systematic journalistic blackmailing. When he was at Wormwood Scrubs he was permitted to sign but not to read documents. Mr. Houston had visited him at Wormwood Scrubs. He denied his signature to the letter in question, and said that he knew nothing of its contents. He submitted that it would save expense if that preliminary point were tried first. He was willing to let it be disposed of by a Judge sitting alone. Was it not convenient, if the letter put an end to the action, that he should be relieved of the action at once ?

Mr. COMYNS CARR, in reply, said that, apparently, the real reason for the desire for a preliminary issue to be tried separately was to get Mr. Houston into the witness-box for a dress rehearsal of the main issues in the action. He submitted that it was inconvenient that the issue of law as to the construction of the letter should be dealt with first in an action in which all the issues were ready for trial.

LORD JUSTICE SCRUTTON, in giving judgment, said that the appeal raised a point of general interest. An order had been made by the Master in an action in which Mr. Bottomley was the plaintiff and Messrs. Hurst and Blackett, Limited, and Mr. Houston were the defendants, ordering that a point of law raised by the defendants should be set down for hearing and disposed of before the trial of the other issues in the action. Mr. Justice Charles had affirmed that order. The defendants now appealed and asked that the whole of the issues raised in the action should be tried together. There was power in the Court, if it thought convenient to do so, to order one issue to be disposed of and the rest of the issues to be postponed until that one issue had been decided, but experience had taught the Court that that power was only to be resorted to in very special cases when it was asked for by the plaintiff.

When one issue was picked out it was not always one which could be disposed of quickly. Cases in which such an order had been made were cases in which a point of law had been raised as a preliminary issue, but when to that was to be added a question of fact, an additional difficulty was created. In his opinion, it was, as a rule, not a desirable method to adopt. In the present case Mr. Bottomley had brought an action for libel alleging that he had been charged with journalistic blackmail. The defendants pleaded that the words complained of were true and they set out particulars at great length. Besides that plea, they said that in a letter, dated June 22, 1922, the plaintiff had undertaken to indemnify them against all claims for libel in consideration of a payment of £250 towards the costs of the plaintiff's appeal against his conviction. That, he thought, raised an interesting question of construction. In connexion with that it was noteworthy that a case raising a question of the construction of an indemnity had recently been heard in the House of Lords, *Great Western Railway Company v. J. Durnford and Son, Limited* (44 *The Times* L.R., 415).

The matter did not, however, end there, because Mr. Bottomley had put in a reply in which he said, not that the letter in question did not bear that meaning, but that, *inter alia,* he had not been allowed to read the document and that it was not his agreement at all. All this introduced quite another question. It became a matter of evidence, and a question of credit might arise. Those being the facts, the Master had made an order which he had not considered as carefully as he ought to have done. He had omitted to include in it the relevant passages in the reply, and he had also made an order for a speedy trial. The question arose, Why should there be a speedy trial of this particular case before other plaintiffs and defendants had had their turn, and why was this libel action more urgent than other libel actions ?

He (the Lord Justice) had come to the conclusion that the order should not have been made. There were no special circumstances justifying the making of such an order. The action should, therefore, proceed in the ordinary way. The costs here and below would be costs in the cause.

LORD JUSTICE SANKEY gave judgment to the same effect.

[Solicitors—Messrs. Samuel Price, Sons, and Robertson ; Messrs. Carter and Bell ; Messrs. Wildey-Wright and Co.]

K.B. Div. } 1928.
(Salter and Talbot, JJ.) } Mar. 30.

ELVINGTON TENANTS, LIMITED v. HATTON.*

Landlord and Tenant—Restrictions—Rent—Increase—Repairs—Landlord's responsibility for the whole—Question for determination—Application to county court—Decision final—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 2 (6).

The landlords of a cottage gave the tenant notice of an increase of 25 per cent. in the rent under s. 2 (1) (*d*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, on the ground that they were responsible for the whole of the repairs. The tenant disputed the increase on the ground that he was partly responsible for repairs, and the landlords applied to the county court under s. 2 (6) to determine, (1) whether the notice of increase was valid, and (2) whether they were responsible for the whole of the repairs. The deputy county court Judge answered both questions in the affirmative. On an appeal by the tenant the landlords took a preliminary objection that by s. 2 (6) the decision of the county court was final. The tenant contended that the sole question was as to the construction of the terms of the tenancy and that this question did not arise under s. 2 (1), (2) or (3), and that therefore the decision was not made final by s. 2 (6).

Held, that the county court had jurisdiction to determine the questions on the application and its decision was final, and therefore the appeal must be dismissed.

This was an appeal by a tenant from the decision of Deputy Judge Stoker, sitting at Dover County Court, in favour of the landlords.

The respondents, Elvington Tenants, Limited, were the landlords of a number of miners' cottages at Eythorne, near Dover. The tenants of these cottages, of whom the appellant, Mr. H. E. Hatton, was one, had been paying rents in excess of the standard rents under certain notices of increase which had been served on them. In May, 1927, one of the tenants, in a test action, disputed the validity of the notices. It was held that the notices were wholly bad and incapable of being amended, and the amounts paid in excess of the standard rents were accordingly refunded to the tenants.

On July 15, 1927, new notices of increase were served on the tenants. The increases were in respect of rates, the 15 per cent. increase of rent allowed to landlords generally, and the 25 per cent. allowed where the landlord was wholly responsible for repairs. The tenants disputed the last head of increase only, on the ground that, under the terms of their tenancies, they were partly responsible for repairs. An application was accordingly made by the landlords to the county court to determine certain questions. The questions were (1) whether the notices of increase given on July 15, 1927, were valid; and (2) whether the landlords were responsible for the whole of the repairs. The deputy Judge gave an affirmative answer to both these questions.

The tenant appealed.

Mr. H. H. Maddocks appeared for the appellant; Mr. B. H. Waddy for the respondents.

Mr. WADDY took a preliminary objection that no appeal lay, on the ground that the finding of the county court was rendered conclusive by section 2 (6) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which provided: "Any question arising under subsection (1), (2) or (3) of this section shall be determined on the application either of the landlord or the tenant by the county court, and the decision of the court shall be final and conclusive." Subsection (1) (*d*) dealt with permitted increases of rent on account of repairs.

Counsel referred to the decision in *Strickland v. Palmer* (40 *The Times* L.R., 314, 649; [1924] 2 K.B., 572). There the objection to the appeal failed because the appeal arose in an action; but the court had expressed the view that if the matter appealed from had been an application, no appeal would have lain. The very wide words of the section in question might be contrasted with the words of section 12 (3), which dealt with apportionment. There it was specifically laid down that the amount was the only question on which the decision of the county court was final and conclusive.

Mr. MADDOCKS contended that the question here was not one "arising under subsection (1)." The sole question before the county court was the construction of the terms of the tenancy, which was a pure question of law. The landlords had no right to ask for determination in that manner; they should have got the matter settled by bringing an action for the increased rents. Further, in deciding that the notice of increase was valid, the county court was deciding questions outside any of the subsections referred to in subsection (6).

Mr. WADDY replied.

MR. JUSTICE SALTER.—In this case we have to determine a preliminary objection to the hearing of this appeal, and for that purpose to construe section 2 (6) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The deputy county court Judge has, on the application of the landlords, purported to decide certain matters under that subsection, which provides: "Any question arising under subsection (1), (2) or (3) of this section shall be determined on the application either of the landlord or the tenant by the county court, and the decision of the court shall be final and conclusive." Accordingly, a preliminary objection is now taken that no appeal lies from the decision of the county court.

The facts are very simple. The respondents are the owners and the appellant is the occupier of a dwelling-house to which the Rent Restrictions Acts apply. At the material time—July, 1927—the appellant was in the relation of what is called statutory tenant to the respondents of the premises in question; that is to say, his original contract of tenancy had expired, and he was holding over under the protection of the Acts. In the circumstances the respondents gave the appellant notice of increase of rent in the form provided in the First Schedule to the Act of 1920, setting out the heads of increase of rent which they proposed to claim. These were three in number: first, on the ground of increase of rates; secondly, the fifteen per cent. profit increase; and lastly, on the ground of responsibility for repairs; so that all the heads of increase fell under section 2 (1) of the Act of 1920. The tenant, as I understand,

* Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.

objected not very strenuously to the first two, but strenuously to the third, though he did not entirely agree with the lawfulness of the first two until the matter actually came into court. The landlords, accordingly, issued a summons under section 2 (6) calling upon the tenant to attend the county court upon their application to the court to determine certain matters. The matters which they invited the court to determine were as follows : First, whether the notice of increase was valid ; secondly, whether the landlords were responsible for all the repairs, so as to be entitled to charge the full twenty-five per cent. increase on that head, or only for part ; and thirdly, if they were not responsible for the whole of the repairs, what percentage of the increase they were entitled to charge.

It is said that the county court had no jurisdiction on that application to decide the first question, at any rate. It may be that the question is put in rather a compendious form, but I think that the court had jurisdiction to decide it. The question is, in substance, no more than a request to decide the validity of the first two grounds of increase of rent ; and, in fact, when the matter came into court, the tenant's objections to these heads were not pressed. I think that the court had jurisdiction to deal with that question. Its decision was that the notice was valid.

The next question submitted was whether the landlords were responsible for the whole or only part of the repairs, and the deputy Judge has found that the landlords were, as they claimed, responsible for the whole, and that, therefore, it was unnecessary to deal with the third question. It is said on behalf of the appellant that the question of responsibility for repairs was not a question arising under subsections (1), (2) or (3) of section 2 and that therefore the decision of the county court upon it was not final and conclusive. The argument is, and must be, that the court had no jurisdiction on that application to deal with that matter at all ; if it was "a question arising under subsections (1), (2) or (3)," then its decision was final and conclusive ; if it was not, then it had no jurisdiction to deal with the matter at all on that application. The question for this Court, therefore, is, was the matter "a question arising under" those subsections ?

The statute provides that "any question" arising under those subsections may be the subject of a summary application to the county court and a final and summary decision there. I should have thought that "any question" must mean any question at all, whether of law or fact. The questions arising under these statutes are sometimes questions of law and sometimes questions of fact. There is considerable authority for saying that questions of law, as well as questions of fact, come within subsection 6. Take, for example, questions arising under subsection (2) of section 2. That is the subsection which deals with insanitary condition of premises, and it provides : ". . . the tenant or the sanitary authority may apply to the county court for an order suspending such increase [on account of repairs] . . . on the ground that the house is not in all respects reasonably fit for human habitation, or is otherwise not in a reasonable state of repair. The Court, on being satisfied by the production of a certificate of the sanitary authority or otherwise that any such ground as aforesaid is established, and on being further satisfied that the condition of the house is not due to the tenant's neglect or default or breach of express agreement, shall order that the increase be suspended until the Court is satisfied, on the report of the sanitary authority or otherwise, that the necessary repairs (other than the repairs, if any, for which the tenant is liable) have been executed . . ." It is obvious, therefore, that, in order to deal with questions arising under that subsection, a Judge may have to deal with the terms of the tenancy, and an express agreement may have to be construed. In the present case the construction of a written contract, as contained in the tenant's rent-book, was necessary in order to determine whether the landlords were responsible for the whole or only for a part of the repairs ; and in the case which I have suggested under subsection (2) there would have to be the construction of a contract, but that clearly would not prevent the application from being one within the meaning of subsection (6). The position is the same with regard to subsection (3), which is the subsection dealing with the transfer of the burden of liabilities from landlord to tenant ; in order to determine disputes under that subsection it would be necessary to construe the first and second contracts of tenancy as regards liability to repair, or whatever the burden alleged to be transferred was, and to compare them. It is perfectly clear that a dispute arising under that subsection would come within the meaning of subsection (6), notwithstanding that it was a dispute of law.

Further, the case of *Strickland v. Palmer* (40 *The Times* L.R., 314, 649 ; [1924] 2 K.B., 572) has been cited to us. That case arose under section 2 (1) (*b*) which deals with increased rates. As I read the judgments, both in the Divisional Court and in the Court of Appeal, both Courts were of opinion that, if in that case the procedure had been adopted which has been adopted here, the county court would have had jurisdiction and its decision would have been final and conclusive. In that case, however, the proceeding in question was an action for rent, and it was held that in such a proceeding the decision of the county court was not final.

One has only to consider what the position would be, if it is right to say that this procedure was not open to the landlords in this matter. If it is not available to a landlord, it is equally not available to a tenant. Suppose, then, a landlord serves a notice of this kind, which the tenant disputes, and the landlord takes no further proceeding, and some time elapses : if the notice is good, a large amount of unpaid rent is becoming due from the tenant ; if, on the other hand, the notice is bad and the tenant has paid the increased rent, he has a right to claim back the rent overpaid. If this procedure is not open to him, he is unable to have the question determined, unless he brings an action.

I think that the intention of the statute is quite clear, and that there is a strong tendency on the part of the legislature, in the case of small tenancies, to make the decision of the county court summary and final in matters of this kind. I am of opinion that this was a final decision, and that no appeal lies from it.

MR. JUSTICE TALBOT.—I am of the same opinion. The question is whether an appeal lies from the decision of the county court on certain questions submitted to it and purporting to arise under section 2 (6) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The principal questions referred to it were whether, under the terms incorporated in a tenancy agreement taken over by the tenant from his predecessor, the landlords were or were not responsible for the whole of the repairs ; and if not for the whole, for what portion they were responsible. The bearing

of that question on the relation between the parties depends on section 2 (1) (*b*), the effect of which is that if the landlord is responsible for the whole of the repairs, he may add an amount of twenty-five per cent. to the standard rent, and if responsible for part only, he may add an appropriate amount. That being a question the materiality of which is created by subsection (1) of this section, it is said that because it is a question of law involving the construction of terms of tenancy, upon the determination of which depends the amount of the addition that the landlord may make to the standard rent, the matter therefore does not arise under subsection (1) of this section. It appears to me to be impossible to give effect to that argument without doing violence to the words of the statute. I leave aside all consideration of inconvenient consequences that may arise, if the argument be correct, and what those consequences may be, and look simply at the question which was asked of the county court. The question was, whether the landlords were responsible for the whole of the repairs of this house, and were therefore entitled to add twenty-five per cent. to the standard rent in respect of that liability. It is impossible to say that that question does not arise under subsection (1) of section 2. I am of opinion that the decision of the county court was conclusive and that we have not power to deal with it.

[Solicitors—Messrs. Collyer-Bristow and Co., for Mr. V. D. de Wet, Dover; Mr. F. A. Cloke, Sandwich.]

K.B. Div. (Salter and Charles, JJ.) 1928. Mar. 21.

LLOYD v. COOK.*

Landlord and Tenant—Restrictions—Dwelling-house — Decontrol — Subsequent letting of part—Tenant of that part—Whether entitled to protection—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 12 (2)—Rent and Mortgage Interest Restrictions Act, 1923 (13 and 14 Geo. V., c. 32), s. 2 (1).

The fact that a dwelling-house has become decontrolled under s. 2 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, does not prevent the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, from applying to any other new dwelling-house which may afterwards be constituted by a separate letting of a part of the decontrolled dwelling-house.

This was an appeal by a tenant from a decision of his Honour Judge Hill Kelly, given at the Bloomsbury County Court, which raised an important point under the Rent Restriction Acts—namely, whether a fresh letting of part of premises which had been decontrolled was outside the protection of the Acts.

The respondent, Mrs. Kate Cook, was the holder of a 99 years' lease of premises known as 14, Eversholt-street, Camden Town, N.W.1. Three rooms on the third floor of that house had been let to a Mr. Churchman, who vacated possession on August 12, 1926. Mrs. Cook thereupon prepared one of those rooms for the use of her son, who came in and occupied it as soon as it was ready. She had the other two whitewashed and papered with a view to another letting.

On August 28, 1926, she let those two rooms on a weekly tenancy at a rent of 14s. a week to the appellant, Mr. Frederick Charles Lloyd. Mr. Lloyd applied to the Registrar to have the standard rent of his rooms fixed by an apportionment of the rent of the whole house on the ground that his rooms constituted a "dwelling-house" protected by the Rent Restriction Acts. The Registrar granted the application, and fixed the standard rent at 5s. 8d. a week, but the County Court Judge reversed that decision on appeal, and held that Mr. Lloyd's rooms were no longer protected by the Acts, having become decontrolled by virtue of section 2 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, which provides:—

"Where the landlord of a dwelling-house to which the principal Act [the Act of 1920] applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house. . . ."

From this decision the tenant, Mr. Lloyd, appealed to a Divisional Court.

Mr. John Duncan appeared for the appellant; Mr. J. C. Lockwood and Mr. Gordon Clark for the respondent.

Mr. DUNCAN contended that the two rooms let to the appellant constituted "a part of a house let as a separate dwelling" within the meaning of section 12 (2) of the Act of 1920, and that their position was not affected by the fact that a different "dwelling-house"—namely, the three rooms which had been previously let to Mr. Churchman—had become decontrolled. He relied on *Cohen v. Gold* (43 *The Times* L.R., 376; [1927] 1 K.B., 865) and *Darlington v. Arnold* ([1927] 64 Law Jo. County Courts Rep., 59).

Mr. GORDON CLARK argued that the fresh letting of the two rooms to the appellant did not make them a fresh dwelling-house. What constituted a fresh dwelling-house was a question of fact for the County Court Judge, and here the County Court Judge had decided adversely to the tenant. The dwelling-house let to the appellant was substantially the same as that formerly let to Mr. Churchman. Further, decontrol of the whole necessitated decontrol of the part on the principle that the greater must include the less.

MR. JUSTICE SALTER.—Notwithstanding the excellent argument on behalf of the respondent by Mr. Gordon Clark, I think that this appeal must be allowed. The question raised is whether it is right to say that, when a dwelling-house has been decontrolled under section 2 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, so that the principal Act [the Act of 1920] no longer applies to it, the principal Act therefore cannot apply to any other new dwelling-house which may afterwards be created by a separate letting of a part of the decontrolled dwelling-house.

The facts here are simple. Mrs. Cook, who was the owner of a long lease of a dwelling-house, No. 14, Eversholt-street, Camden Town, let three rooms on the third floor of that house to a Mr. Churchman. That letting was undoubtedly the letting of a dwelling-house, and to that tenancy and that dwelling-house the Rent Restriction Acts applied. That tenancy came to an end by Churchman vacating

* Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.

the dwelling-house on August 12, 1926. Mrs. Cook, the landlord, thereupon took possession of that dwelling-house; she prepared one room out of the three for the use of her son, who came in and occupied it when it was ready, and she had the other two rooms whitewashed and papered with a view to letting. She subsequently let those two rooms to the appellant, Lloyd, his tenancy commencing on August 28, 1926. It is to my mind quite plain that that was a letting by her to Lloyd of a dwelling-house. The question is, Was it a dwelling-house to which the Rent Restriction Acts applied?

Lloyd applied at Bloomsbury County Court for an apportionment of the rent of 14, Eversholt-street with a view to determining the standard rent of his dwelling-house, namely these two rooms, under section 12 (3) of the Act of 1920. That subsection provides: "Where, for the purpose of determining the standard rent . . . of any dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed . . . the County Court may, on application by either party, make such apportionment as seems just. . . ."

The question, therefore, is whether Lloyd's dwelling-house consisting of these two rooms, the tenancy of which related him to Mrs. Cook, is a dwelling-house to which the Act of 1920 applies. In order to see whether it is, reference must be made to sub-section 2 of section 12. That sub-section reads: "This Act shall apply to a house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed" certain fixed limits. The rent of these two rooms is within those limits, and the two rooms are "part of a house let as a separate dwelling"; so far, therefore, Lloyd is entitled to an apportionment. It is, however, said that he is not entitled to an apportionment because his dwelling-house has been decontrolled. Reference, therefore, must be made to section 2 (1) of the Act of 1923. [His Lordship read the sub-section.] As I think I have observed in other cases under these Acts, it is always necessary to have regard to the questions, what is the dwelling-house, who is the landlord and who is the tenant, who are related by the tenancy. There is no doubt that Churchman's dwelling-house was decontrolled; when his tenancy ended, Mrs. Cook was the landlord of that dwelling-house and the whole of it came into her possession. That dwelling-house, therefore, was decontrolled and the Acts ceased to apply to it; if the statutes themselves are not sufficiently plain, that conclusion appears quite clearly from the case of *Dunbar v. Smith* (42 *The Times* L.R., 196; [1926] 1 K.B., 360); but because that dwelling-house was decontrolled, it does not follow that the dwelling-house constituted by the two rooms let to Lloyd is also decontrolled. In my opinion, it is not.

The case of *Cohen v. Gold* (43 *The Times* L.R., 376; [1927] 1 K.B., 865) is, I think, although not a direct authority in this case, very much in point. The facts in that case were that the landlord of a house was in possession of the whole house, with immaterial exceptions, at the passing of the 1923 Act. In 1925 he let three rooms to a tenant, and the question was whether he was in possession of the dwelling-house constituted by these three rooms at the passing of the Act. The Divisional Court held that he was not in possession of the three rooms as a dwelling-house, or as landlord, within the meaning of the Act, so as to effect decontrol. So far, then, that decision is in point.

In my opinion, the fact that Churchman's dwelling-house was decontrolled is quite irrelevant in this case: the question is whether Lloyd's dwelling-house was decontrolled. Mr. Gordon Clark ingeniously referred to this as being a question of fact. He contended that the fresh letting was not the letting of a fresh dwelling-house, and that the whole of the original dwelling-house, *minus* one room, was let to Lloyd. In my opinion, however, as soon as Lloyd's tenancy was created, there was brought into existence a new dwelling-house and one that became the subject of a new tenancy. The question then resolves itself into this—Has that new dwelling-house been decontrolled? In my opinion, it has not. I agree with the whole of the judgment of the County Court Judge except the last two lines. I agree with his finding that Mrs. Cook was the landlord of the dwelling-house consisting of the three rooms let to Churchman, and that on the termination of Churchman's tenancy she came into actual possession of the whole of that dwelling-house within the meaning of section 2 (1) of the Rent and Mortgage Interest Restrictions Act, 1923. I agree with his decision that thereby the Act of 1920 ceased to apply to the dwelling-house. I do not agree with his conclusion that consequently Lloyd was not entitled to have the rent of 14, Eversholt-street apportioned. I do not think that that follows.

I am of opinion that here the tenant was entitled to an apportionment and that this appeal must be allowed. The judgment in favour of the landlord must be set aside, and judgment entered in favour of the tenant.

MR. JUSTICE CHARLES.—I agree.

Leave to appeal was granted.

[Solicitors—Mr. A'Deane Gent Wood; Mr. E. M. Tringham.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) 1928. Mar. 19.

AYLWARD v. AYLWARD.*

Divorce—Practice—Wife's undefended petition for dissolution — Temporary separation — Evidence of husband's association with a known woman — Charge of adultery at a hotel with woman unknown — Evidence based on hotel incidents.

Held, that the petition must be dismissed because his Lordship was not satisfied as to the fact of the adultery alleged to have occurred at a hotel. It was one of the class of cases that cast a great reproach on the administration of justice in the Divorce Division. His Lordship would not sanction the practice of resorting to hotels to establish a *prima facie* case for dissolution of marriage.

This was an undefended petition in which Mrs. Louise Elizabeth Frances Aylward, *née* Gilliland, of the Ladies' Army and Navy Club, St. James'-place, prayed for the dissolution of her marriage with Mr. Cyril Bland Aylward, of Bournemouth, on the ground of his adultery with a woman unknown at the Hotel Belgravia, Victoria, in August 1927. During the petitioner's evidence it was stated that

* Reported by WILLIAM LATEY, Esq., Barrister-at-Law.

the respondent was in love with another woman who was not the subject of any charge in the pleadings.

Mr. R. F. Bayford, K.C., and Mr. H. W. Barnard appeared for the petitioner.

LORD MERRIVALE, after hearing the evidence, delivered judgment as follows :—

The question is whether I am convinced that adultery took place. This is a case of a class which, as I said last week,† tends to cast a great reproach on the administration of justice in this Division. Two people of a good position in life have been married four or five years when disagreements arise and the husband ceases to occupy the same room with his wife. They suggest living apart from each other for a time in order to start afresh, and act accordingly. Shortly afterwards the husband asks his wife to assist him in securing a dissolution of marriage as he cares for another woman. The wife does not know what to do. He sees her again and states in effect that he is in love with another woman and identifies the woman in question and states her address, and again asks his wife to help him to procure a dissolution of the marriage. The usual formal letter follows, dated September 3, 1927, enclosing a bill dated August 31 from a well-known hotel, and saying : "It (the bill) speaks for itself, seeing how things are with us." It shows that the respondent and a woman occupied a room as Mr. and Mrs. Aylward and that he duly paid the bill. The wife consulted her solicitors to know if she could file a petition for divorce. The petition was filed and comes on for trial. It is said that the petitioner is entitled to a finding that the respondent has committed adultery with a woman unknown.

I have to consider evidence of this kind in a state of things which undoubtedly exists in regard to artifical proceedings for dissolution of marriage by consent of the parties. The respondent seems to be a self-respecting man, not the sort of man to commit adultery with some chance person. Doubtless he stayed at the hotel with a woman with the object of securing a decree *nisi*, but I see no reason to suppose that the respondent "committed adultery with a woman unknown." The woman at the hotel might have been, for all I know, some near relative of his own. I pronounce no decree in this case.

It is time that this practice of resorting to hotels in order to make a *prima facie* case for dissolution of marriage, as the effect of a conclusion at which the parties have arrived between themselves, should be stopped. For my part I do not sanction it, and it will be stopped in this Division unless it is sanctioned by a higher authority elsewhere. I dismiss the petition, with costs against the respondent. I do so more readily because the parties here are in a position, if they think justice has not been administered, to take care that the matter should be reviewed.

In reply to observations by Mr. Bayford, the President said : "The wife's reluctance to be a willing party to a divorce was apparently overcome. As to the couple who occupied the room, they might have sat up all night. It is part of the ceremonial that they should be found in bed together."

[Solicitors—Messrs. Charles Russell and Co.]

† In the previous week Lord Merrivale adjourned two undefended petitions for divorce by wives for further inquiry, the charges in both being in respect of adultery alleged to have been committed at hotels. In the first his Lordship said : "The case which exists is not presented. I am not satisfied with regard to the proof of the unreal case when the real case has not been investigated."

In the second case his Lordship said : "I want to know what the real case is. Why are these mechanically conducted cases presented as a cloak for the real facts ? I have made it clear that I will not be a party to that sort of proceeding if I become aware of it. This is the second case of the sort in the last hour. Facts within the reach of the parties, and in one case within the knowledge of the parties, are withheld. A real case of an apparently adulterous association by the husband with another woman seems to exist. Cases presented on flimsy material make constant difficulty for the Court in what is known as 'hotel divorce,' resting upon technical proof of what may be an act of adultery without, as far as I know, inquiries into the real case. Inquiries might have been made at addresses known to the parties. Cases brought here on a flimsy proof of adultery bring discredit upon the administration of justice."

In the list of undefended suits heard on the same day as *Aylward v. Aylward* there were several petitions, the charges in which were based on hotel evidence, and in which the President declared himself satisfied, and granted decrees *nisi*.

In the first week of the Easter term the President adjourned for further inquiries several cases in which the charges were based upon hotel evidence, and in two cases, in which wife petitioners gave evidence of association between the husbands and women actually living with them as their wives, directed that the petitions should be amended and served on those women.

Chan. Div. (Russell, J.) 1928. Apr. 2.

WELD v. PETRE.*

Mortgage—Redemption—Shares—Lapse in payment of interest—Retention of shares by mortgagee—Dividends received in excess of loan and interest—Summons to redeem and claim to be paid the excess—Claim for personal order against mortgagee—Rules of the Supreme Court, Order LV., r. 5*a*.

In 1900 B. mortgaged shares in a company to L. to secure a loan of £1,000 for three months with interest at 6 per cent. The shares were afterwards registered in the mortgagee's name. The mortgage not being paid off the mortgagee received additional shares as further security. The dividends received by L. cleared the interest on the loan up to 1908. No further dividends were paid until 1916. L. retained the shares and by 1921 had received dividends sufficient to pay off the loan. L. died in 1923 and in 1926 the plaintiffs, who were entitled to the equity of redemption in the shares, claimed the right to redeem them. The right was disputed by L.'s executors although at that date the dividends received were in excess of what was

* Reported by J. B. B. MACMAHON, Esq., Barrister-at-Law.

sufficient to pay off principal, interest, and costs.

Held, that equity would not deprive a mortgagor of his right to redeem if when the right was asserted the debt had been, or could be, repaid, and if the security was available and no one's position had been altered in the meantime. There would accordingly be an order to re-assign the shares to the plaintiffs, but as an order for the repayment of the excess would be a personal order for payment against the mortgagee it could not be obtained by originating summons under Order LV., r. 5*a*, such excess being only recoverable in proceedings commenced by writ.

This was a summons by which persons claiming to be entitled to the equity of redemption in certain shares in a limited company sought to redeem them, the defendants being the executors of the mortgagee. Redemption was resisted on the ground that, owing to the delay and laches of the applicants, either their right to redemption had been lost or the Court should withhold its assistance by refusing to order redemption.

The relevant facts were as follows : The shares in question were originally 300 ordinary shares of £5 each fully paid in the Cornbrook Brewery Company, Limited. These were the property of Henry Weld-Blundell, who in February, 1900, mortgaged them to Joseph Francis Lescher, to secure a loan of £1,000 for three months with interest at 6 per cent. The shares were registered in the mortgagee's name on December 10, 1900. Henry Weld-Blundell died on September 5, 1901. His legal personal representatives were his widow, the plaintiff, Herbert Joseph Weld, and William Dalglish Bellasis. Apparently the executors were unable or unwilling to pay off Mr. Lescher's £1,000, and in July, 1902, they offered him 200 more shares as additional security. He accepted this offer and 200 more shares were registered in his name on August 14, 1902. The estate of the mortgagor proved in fact insolvent, but his brother, Charles Weld-Blundell, who was a large creditor, came to the rescue and took over some of the assets at the value of £8,534. He then proceeded to settle those assets for the benefit of his brother's widow and daughter. The settlement was dated September 1, 1902. Among the assets so acquired and settled were the 500 shares subject to the £1,000 mortgage ; but the mortgage was incorrectly described in the settlement as carrying interest at 5½ per cent. The trustees of the settlement were and are the present plaintiffs. Among the assets so acquired and settled were further parcels of ordinary shares in the same company, of which some were and some were not subject to mortgages. The interest which fell due to Mr. Lescher on August 5, 1903, was not punctually paid, and as a result Mr. Lescher obtained further security from the trustees, in pursuance of a power contained in the settlement, to the extent of another 100 shares, which were registered in his name on October 16, 1903. He was then mortgagee of 600 shares of £5 each. A dividend at the rate of 2 per cent. per annum, less tax, received by Mr. Lescher, cleared the interest on the loan up to February 5, 1904, and by means of similar dividends received by Mr. Lescher interest was cleared up to February 5, 1908. In 1908 Mr. Lescher became desirous of having his loan repaid, because, according to his letters, having been appointed chairman of petty sessions, he did not wish to be a holder of brewery ordinary shares. A correspondence ensued, in which Mr. Lescher threatened to sell and to take legal proceedings, and which culminated in a letter of June 18, 1908, from Mr. Lescher to the solicitors for the trustees in the following terms : "I have your letter of the 15th inst. The course you therein recommend will incur further *pourparlers* which is not my intention—and I mean acting promptly, and at once, however unpleasant such a course may be."

Mr. Lescher, however, did nothing at all. He never at any time either sold or foreclosed. Bad times came to the company and no dividend was paid on its ordinary shares, nor was there any trace during this period of Mr. Lescher's demanding or receiving interest on the £1,000. During the War prosperity came to the brewery, and in respect of the year 1916 and succeeding years down to the present time substantial dividends free of tax were paid on the ordinary shares. These dividends were received and retained by Mr. Lescher. In 1920 the 600 shares of £5 each were subdivided into 3,000 shares of £1 each, and 1,500 bonus shares were allotted to Mr. Lescher, with the result that he then held 4,500 fully paid shares of £1 each. The continued prosperity of the company was well known to both the trustees of the settlement. They held, as already pointed out, other ordinary shares therein. Moreover, the plaintiff, Herbert Joseph Weld, had throughout been a director of the company. By 1921 the dividends received by Mr. Lescher were sufficient to pay off the loan.

At the end of 1922, or early in 1923, it occurred to someone that Mr. Lescher's loan must or might have been satisfied out of the Cornbrook dividends, and on January 5, 1923, the plaintiff, Francis Joseph Weld, one of the trustees and the solicitor for the trustees, wrote a letter addressed to Mr. Lescher : "Adverting to the advance made by you to the late Mr. Henry Weld-Blundell on security of some Cornbrook shares it has been suggested to me by one of the family that I should approach you in the matter in view of the fact that by this time your debt must have been largely reduced if not paid off out of the dividends. Would you be prepared to transfer the shares back to Mrs. Henry Weld-Blundell and her daughter on payment of the principal due together with a reasonable rate of interest over the whole period during which the debt has run ? As you are, no doubt, aware, Mrs. Henry Weld-Blundell and her daughter are not well off, and I shall be glad if you will give the matter your consideration." Mr. Lescher never received that letter. He died on January 7, 1923, and the letter was answered by his daughter, who said the matter was for the executors and lawyers, whose address she gave.

The defendants, the executors of Mr. Lescher, proved his will in April, 1923. In 1923 the company issued further bonus shares, with the result that 2,250 ordinary shares were added to Mr. Lescher's holding. The 300 shares of £5 each, which were the subject of the original mortgage, had thus increased and multiplied until they were represented by 6,750 fully paid £1 shares. The 6,750 shares were still standing in the names of the defendants as executors of Mr. Lescher.

On October 4, 1926, the solicitors for the trustees wrote to the solicitors for Mr. Lescher's executors claiming to redeem the security. Correspondence ensued. The right to redeem was disputed and

eventually this originating summons was issued on July 30, 1927.

Mr. Jenkins, K.C., and Mr. B. A. Hall appeared for the plaintiffs ; Mr. Spens, K.C., and Mr. Evershed for the defendants.

Mr. Justice Russell delivered a considered judgment. His Lordship stated the facts and said : Mr. Lescher's position as regards the loan was this. He had no personal remedy for the principal and interest, for his mortgagor was dead and the executors had no estate. He could only hope for recoupment either by realizing the shares as mortgagee, or by foreclosing and holding the shares as an investment or realizing them as absolute owner. Foreclosure could be dispensed with by obtaining a release of the equity of redemption, but he neither sold nor foreclosed, nor did he obtain a release of the equity of redemption. The only possible inference is that he determined to hold on to his security with a view to realizing it later to greater advantage. He elected to stand on his security.

The following facts are clear upon the evidence : (1) The plaintiffs are assignees of the equity of redemption in the shares ; (2) the mortgagee received in his lifetime, by means of dividends, moneys far more than sufficient to repay him the £1,000 principal with interest at the agreed rate from the date of the loan ; (3) the mortgaged shares with the bonus additions are there, available for return to the assignees of the equity of redemption if the debt for which they stood in Mr. Lescher's name as security has been repaid ; and (4) no right of any third person affecting the shares has intervened, for those claiming under Mr. Lescher's will are mere volunteers. In those circumstances the plaintiffs are, in my opinion, *prima facie* entitled to redeem.

On what grounds is this claim resisted ? The evidence of the defendants contains suggestions of foreclosure by Mr. Lescher, or alternatively of a bargain by which in some way Mr. Lescher is supposed to have acquired the shares freed from any right to redeem. There is no justification for either suggestion, nor does any Statute of Limitations apply to bar the right to redemption. Ultimately the defendants were driven to rely solely on delay and laches and their contention was that this Court, in view of delay by the plaintiffs, would refuse to grant to the plaintiffs the equitable relief which they sought.

This question of delay requires some careful examination in order to see exactly at what point of time the delay is said to begin. Mr. Lescher undoubtedly held as mortgagee when he wrote his letter in June, 1908. The plaintiffs were under no contractual liability to him to pay either interest or principal, nor was there, so far as I can see, any duty on them to inquire from time to time whether he still held the shares, or, if he held them, whether he held them as mortgagee. It was open to him to sell after notice, or to foreclose. He did neither, and the plaintiffs were entitled, and indeed bound, to assume that he continued to hold the shares as mortgagee until the time arrived when the loan had or might have been paid off out of the dividends received by the mortgagee ; the plaintiffs were in no way bound to assert their right to redeem or their right to have the shares retransferred to them. But, from the evidence, we now know that this event did not in fact occur until some time in the middle of the year 1921. Eighteen months later the letter of January 5, 1923, is written, and in October, 1926, the claim to redeem is quite definitely made and insisted upon. In my view no greater delay can be attributed to the plaintiffs than the period of five years which elapsed between the middle of 1921 and October, 1926. If I am right in this view there is no foundation for the suggestion that delay or laches can be any answer to the present claim.

It was argued, however, by the defendants that the period of delay must for some reason be dated back to June 18, 1908, that is, some 18 years before the claim against the executors and some 19 years before the issue of the originating summons herein. Upon this footing it is said that the delay is so great that this Court ought to and will refuse to grant equitable relief, and in arriving at that conclusion will be assisted, if not guided, by a consideration of the Statute of Limitations. Why delay should commence to run in June, 1908, I confess I cannot imagine, but the case was argued on that footing. Instances were cited of cases in which equitable relief was refused after lengthy delay on the part of the person seeking it. I do not propose dealing with those cases, which are unconnected with mortgages. Three cases as to relief in respect of mortgages were cited, but no one of them appears to be of assistance to me here. In *Floyer v. Lavington* (1 P. Williams, 268) a bill was brought for the redemption of a rent-charge expressed to be redeemable in the grantor's lifetime. The rent-charge had been granted some 60 years before. In the meanwhile the grantee had, after the death of the grantor, conveyed the rent-charge to a purchaser who had settled it on his marriage. Redemption was sought by the heir of the grantor. The Lord Chancellor dismissed the bill on various grounds, which included delay. The reporter adds that "It was thought that the length of time was the chief objection." It is, however, obvious that in addition to lapse of time the position had altered and other rights had intervened.

Lockwood v. Ewer (9 Mod., 275) was a case in which, after 21 years, the representatives of a mortgagor claimed redemption against the representatives of a mortgagee. The subject-matter of the mortgage, made in 1708, was stock in the old East India Company. The facts are not very lucidly stated in the report, but this much appears, that the mortgagee had had to expend moneys on calls, that the old and the new East India Companies had been united, and that before his death in 1715 the mortgagee had sold out the mortgaged stock. The Lord Chancellor's judgment is in the main directed to showing that the mortgagee could sell the stock without the necessity of foreclosing. He then dismissed the bill, the delay in that case being fatal. In that case, too, it is obvious that during the period of delay changes had occurred, and indeed the stock seems to have been sold.

Brooks v. Muckleston ([1909] 2 Ch., 519) was an instance of the dismissal of a foreclosure action on the ground of delay. The delay was grievous, and in the meanwhile the defendant, though having notice of the mortgage, had paid value for the mortgaged property upon the faith of the fact that no interest had been paid or claimed for 45 years. The case is quite unlike the present one, and in any event different considerations should, it seems to me, apply to applications by mortgagors to redeem from those which apply to applications by mortgagees to foreclose. Even if the delay to be imputed to the plaintiffs extends beyond the five years which I have indicated to some point of time subsequent to June, 1908, none of the cases cited would, in my opinion, justify me in declining to order redemption in the present case. There can be no doubt on the evidence that when the account is taken nothing will be found

due in respect of principal, interest, or costs. The shares are available and no one has altered his position in the meantime. Equity should not, in my opinion, deprive mortgagors of their right to redeem if when they assert it the debt has been or can be repaid, and if the security is available, and if no one's position has been altered in the meanwhile. If these circumstances co-exist the mortgagor should be allowed to redeem unless his right has been destroyed by statute, foreclosure, sale, or release.

There is no difficulty in the present case as to ordering a re-assignment of the 6,750 shares. The plaintiffs, however, ask in addition for an account of the dividends received by Mr. Lescher and his executors and payment of the balance after deducting the amount of principal, interest and costs in respect of the loan. This is asking for a personal order for payment against the mortgagee. Such relief they are not, in my opinion, entitled to obtain by means of an originating summons. The relief obtainable under Order LV., Rule 5*a*, is confined to the relief there specified and does not extend to personal orders for payment. If the plaintiffs desire to recover from the defendants any moneys received over and above the amount of principal, interest, and costs, they can only do so in proceedings commenced by writ, to which, of course, the relevant Statute of Limitations would apply. The plaintiffs concede that the defendants are entitled to their costs of the present proceedings. These must be taxed as mortgagee's costs. I will order an account to be taken of what, if anything, is due to the defendants as executors of Mr. Lescher for principal, interest, and costs, including therein their costs of this action in respect of the loan of £1,000 with interest at 6 per cent. advanced by Mr. Lescher to Henry Weld-Blundell in February, 1900. I further order that upon payment by the plaintiffs to the defendants of the amount, if any, found due or, if nothing is found due, upon the filing of the certificate finding that nothing is due, the defendants do transfer the 6,750 shares standing in their names to the plaintiffs or as they shall direct. And I direct that in taking the account interest is to be calculated only from November 5, 1905, and credit is to be given for all cash received since that date by Mr. Lescher, or the defendants, by way of dividend or bonus in respect of the shares from time to time standing in the name of Mr. Lescher or themselves as security for the said loan of £1,000. That is the strict order. I would, however, suggest that, without in any way prejudicing the defendants' right to appeal, an order should be made in the following form :—The defendants admitting that the cash dividends received by Mr. Lescher in his lifetime, or by the defendants after his death, in respect of the 600 Cornbrook shares and the 3,000 shares into which they were sub-divided, and the 1,500 and 2,250 bonus shares, exceed the amount which on taking an account would be found due for principal, interest and costs in respect of the loan of £1,000 with interest at 6 per cent. per annum made by Mr. Lescher to Henry Weld-Blundell in February, 1900, order the defendants to execute a transfer to the plaintiffs, or as they shall direct, of the said 3,000, 1,500, and 2,250 shares and to deliver to the plaintiffs such executed transfer together with the certificate or certificates relating to the said shares.

Counsel for the parties consenting, the order was made in the latter form.

[Solicitors—Messrs. Gregory, Rowcliffe and Co., for Messrs. Weld and Weld, Liverpool ; Messrs. William A. Crump and Son.]

K.B. Div. (Salter and Charles, JJ.) 1928. Mar. 26.

EBNER v. LASCELLES.*

Landlord and Tenant—Restrictions—Dilapidations—Transfer of burden to tenant—Non-occupation by tenant — Subletting of part furnished — Assessment of dilapidations — Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 2 (3).

The plaintiff was the lessor and the defendant was the lessee of a flat consisting of ground floor and basement, the lease exempting the lessee from liability for loss arising from fair wear and tear. When the lease expired in 1921 the plaintiff granted to the defendant a fresh lease but the above exemption was withdrawn. The defendant never occupied the flat but sublet the ground floor furnished and the basement unfurnished. When the lease expired both the ground floor and the basement were vacant and the defendant gave up the premises.

In an action for dilapidations,

Held, (1) that non-occupation by the tenant did not take away the protection given to the tenant by s. 2 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as regards the transfer of a liability for cost of repairs, (2) that the subletting of the ground floor furnished, which had come to an end, did not take any part of the premises outside the Act, so far as a claim for dilapidations was concerned, and (3) that the defendant was liable only for damages on the basis of the exemption contained in the earlier lease.

This was an appeal by the defendant from a decision of his Honour Judge Moore Cann, at the Brighton County Court, in favour of the landlord.

The plaintiff, Mr. William Frederick Ebner, was the landlord of a block of flats at Codrington House, Hampton-place, Brighton. The defendant, Miss Beatrice Lascelles, was the tenant of Flat No. 1, which consisted of a ground floor and basement premises. In 1916 the tenant had taken over the residue of a three years' lease of those premises from March 25, 1915, at a rent of £82 10s. per annum. Under that lease the tenant had been exempted from liability for loss arising from accidental fire, fair wear and tear, and reasonable use of the premises. She was granted a further lease, containing similar exceptions, at a rent of £90 per annum from March 25, 1918. Under a third agreement the premises were again let to her on March 25, 1921 ; the lease was for three years at a rent of £130, with an option of a further three years' lease at a rent of £150, but the exceptions clause contained in the earlier leases was withdrawn. The tenant exercised the option of renewal, and finally gave up the premises on March 24, 1927. The tenant had never herself occupied the premises, but had systematically sublet the ground floor portion as furnished premises. She had also

* Reported by T. R. F. Butler, Esq., Barrister at-Law.

sublet the basement portion unfurnished. Both portions became vacant before the lease expired.

The plaintiff brought an action, in which he claimed for dilapidations under the last-mentioned agreement. The defendant contended that the premises were under the protection of the Rent Restrictions Acts, and that the withdrawal of the exceptions clause contained in the earlier leases constituted the transfer to her of a burden previously borne by the landlord within the meaning of section 2 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and that therefore the dilapidations ought to be assessed, not under the covenants in the last agreement, but under the earlier and less onerous covenants. She counterclaimed £33 10s. for rent overpaid for the period of six months before action brought.

The County Court Judge held that, inasmuch as the tenant had taken the premises for the sole purpose of subletting the whole, and had never gone into occupation herself, the premises were not protected by the Rent Restrictions Acts ; and that, if he were wrong in that conclusion, and the premises did come within the Acts, the ground floor flat had been taken outside the Act by reason of its having been sublet furnished.

The tenant appealed.

Mr. Alexander Cairns appeared for the appellant ; Mr. J. G. Hurst, K.C., and Mr. John Flowers for the respondent.

Mr. Justice Salter.—This appeal raises questions under the Rent Restrictions Acts which, as sometimes happens under those Acts, are not altogether free from difficulty. The action was one for dilapidations —an action to recover damages for breach of the repairing covenants under an agreement of tenancy. Liability for a breach of the agreement to repair was admitted, but it was said by the defendant that she was not liable on the whole of the covenants in the agreement inasmuch as they had been extended beyond the repairing covenants in previous agreements between the landlord and herself and therefore constituted a transfer of a burden from the landlord to herself within section 2 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and therefore one that was not permitted. That was her first contention. She further set up a counterclaim for rent overpaid in excess of the standard rent. The questions which arose in the case were whether the premises, the subject of the tenancy, were or were not a dwelling-house to which the Acts applied ; and, having regard to the sublettings which had been made by the defendant, the further question whether each part was or was not a dwelling to which the Acts applied and whether there was the larger or the smaller liability to repair in respect of each part.

The facts are that in 1916 the defendant, Miss Lascelles, became tenant from Sir James Bradford of the premises now in question for the residue of a term of three years expiring March 25, 1918, at a rent of £82 10s. The premises in question are known as Flat No. 1, Codrington House, Brighton, and it is common ground that this letting of 1915 was the first letting of this flat since August 4, 1914, and therefore it is common ground that £82 10s. a year is the standard rent of the dwelling-house which forms the subject of tenancy between these parties. That three years' tenancy expired on March 25, 1918, and from that date Miss Lascelles took this flat from Sir James Bradford for a further three years at an increased rent—namely, £90 per annum. Neither at that time nor at any time was any notice to increase the rent given under the Rent Restrictions Acts. On March 25, 1921, on the expiration of that second period, there was a third tenancy created which is the tenancy with which we are more particularly concerned. The tenancy was between Sir James Bradford and Miss Lascelles, and was for six years at £130 a year for the first three years and £150 a year for the second three years, with power to the tenant to determine the agreement at the end of the first three years. The repairing covenant in the agreements of 1915 and of 1918 had been a covenant to repair, fair wear and tear and reasonable use excepted. The repairing covenant in the tenancy agreement of March 25, 1921, omitted the words "fair wear and tear and reasonable use excepted" ; otherwise the repairing covenant was the same, so that it was made heavier upon the tenant to her disadvantage and the advantage conferred upon the landlord was made greater by the omission of those words. The tenant did not determine the six years' tenancy at the end of the first three years ; it therefore ran its full length and expired on March 25, 1927. Miss Lascelles during this period of 12 years, except for a short period, did not occupy this dwelling-house or any part of it herself. With regard to the ground floor part of the demised dwelling-house she furnished that and sublet it from time to time furnished to subtenants. With regard to the other part of the demised premises—the basement—she sublet that unfurnished from time to time to subtenants, and these sublettings by her, whether of the ground floor or of the basement, were sublettings for habitation. When the end of the period—March 25, 1927—was approaching both Miss Lascelles' subtenants had left the premises. The furniture had been removed and for a week or two before the contractual tenancy ended on March 25, 1927, this flat had been in fact unoccupied. This is, therefore, not a case of continuation under the statutes, or of a statutory tenancy : the tenancy here was always a contractual tenancy. When the contract ended the tenancy ended and the plaintiff took possession of the vacant premises. The plaintiff had been Miss Lascelles' landlord since 1922. The premises having been surveyed, the interior was found to be to some extent out of repair and this claim was made. The question is whether the landlord is entitled as against this tenant to enforce to the full the repairing covenant in its existing form with the omission of any words as to fair wear and tear and reasonable use.

The first argument that was raised before the learned County Court Judge was this : that the Acts did not apply to this tenancy of these premises because these were business premises. Business premises did not come within the purview of these Acts till 1920. The Act of that year brought them for a very short time within the purview of the Acts and provided by section 13 (1) : "This Act shall apply to any premises used for business trade or professional purposes or for the public service as it applies to a dwelling-house, and as though references to 'dwelling-house' 'house' and 'dwelling' included references to any such premises" subject to certain modifications.

The learned Judge applied his mind to the question whether these premises were used for business, trade, or professional purposes, and he has found that these are business premises. If they are, then, no doubt, the Act does not apply to them. So far as section 13 (1) is concerned, I agree that the question whether these are premises used for business, trade, or professional purposes is a question of fact, if there is any evidence ; but I am quite unable to see that these

are premises used for business purposes, trade purposes, or professional purposes. What has to be considered is the actual use to which the demised premises are in fact put. I think it is not immaterial to refer to the description of the demised premises in the tenancy agreement. It is : "All that residential flat being the ground floor flat, Codrington House, Brighton, in the County of Sussex, together with the two front rooms, scullery, yard, and lavatory in the basement of such premises," and there is a covenant not to assign, underlet, or part with possession except as a furnished flat for a period not exceeding six months, and not to carry on, in, or upon the said premises any trade or business. The flat is, therefore, let as a residential flat and obviously let for habitation, and it has been sublet in two parts, always for habitation. I am quite unable to see any evidence on which the learned Judge could find that these premises are premises used for business, trade, or professional purposes. But I think that is not the real question. The real question is under subsection 12 (2), which provides : "This Act shall apply to a house or a part of a house let as a separate dwelling." The word "house" there obviously applies to the structure and this flat is, to my mind, quite clearly "part of a house let as a separate dwelling." It is quite clear from the agreement that these premises were let as a residential flat on condition that no business was carried on there. I am, therefore, not able to agree with the learned Judge in finding that the Acts did not apply to this flat on the ground that it was not a dwelling-house or was business premises.

The next point taken is that the Rent Restriction Acts did not apply to this flat because the defendant was never in occupation. Non-occupation is, in substance, admitted. Miss Lascelles, in her cross-examination, said, "I told Sir James Bradford that I got the premises for the express purpose of subletting. I only occasionally used them myself." It may, therefore, be taken that except for a short period or short periods she never was herself in occupation of this flat. In the last few weeks before the tenancy expired no one was in occupation. The subtenants had gone. Miss Lascelles, of course, was in possession of the whole flat but was not in occupation. It is said that since she was not substantially in occupation at any time during the tenancy the Acts do not apply to this flat, and in support of that contention *Hicks v. Scarsdale Brewery Company* ([1924] W.N., 189), *Gidden v. Mills* ([1925] 2 K.B., 713), and *Prout v. Hunter* (40 *The Times* L.R., 868 ; [1924] 2 K.B., 736) are cited. If those cases are looked at it will be seen they are all cases of actions for ejectment. In *Hicks v. Scarsdale Brewery Company* (*supra*) Mr. Justice Rigby Swift held that a tenant, in order that he may be entitled to hold over under the protection of the Acts after the expiration of the contractual tenancy, must be in occupation when the tenancy ended. This particular right which is given by these Acts to tenants was described by Mr. Justice Lush in the well-known case of *Keeves v. Dean* (40 *The Times* L.R., 211 ; [1924] 1 K.B., 685) as a "status of irremovability" and the subsequent authorities have approved that view. One of the tenant's rights is to hold over against the landlord's will after his contractual term is ended, but it is a right to keep possession—and if he has not got possession at the material time he loses that right. That, I understand to be the position in *Hicks v. Scarsdale Brewery Company* (*supra*). I do not know that I need say anything with regard to *Gidden v. Mills* (*supra*) and *Prout v. Hunter* (*supra*).

It has been said, quite rightly, that the main rights conceded to a tenant under these Acts are first a status of irremovability, and next fair rents, that is to say, the right not to have the rent raised unduly. The right to hold over is a right that comes into existence after the expiration of the contractual tenancy. As long as the tenant is there under the protection of his contract he has no need of the protection of the Act, but the Act also protects him during his contractual tenancy in regard to rent because, notwithstanding that he may make other agreements with his landlord, he is not to be charged more rent than the law allows, and if he is overcharged he can have it reduced. The latter is, therefore, a protection which he has during the tenancy and the two rights must be kept distinct. It does not at all follow that, because a tenant loses his right to hold over if he is not in occupation at the end of his contractual period, therefore he cannot have the benefit of the Act to protect him during the period of his contractual tenancy. It appears to me not to follow at all. In this case if Miss Lascelles had denied the plaintiff's right to possession it may be that the plaintiff would have succeeded against her on the ground that she was not in occupation at the end of the tenancy, but to my mind it does not in the least follow that therefore this was a tenancy to which the Act did not apply so as to protect her in regard to the amount of rent and repairs.

The third point taken is that, because part of this flat was sublet furnished by Miss Lascelles, therefore the Act does not apply to the flat as a whole or at any rate does not apply to the part sublet furnished. The authorities referred to here are *Prout v. Hunter* (*supra*), *Leslie and Co., Limited v. Cumming and Others* (42 *The Times* L.R., 504 ; [1926] 2 K.B., 417). The last also was an ejectment case. In *Prout v. Hunter* (*supra*) the tenant had sublet the whole furnished. It was held that the landlord was entitled to eject because the tenant had taken the whole premises out of the Act by subletting them furnished. In the case of *Leslie and Co., Limited v. Cumming and Others* (*supra*) the tenant had sublet part furnished. An action for ejectment was brought in regard to the whole premises, and the Court held that the landlord was not entitled to succeed in the action for the whole, leaving open the question whether he might not have succeeded if he had confined his claim to the part that had been sublet furnished. There are observations of Mr. Justice Roche and Mr. Justice MacKinnon which must be cited.

Mr. Justice Roche said, after referring to the terms of section 12 (2) of the Act of 1920 : "Then occurs the proviso as to furnished letting. The contention here is that the application of the Act to the whole of these demised premises is excluded by this proviso as to furnished letting. But the whole of these demised premises were not let furnished ; only two rooms were so let. It may be that in accordance with the reasoning in *Gidden v. Mills* (*supra*), which follows and applies *Prout v. Hunter* (*supra*) and *Phillips v. Hallahan* (41 *The Times* L.R., 407 ; [1925] 1 K.B., 756), the plaintiffs, if they had claimed possession of the two rooms let to Mr. Samad, might have succeeded. It is, however, unnecessary to decide that point." Mr. Justice MacKinnon said : "As regards the previous letting to Mrs. Willcocks and Mr. Moore, whose occupation had come to an end long before proceedings had been taken in this action, I agree that the time at which one has to consider whether a dwelling-house is a dwelling-house subject to the protection of the Act is the date of the writ or, in this case, the plaint in the County Court. I

do not suppose that Mr. Stone would have sought to argue that *Prout v. Hunter* (*supra*) went as far as to apply in a case where the dwelling-house had been let furnished during the currency of the original lease, say in 1919 or 1920, but he does seek to say that a letting furnished for, I suppose, however short a period after the tenant became a statutory tenant took the house out of the category of a protected house and put it into the category of an unprotected house. It is only necessary to consider what startling results that contention would lead to in order to see that that argument must be wrong. For instance, if there be, as well there may be, a person in occupation of a house at Henley-on-Thames as what is called a statutory tenant, and supposing the owner of that house discovered that the statutory tenant let the premises furnished for the regatta week in 1922, could he now, by virtue of that use of the house for a week four years ago, come to the Court and say: Give me possession of the premises, because by virtue of that temporary subletting so long ago the premises ceased to be protected? I am far from saying that because you find that some contention under these Acts leads to an extraordinary result that therefore that cannot be the effect of the Act, because the Acts are so worded that extraordinary results of one kind and another do follow; but I think those considerations assist in leading one to the conclusion, with which I agree, that the fact that a house has been let furnished for a period which has expired before proceedings are commenced cannot be relied upon as taking the house out of the protection of the Act in the way which is suggested."

In this case these proceedings are commenced after this tenancy has completely ended and the landlord has retaken possession of the premises. Mr. Justice MacKinnon there suggests that it is right to say that a subletting even of the whole of the premises furnished which is finished and done with before action brought would not deprive the tenant of any rights and *a fortiori* the letting of a part would not have that effect. My view is that the letting furnished of a part of this flat by the defendant does not have any effect in taking this flat or any part of it out of the operation of the Act as regards the extent of the covenant to repair and the right of the tenant to claim the protection of the Act in respect thereof.

The only other matter to consider is the defendant's counterclaim with regard to rent overpaid. She puts her case, and I think she is entitled to do so, in this way—she says that the extension of the scope of the repairing covenant is under the Act equivalent to an increase of rent and is therefore not permissible. With regard to the rent it is common ground that the standard rent is £82 10s. a year, and that for six months before action was brought she paid at the rate of £150 a year. The difference is £33 15s. It is then argued that the claim for rent overpaid ought not to apply to the part let furnished, but only to the basement. I have already dealt with that point in another portion of my judgment. In my view it is not sound. I think, therefore, the judgment of the learned County Court Judge must be set aside and judgment must be for the plaintiff for such damages as may be found to be due on the assumption that the tenancy is subject to the "fair wear and tear" clause, and that on the counterclaim judgment must be entered for the defendant for £33 10s.

The appeal is, therefore, allowed.

MR. JUSTICE CHARLES.—I agree, and will add only a very few words on one point. The County Court Judge, in his judgment, said as follows: "Where a tenant takes premises for the sole purpose of subletting the whole and never goes into occupation herself, the case is not protected by the Act. It seems to me that that is only another way of saying that they are business premises taken for business purposes. That really deals with the whole of the case as regards the Act." I desire to say that that appears to me to involve a misconception of the true connotation of the term "business premises" in this Act of Parliament. It is a misconception to say that to take a lease of premises for the sole purpose of subletting is the taking of the premises for business purposes and that, thereby, the premises become business premises. It appears to me that no such meaning can be imported into the words of the Act, which mean exactly what they say. The premises here were not premises used for "business, trade, or professional purposes."

[Solicitors—Messrs. J. S. Blanckensee and Co.; Mr. Robert Breach, Hove.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) } 1928. Mar. 26.

H. v. H.*

Divorce—Maintenance—Deed of separation—Covenant by husband to provide allowance—Covenant by wife not to sue for further support, alimony, or maintenance—Decree absolute for dissolution granted to wife on the ground of husband's adultery—Petition by her for maintenance—Covenant pleaded in bar—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), ss. 190, 192.

A woman who in a deed of separation covenanted in consideration of certain benefits not to claim from her husband in the future "support, maintenance, or alimony," and was afterwards granted a decree absolute of divorce, was held not to be debarred from petitioning for maintenance after the dissolution of marriage, notwithstanding that the deed contained no provision for its termination on the marriage being dissolved. It was held that the woman made the covenant, as a wife, with her husband, as a husband, but being no longer the wife she was entitled to proceed with her petition for a pecuniary allowance from her former husband.

This was a summons adjourned into Court on appeal from the order of a registrar dismissing the petition for maintenance of a woman who had been granted a decree absolute dissolving her marriage. The parties were married on June 8, 1892, in Ireland, and there were four children now living, all of age. In 1904 the wife instituted proceedings in the Dublin High Court for a divorce *a mensa et thoro* on the ground of her husband's alleged cruelty, but the suit was compromised by an indenture dated June 8, 1904. It set out that owing to unhappy differences the parties had agreed to live separate from each other for the future; that the husband covenanted

* Reported by WILLIAM LATEY, Esq., Barrister-at-Law.

to pay the wife £50 a year during her life, and to charge a moiety of such annuity upon a leasehold house of the husband's; and that the wife covenanted that she or any person on her behalf "shall not at any time hereafter commence or prosecute any action or other proceeding for compelling the said G. E. H. to cohabit with her, or to allow her any support, maintenance, or alimony," except the £50 annuity. There was also a covenant by the wife indemnifying the husband against any liabilities or claims.

In 1919 the wife again filed a petition in the Dublin High Court for a divorce *a mensa et thoro* on the ground of alleged cruelty, but the proceedings were compromised by a fresh deed of separation dated November 15, 1920. The main difference between this indenture and that of 1904 was that the later one transferred to the wife all the husband's interests in the aforesaid house in substitution for the £50 annuity. The other covenants by both parties in the old deed were reproduced in the new deed, which, however, contained no provision for its termination in the event of the marriage being dissolved. The new deed also contained the proviso that the wife should not at any time thereafter take any proceedings against the husband to "obtain a divorce or judicial separation in respect of any misconduct which has heretofore taken place or is alleged to have taken place" on the part of the husband.

In November, 1924, the wife filed a further petition in the Dublin High Court for a divorce *a mensa et thoro*, to which the husband appeared under protest against the jurisdiction, and set up that since 1922 he had acquired an English domicile. In November, 1925, the petition was dismissed on the ground that the respondent had acquired an English domicile. On September 25, 1926, the wife filed a petition in the English High Court praying for the dissolution of her marriage on the ground of his adultery, and on May 4, 1927, at Liverpool Assizes, she was granted a decree *nisi* dissolving her marriage, and this decree was made absolute on November 14, 1927. On November 15, 1927, she filed a petition for maintenance. On January 6, 1928, the respondent issued a summons calling upon the petitioner to show cause why the maintenance proceedings should not be stayed and the petition dismissed on the ground that the petitioner was estopped from presenting or prosecuting the same by her covenant in the indenture of November 15, 1920. During the proceedings before the registrar it was not denied that the husband had complied with his covenants. The registrar dismissed the petition for maintenance, and the petitioner appealed.

Sir James O'Connor, K.C., and Mr. J. W. Morris appeared for the petitioner appellant; Mr. Clifford Mortimer and Mr. A. Richard Ellis for the respondent.

Sir J. O'Connor submitted that the petitioner was entitled to proceed with her claim for maintenance under section 190 (1) and (2) and section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925.

By section 190, "(1) The Court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the Court may deem to be reasonable. . . . (2) In any such case as aforesaid the Court may, if it thinks fit, by order, either in addition to or instead of an order under subsection (1) of this section, direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the Court may think reasonable. . . ."

By section 192, "The Court may, after pronouncing a decree for divorce or for nullity of marriage, inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the Court thinks fit. . . ."

Counsel said that section 190 was drawn in the widest language and the Court was unfettered by the existence of the petitioner's covenant. Before the decree absolute the parties had mutual rights as husband and wife, but after it they were strangers to one another. There was a complete change of status. A covenant made by a wife *qua* wife could not fetter the discretion entrusted by the legislature to the Court in dealing with the question of maintenance. The Court was put in the position that Parliament occupied before the Matrimonial Causes Act, 1857, and had power to make arrangements which were proper and decent in the circumstances after a dissolution of marriage. He commented on the difference in the wording of the subsections relating to dissolution and judicial separation. Section 190 (4) said: "Where any decree for restitution of conjugal rights or judicial separation is made on the application of the wife, the Court may make such order for alimony as the Court thinks *just*." In regard to dissolution the word used was "reasonable." The distinction might be illustrated by the classical example in *The Merchant of Venice*. Portia in that great passage beginning "The quality of mercy is not strained" asked Shylock to be reasonable. He would not, and she then used her trump card. The petitioner's covenant not to take proceedings was bad as being against public policy.

Counsel referred to *Bishop v. Bishop* and *Judkins v. Judkins* (13 *The Times* L.R., 366; [1897] P. 138). There the Court of Appeal decided that notwithstanding that by an agreement for separation, made between husband and wife on withdrawal of the wife's petition for divorce, the wife had agreed to accept a specified sum for maintenance, to be paid whether the marriage were dissolved or not, the Court had power under the Divorce Acts, after a decree of dissolution on a fresh petition by the wife based on misconduct by the husband since the agreement, to disregard the agreement and order permanent alimony to be paid to her at a rate exceeding the amount specified in the agreement, if on inquiry the husband's means permitted it. Counsel pointed out that in his judgment in *Bishop v. Bishop* (*supra*) Sir Francis Jeune, President, explained Sir James Hannen's judgment in *Morrall v. Morrall* (6 P.D., 98), where the marriage had been dissolved on the ground of the husband's adultery and he contested his former wife's petition for maintenance on the ground that by an agreement she had covenanted not to seek further "support, maintenance, or alimony." Sir James Hannen, in Sir F. Jeune's opinion, considered that the agreement was based on the condition of separation between the parties and did not restrain the wife when her right to a dissolution of her marriage was established, and when thus a

state of things arose which was not in contemplation when the deed was executed. Lord Justice Lindley, in giving judgment in *Bishop v. Bishop* (*supra*), said, at page 164 : "We are not aware of any authority since the Divorce Act which shows that a covenant by a husband or wife not to sue the other for a divorce grounded on future misconduct is valid, and we doubt whether an express covenant not to sue for increased alimony in the event of such a divorce could be recognized."

In *Reid v. Reid* (42 *The Times* L.R., 30 ; [1926] P., 1) it was held that a wife who had an allowance under a separation deed, which contained no provision for its termination in the event of a divorce, might be restrained by an order for permanent maintenance from taking any proceedings to enforce the allowance under the separation deed in addition to such maintenance.

He submitted that the registrar was wrong in dismissing the petition.

Mr. CLIFFORD MORTIMER said that this was a matter of importance arising for the first time. It had never been decided, though there were a number of judicial *dicta* relating to it. He understood that there were two propositions advanced for the petitioner : (1) The change of status resulting from the dissolution of the marriage entitled her to repudiate her covenant ; (2) the statutes empowered the Court to grant her maintenance despite her covenant. As against these propositions he submitted (1) that the change of status did not relieve the wife from her contractual obligations unless the deed gave her such power, and the deed did not ; and (2) that the Matrimonial Causes Acts gave the Court no power to set aside a covenant made in these circumstances and the petitioner was bound by her common law obligation. The decision in *Morrall v. Morrall* (*supra*) was given on grounds which by common consent had been accepted as wrong. In no case had there ever been a decision on this point. He distinguished *Bishop v. Bishop* (*supra*), in which there was no covenant not to sue, and *Gandy v. Gandy* (7 P.D., 77, 168), which was a judicial separation case. There was no doubt of a wife's capacity to enter into a separation deed and to be bound by her covenants (*Besant v. Wood,* 12 Ch.D., 605).

The wife had compromised a suit by a deed partly for her benefit. A deed of separation usually contained a covenant to end its provisions if the marriage were dissolved, but there was no such provision in this deed. If there was a deed made by a married couple agreeing to live separate, the husband to make his wife an allowance of £500 a year, but with no covenant by the wife not to sue for maintenance in the event of the marriage being dissolved, the husband would be bound by the deed to continue paying the £500 a year. He referred to *Bosworthick v. Bosworthick* (42 *The Times* L.R., 719 ; [1927] P., 64), where the marriage was dissolved but the marriage settlement remained in force. If a wife sued on the deed, she could not afterwards repudiate it (*Roe v. Roe,* 32 *The Times* L.R., 490 ; [1916] P., 163). He referred to *Clifford v. Clifford* (9 P.D., 76) and *Tress v. Tress* (12 P.D., 128).

He submitted that the reciprocal obligations under the deed had not come to an end, and the statutes did not absolve the petitioner from her covenant. As regards the power of the Court under section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, variation of settlements was limited to settled property. There was no power to expunge this covenant from the deed, but only a power to allocate the settlements, and this appeal should be dismissed.

In his reply SIR J. O'CONNOR referred to *Jump v. Jump* (8 P.D., 159) as to an annuity being held to be a species of personal property with which the Court could deal.

LORD MERRIVALE delivered a considered judgment as follows :—

The applicant was petitioner in a suit for the dissolution of her marriage with the respondent, wherein a decree absolute of divorce was pronounced in November, 1927. Subsequently to the decree, by a petition framed in accordance with the Supreme Court of Judicature (Consolidation) Act, 1925, section 190, she sought an order for permanent maintenance. This application was met by the respondent with an affidavit setting up an agreement under seal, made between the parties in 1920 (by way of compromise of an action then brought by the applicant), whereby she covenanted that she should not thereafter commence or prosecute any action or other proceeding for compelling the respondent to allow her any support, maintenance, or alimony. The question now to be determined is whether the present petition of the applicant is maintainable by her notwithstanding her covenant.

For the respondent it was contended that the covenant, having been made for good consideration by a competent contracting party, ought to be enforced by the Court in the mode in which the provisions of agreements for separation made between husband and wife were enforced before the Supreme Court of Judicature Act, 1873, and, indeed, after that statute was in operation, by Courts of Equity ; and that, inasmuch as part of the consideration moving from the respondent was an assignment of property, the petitioner, while retaining the property, ought not to be heard upon an application in breach of the covenant. Stress was laid also upon the argument that, except in so far as a post-nuptial settlement may be varied in this jurisdiction by application of the powers contained in the Supreme Court of Judicature (Consolidation) Act, 1925, section 192, the disposition of property effected by the deed in question is binding upon the parties, notwithstanding the change effected in their status by the dissolution of their marriage. Change of status, it was said, is immaterial. *Bishop v. Bishop* (13 *The Times* L.R., 366 ; [1897] P., 138), which was relied upon for the applicant, was said not to cover the present case, inasmuch as in that case there was no covenant not to sue.

Counsel also met by anticipation the doubt which was expressed by the Court of Appeal in *Bishop v. Bishop* (*supra*) as to the validity of any agreement during marriage not to sue for increased maintenance in the event of a subsequent divorce on the ground of adultery. This deed of compromise, it was truly said, was not made in contemplation of any proceeding for dissolution of marriage.

The matter last mentioned does not present the true ground on which, as it seems to me, the issue between the parties is to be dealt with. The deed in question was made by way of compromise of a suit for divorce *a mensa et thoro* in Ireland, the parties being at the time domiciled there. The marriage between them was incapable of dissolution under their then conditions except by Act of Parliament. No doubt an express undertaking by a wife in this country that she would not sue her husband for maintenance if he should be guilty of adultery would be held to taint with immorality a contract of which it should be found to have formed a part. If adultery

supervened, and a petition for divorce was filed in respect of such adultery, the bargain would be evidence of collusion. Whether an Irish petitioner for relief by Act of Parliament would have fared any better in times when the procedure upon petition to Parliament by Irish applicants for divorce was settled is a speculative inquiry, but, inasmuch as the stringency of the provisions of the Matrimonial Causes Act, 1857, was largely founded on the practice upon Bills for divorce, I think she would not. As I have said, however, the argument seems to me to have little practical relation to the facts of this case.

The decisive question here, as I see this case, is whether the present applicant has covenanted not to do the thing which she now seeks to do. In my opinion, she has not. She covenanted, as a wife, against making, as a wife, any claim upon her husband, as a husband, for support, maintenance, or alimony. That is to say, she covenanted not to proceed in a Court, having jurisdiction in such matters, to require as against her husband the provision for her livelihood for which in his marital capacity he would during their marriage *prima facie* be liable. She is not so proceeding. She is no longer a wife, but, having been the wife of the respondent, she comes to this Court, under a statute applicable to her present plight, to ascertain whether the Court will, in the circumstances of her case, deem it right that her sometime husband should make her some pecuniary allowance. It does not weaken the applicant's title to be heard under section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, that in *Morrall v. Morrall* (6 P.D., 98) Sir James Hannen (as he then was) held that a wife's covenant not to claim increased maintenance was released by the adultery of her husband established in a suit for judicial separation, or that in *Bishop v. Bishop* (*supra*) the Lords Justices in the Court of Appeal appear not to have doubted that in a case of divorce this view would have been correct.

The applicant is entitled to be heard on her petition. The objection which was made to her claim on the ground that the respondent purchased the covenant on which he relies by a grant of property, so far as it has weight, will be open for consideration when the Court proceeds to determine, within the terms of the statute, what payment, if any, having regard to the applicant's fortune, the ability of the respondent, and the conduct of the parties, the Court deems to be reasonable. The respondent must pay the costs.

Leave to appeal was given on the terms of the respondent's securing the petitioner's costs.

[Solicitors.—Messrs. Evelyn Jones and Co.; Messrs. J. Westcott and Sons.]

Prob., Divorce, and Adm. Div. (Hill, J.) } 1928. Mar. 27.

HYMAN v. HYMAN.*

Divorce—Maintenance—Deed of separation—Husband's covenant to provide for wife—Wife's covenant not to sue for further alimony or maintenance—Decree absolute dissolving marriage on ground of husband's adultery—Wife's covenant pleaded in bar — Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 190.

In circumstances practically the same as reported in *H. v. H.* (44 *The Times* L.R., 463), Hill, J., held that he was bound by the President's decision therein, and directed on the issue before him that the divorced wife might proceed with her petition for permanent maintenance.

This was an issue ordered by the President on October 24, 1927, to be tried on a preliminary point raised by the husband respondent in his answer to the wife's petition for maintenance, namely, that the petitioner was bound by her covenant, in a deed of separation dated September 20, 1919, not by any means, either by taking out citation or process or by instituting any action in England or elsewhere or in any other manner, to compel the respondent to allow her any alimony or maintenance further than the weekly sum which the respondent thereby covenanted to pay her.

The marriage took place on September 14, 1912. In July, 1919, the respondent left the petitioner—according to the points of claim to live permanently with another woman. By the deed dated September 20, 1919, the husband and the wife agreed to live apart, and the husband agreed to pay the wife £20 a week during her life for her maintenance and support, together with two separate lump sums of £200 and £2,000. In addition to the wife's covenant set out above which was pleaded in bar, and an undertaking by her not to sue for restitution of conjugal rights, the deed contained an indemnification of the husband against all debts and liabilities contracted by the wife, and an agreement that the weekly payment should cease and all the covenants be void if cohabitation as man and wife were resumed. There was also a covenant by the husband that he should not in any way annoy, molest, disturb, or otherwise interfere with the wife in her person or business or in her manner of living nor at any time thereafter require, or by any means, either by taking out citation or process or by instituting any action in England or elsewhere or otherwise, endeavour to compel the wife to cohabit with him, or to enforce any restitution of conjugal rights or sue or cause to be sued any person or persons for receiving, lodging, protecing, or entertaining her, but that she might live as if she were unmarried. There was a guarantee in the deed by a brother of the husband for the payment of the £2,000 and the £20 a week.

On January 11, 1926, the wife petitioned for a divorce on the ground of the husband's adultery with a named woman, and on January 25, 1927, the wife was granted a decree *nisi* for the dissolution of her marriage. On February 7, 1927, the petitioner filed a petition for maintenance, and the respondent set up the deed of separation in bar, on the ground that he had complied with all his covenants and continued to pay the agreed allowance. He submitted that the deed was a valid answer to the petitioner's claim for maintenance and asked for a declaration accordingly. The proceedings were stayed pending the issue, which came on for hearing on February 10, 1928. The husband was the plaintiff in the issue, and the wife the defendant. In his points of claim the husband said that though the decree *nisi* was pronounced on January 25, 1927, the wife had taken no steps to obtain a decree absolute.

Sir Herbert Cunliffe, K.C., and Mr. H. Durley Grazebrook appeared for the husband respondent; Sir W. Schwabe, K.C., and Mr. G. Tyndale for the petitioner.

Sir Herbert Cunliffe, K.C., on February 10, 1928, reviewed the authorities and submitted that there

* Reported by William Latey, Esq., Barrister-at-Law.

was no statute or ecclesiastical law that could do away with the contractual obligation of the wife. Having regard to the loss of time and the nature of the application, the Court might defer judgment until the decree was made absolute.

The hearing was then adjourned, and on its resumption on March 27 it was anounced that in the interim the decree *nisi* had been made absolute.

MR. JUSTICE HILL.—There is another important new factor, the President's judgment in *H. v. H.* (44 *The Times* L.R., 463). The President's view appears to be that the contract is made on the basis of a status which has now been changed, with the result that the contract is gone.

SIR W. SCHWABE claimed that the former wife's covenant was no bar, and cited authorities already referred to in *H. v. H.* (*supra*). The wide powers of the Court under section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, could not be taken away by any previous agreement between husband and wife. This covenant by the wife was made in contemplation of the continuance of the marriage status. It must be void as being against public policy if a wife covenanted not to sue for further maintenance even in the event of her huband's committing adultery. But the deed as a whole, apart from the former wife's covenant, continued to operate (*Charlesworth v. Holt,* L.R., 9 Ex., 38).

SIR H. CUNLIFFE, in reply, said that the extra consideration of £2,200 which the wife received under the deed distinguished this case from *H. v. H.* (*supra*). Another important difference was that here there was a guarantee by the brother of the husband. If the President's decision in the other case was right and his Lordship was bound by it, the divorced wife could continue to claim all the benefits of her former husband's covenants, but could repudiate her own covenants, on the strength of which she secured all those benefits. It was inequitable that one party should remain bound by his covenants while the other was not. The petitioner must make her election. Either the deed was subsisting and binding on both parties, or it was ended and neither party was bound. If the petitioner claimed maintenance she was not entitled to such provision in addition to the benefits which she obtained under the deed. She must give up one or the other.

MR. JUSTICE HILL gave judgment as follows :—

In this case I am trying a preliminary issue arising on a deed of separation, namely, whether, having regard to the terms of the covenant made by the petitioner in the deed of September 20, 1919, she can proceed for an order for maintenance against her former husband under section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925. In the case of *H. v. H.* (44 *The Times* L.R., 463) the President of this Division delivered a judgment which exactly covers the point that has been raised. In that case the Registrar had declined to proceed with a petition for maintenance on the ground that the wife petitioner had covenanted in a separation deed not to claim maintenance. The President decided in favour of the petitioner and allowed the hearing of the petition for maintenance to proceed and refused to treat the covenant in the deed as a bargain or as something which was conclusive. The only difference between that case and this, so far as I can see, is that in this case there was a guarantor of the husband's fulfilment of his obligations under the deed. It may be that this agreement contained in this deed is at an end. If so, the guarantor is discharged. As regards the relations between the previously married couple the guarantor's position is beside the point. His guarantee is not material to the issue between the parties in this petition. The President's decision is binding upon me, and it is unnecessary for me to go into the whole matter afresh. I am not in the least suggesting that, if I were not so bound, I should decide otherwise. The petitioner, therefore, is not precluded by her covenant from pursuing her petition for maintenance. The provisions in the deed of September, 1919, will be considered when the petition is heard. I give judgment for the petitioner in the issue with costs, and grant leave to appeal on security for costs being lodged.

[Solicitors—Messrs. John B. and F. Purchase and Clark ; Messrs. Heywood and Ram.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) 1928. Mar. 19.

THOMAS AND ANOTHER v. JONES AND ANOTHER.*

Probate—Practice—Costs—Will propounded in solemn form by co-executors — Benefit to solicitor executor's daughter—Allegations by defendants of lack of knowledge and non-disposing mind of testator — Will duly executed and pronounced for excepting residuary clause — Executors' right to costs out of estate curtailed — Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 31 (1) (*h*)—Rules of the Supreme Court, Order LXV., r. 1.

A solicitor who knowingly and for his own purpose involves his own interests with those of his client, where there is doubtful capacity and no competent proof of a capable consent, disregards his fiduciary obligations, and affords the Court ground for an order impugning his *prima facie* right as executor propounding a will to claim his costs of the action out of the testator's estate.

This *prima facie* right of an executor is absolute, as laid down by the Court of Appeal in *In the Estate of Plant* (42 *The Times* L.R., 443 ; [1926] P., 139), unless it is "lost or curtailed by such inequitable conduct as may amount to a violation or culpable neglect of his duty" (*per* Sir George Jessel, M.R., in *Turner v. Hancock,* 20 Ch.D., 303).

An innocent executor may be involved in liability for costs arising from the action of his co-executor (*In the Estate of Barlow,* 35 *The Times* L.R., 326 ; [1919] P., 131).

This was a probate action arising out of a dispute concerning the estate, worth about £32,000, of Mr. John Llewelyn Jones, a fruit merchant, of Cyncoed House, Hollybush-road, Penylan, Cardiff, who died on May 31, 1927, aged 67. The plaintiffs, Mr. Henry John Thomas, solicitor, of Park-place, Cardiff, and Mr. William Thomas Banbury, of Willapark, Tydraw-road, Cardiff, propounded as executors a will of the testator, dated May 5, 1927, and alternatively a will dated November 2, 1926. The defendants, Mrs.

* Reported by WILLIAM LATEY, Esq., Barrister-at-Law.

Minnie Jones, of Cyncoed House, the testator's widow, and Mr. Frederick Turner and Mr. Thomas Turner, her sons by a former marriage, put the plaintiffs to the proof of the due execution of the will of May, 1927, and said that the testator did not know and approve of the contents of that will, and was not at that time of sound and disposing mind. The defendants, by way of counterclaim, asked the Court to pronounce against the will of May, 1927, and for the will of November, 1926.

Mr. Bayford, K.C., Mr. Clifford Mortimer, and Mr. A. Richard Ellis appeared for the plaintiffs; Mr. Willis, K.C., and Mr. R. M. Middleton for the defendants.

LORD MERRIVALE granted probate of the will of May 5, 1927, excepting a residuary clause.

On the matter of costs his Lordship delivered the following considered judgment:—

Certain questions of costs arise in this case under circumstances which make a decision between the parties, as litigants in a dispute as to probate, a matter of some difficulty. The testator, who seems to have made a considerable fortune as a trader, had been for some time retired from business when in November, 1926, he was found to be suffering from a malignant disease which necessitated an operation. He spent a substantial part of the day before the operation with his solicitor, the plaintiff Mr. Thomas, framing a will. He was not able to make up his mind then about various matters, or about the disposal of the bulk of his estate after the death of his wife, the defendant Mrs. Jones, whom he had married late in life when she was a widow. He executed the engrossment, which was hastily prepared, and intended to make a new will later if he should recover.

After the operation he appeared for some time to be regaining his normal health, and he took up again with the solicitor, with whom he was on confidential terms, the question of the will. Various uncertainties in his mind however postponed further definite action and the testator presently became very seriously ill. Ultimately, after his condition was known to be hopeless, the solicitor, who had meanwhile been constantly visiting him, supposedly as a friend, attended at the house on May 5, 1927, for the purpose of obtaining execution of the will in question. It was signed and witnessed and after the testator's funeral, was produced and read. Very promptly, and not unnaturally in view of its effect on her position, it was contested by the testator's widow.

The will of May 5, was remarkable in that it severely reduced the provision made in the earlier will for the widow (with whom apparently the testator had remained on very good terms to the end of his life) and in that it contained a residuary clause in favour of new beneficiaries. Two of them were cousins of the testator, and one was the daughter of his solicitor, a girl of 19 with whom the testator had practically no personal acquaintance. This young lady is also named in the body of the will as a legatee of £1,500. The revoked will had appointed three executors, the solicitor, a former partner of the testator, and a friend of the testator's widow. The later will omitted the third executor. The testator had told Mrs. Jones that this executor had been included as her friend.

No medical opinion as to the testator's capacity and fitness to execute a will on May 5 was obtained by the plaintiff Mr. Thomas. There were scanty instructions in the testator's handwriting with regard to the new will but none as to the parts of the will of May to which I have referred. The widow supposed, upon information given her by the solicitor, that when the will of May 5 was executed, her husband was making a codicil of trifling effect. Apart from the knowledge of the testator there was no knowledge outside the solicitor's office of the fact that—as was alleged by the plaintiffs—the testator was repeatedly occupied during the later stages of his illness in discussing testamentary dispositions. The solicitor was supposed to be with him as an old friend.

The case for the will of May 5 depended in the main upon the oral evidence and entries of and documents prepared by the plaintiff Mr. Thomas. He failed to give any clear account of the directions given by the testator, of the intentions expressed or motives declared by him, and in respect of such matters as he enlarged upon he was an unconvincing witness. The documents which he produced were not connected to my satisfaction with the matter dealt with in them, and inasmuch as those relating to the period in doubt were documents of which the main feature was the benefaction to the solicitor's daughter they could not be accepted as being in themselves satisfactory or cogent evidence. The evidence of various reliable witnesses showed that the testator's powers, mental and physical, underwent a continuous process of enfeeblement from early in April to the time of his death on May 31, 1927. From April 26 onward the deterioration was marked and rapid. On April 29 and from then to the end the testator was subject to delusions, incapable of concentration, and, as Dr. Dunbar described it, "facile and childish." From May 2 onward he was unfit to transact any business which required a present exercise of judgment or the taking of a new decision.

Giving all such weight as I could to the evidence in support of the will of May 5 I found that before April 29 this instrument had been determined upon as to all its contents except the residuary clause. The disposal of the residue of the estate after the specific devises and bequests in the will had not been decided by the testator. There had been conversations between the testator and the plaintiff Mr. Thomas with regard to it, and the name of Mr. Thomas's daughter had been from time to time spoken of, but the matter was at large; so much so that after the time at which Mr. Thomas at the trial suggested that it had been settled in the form in which it appeared in the will of May 5 he dictated for engrossment a clause which would have given his daughter not a third or fourth but half of the residue. The residue was spoken of in the course of the argument as a body of assets which upon the death of the defendant, the testator's widow, would exceed £19,000.

Upon close consideration, after the case was complete, of the evidence as to the testator's condition on May 5 I was confirmed in the view which the case presented to my mind as I heard it, that the testator had not on that afternoon, or at any material time on that day, capacity to determine upon any testamentary disposition. He had not then a disposing mind, memory, or understanding. He had, however, such a degree of knowledge and understanding as to recognize those about him, to know the plaintiff Mr. Thomas quite well, to remember that the plaintiff and he had been engaged in preparing his will, and to appreciate that he was asked to execute as his will the document which was then put before him. Testamentary capacity to any greater extent he had not, and I have not been able to satisfy myself that

any understanding person who fully considered the facts which were already known, or which were then apparent to this plaintiff, could have been convinced that he had.

In the view that I took of the case it appeared to fall within the operation of a principle of testamentary law enunciated in 1883 by Sir James Hannen, President, in a case of *Parker v. Felgate* (8 P.D., 171, at p. 174), and in 1902 affirmed by the Judicial Committee of the Privy Council in a case of *Perera v. Perera* (17 *The Times* L.R., 389 ; [1901] A.C., 354). The law was stated by Sir James Hannen in these words :

" A person might no longer have capacity to go over the whole transaction, and take up the thread of business from the beginning to the end, and think it all over again, but if he is able to say to himself, ' I have settled that business with my solicitor, I rely upon his having embodied it in proper words, and I accept the paper which is put before me as embodying it,' it is not, of course, necessary that he should use those words, but if he is capable of that train of thought, in my judgment that is sufficient." Lord Macnaghten, Lord Davey, Lord Lindley, and Sir Ford North were members of the Board by which Sir James Hannen's pronouncement was approved.

Applying the principle laid down in *Parker v. Felgate* (*supra*) I came to the conclusion that the testator's execution of the will so far as it had been resolved upon while he had capacity was *pro tanto* good execution—that the residuary clause was severable and must be excluded from probate, and that probate of the remaining parts of the will could be and ought to be granted.

Probate of the will of May 5, 1927, excepting the residuary clause, having been decreed, the question as to costs arose which it is necessary now to determine. On behalf of the plaintiffs, as the executors, it was said that they had established the will of the testator and that, whether they got judgment with costs or not, they had become entitled as a matter of law and without any order of the Court to take their costs out of the estate. As to the costs of the defendants it was submitted that while there is a discretionary power in the Court to leave the defendants to pay them, or to order payment of all or part out of the estate, there is no power in the Court to order payment by the plaintiffs.

The rules of practice, if not of law, with regard to the costs of executors in and about probate of testamentary papers were fully discussed recently in the Court of Appeal in the case of *In the Estate of Plant* (42 *The Times* L.R., 443 ; [1926] P., 139), and it was definitely determined that under the Judicature Acts and Rules, and especially under Order LXV, Rule 1, an executor who succeeds in an action in establishing a will is *prima facie* entitled to have costs as between solicitor and client out of the testator's estate and that he has this right absolutely unless, as was said of a trustee by Sir George Jessel, Master of the Rolls, in *Turner v. Hancock* (20 Ch.D., 303, at p. 305) the *prima facie* right is " lost or curtailed by such inequitable conduct . . . as may amount to a violation or culpable neglect of his duty," and subject to the limitation stated by Lord Justice Lindley in *In re Beddoe* ([1893] 1 Ch., 547) that the costs and charges in question are " costs and charges not improperly incurred."

The plaintiffs are entitled to be reimbursed from the testator's estate for costs and charges properly incurred. Are they entitled then, as a matter of law in all events, to costs incurred by reason of their insisting upon probate not only of clauses expressing the testamentary mind of the testator but of a clause which was not his testamentary act ? This must depend, I think, upon the two tests supplied by the authorities which I have mentioned. Did they properly incur these additional costs, or were the same incurred by reason of a " violation or culpable neglect of a duty " ?

The answer to the inquiry so raised depends on a clear view of the conduct of the plaintiff Mr. Thomas. Not with a sole regard to his duty as a solicitor he laboured whilst the testator's powers were failing to secure a will in a form advantageous to a member of his own family. In a position in which his parental interests constantly influenced his action he had long interviews with the testator, professedly as a friend, of which no account could be had except his own. With accurate information of the opinion of the medical attendants as to his client's desperate condition he omitted to consult them as to his client's disposing capacity. He moreover omitted to secure that there should be competent independent evidence of the client's capacity to execute a will.

After the death of the testator the plaintiff Mr. Thomas on behalf of the executors unsuccessfully used ingenious means to secure statements in support of the will of May 5 from the doctors and others, and knowing the opinion of the doctors, that their patient had not testamentary capacity at the material times, the plaintiffs did not call them as witnesses. This course was taken not because the plaintiffs, as executors, challenged the honesty or competence of the medical men, but because as litigants, and one of them an interested litigant, they desired the tactical advantages of cross-examination of the doctors as witnesses called by their opponents. In all the things with which I have dealt the course of the plaintiffs was governed by the interests of the plaintiff Mr. Thomas.

The issues involved in the trial were confused, and the length of the hearing was very substantially increased by the mode in which the plaintiff Mr. Thomas fell back on vague general statements when critical matters were in question, and by the difficulty thus caused in testing material allegations of fact which rested entirely on his scanty testimony as to his own conduct which he, an interested witness, gave to this Court. In my judgment a solicitor who knowingly and for his own purpose involves his own affairs and interests with those of his client, without the client's effectual consent or where there is doubtful capacity and no competent proof of a capable consent is a wrongdoer. Being in a position of trust he disregards his fiduciary obligation. This I find to have been done by the plaintiff Mr. Thomas. There are, therefore, grounds in this case for an order which impugns the *prima facie* right of executors propounding a will to receive out of the testator's estate costs not otherwise provided for.

In some particulars the position of the two plaintiffs differs. The plaintiff Mr. Banbury had not the skill or knowledge any more than he had the professional responsibility of the plaintiff Mr. Thomas. At an early period after the testator's death, however, with abundant means of knowledge of the doubts which existed, he made common cause with his co-plaintiff. I accept the evidence of Dr. Dunbar, in preference to his, as to what took place at an interview when Mr. Banbury had full means of knowing the nature and prospects of the controversy over this will of May 5. The evidence of the testator's widow, Mrs. Jones, and his sister, Mrs. Morgan, gave me a surer view, also, as to the state of the testator after

May 5 than did Mr. Banbury's account of it. Further, for the conduct of the cause as a whole he must be held jointly responsible with his co-plaintiff. I must not disregard, either, the view expressed in the Court of Appeal in the case of *In the Estate of Barlow* (35 *The Times* L.R., 326 ; [1919] P., 131), that in proceedings for probate an innocent executor may be involved in liability for costs involved by the action of an executor affected by knowledge.

Ascertainment by taxation of the proportion of the costs, liability for which ought not to fall on the estate, is in the present case impossible. There is no clearly severable issue with regard to which they can be measured. Probably the costs in this action were doubled by the errors in conduct which I have found to be established against the plaintiff Mr. Thomas. I am satisfied beyond doubt that they were increased by more than a third.

I therefore direct that the plaintiffs' costs of the action be taxed and that as to one-fourth of the ascertained amount they be borne by the plaintiffs personally. The defendants' costs have also to be dealt with. The defence, though no doubt inspired by a natural sense of grievance which was not an actionable wrong, supplied the Court with much necessary information not proved by the plaintiffs. The will of May 5 was established without the residuary clause. As to the residuary estate there is an intestacy and the widow has a statutory interest in it, antecedent to the rights of the next-of-kin. To direct payment of the whole of the costs of the defendants out of this fund would be manifestly unsatisfactory. On the other hand, neither the whole of these costs nor a separable part of them attributable to a distinct issue can be taxed against the plaintiffs either as executors or personally.

I have arrived at the conclusion that three-fourths of the costs of the defence shall come out of the estate, and that, as the defendants' costs were needlessly increased in like manner with the costs of this action as a whole, one-fourth of the defendants' costs should be paid by the plaintiffs personally.

[Solicitors—Messrs. Kinch and Richardson, for Mr. Henry John Thomas, Cardiff ; Messrs. Wrentmore and Son, for Mr. Ewan G. Davies, Cardiff.]

Court of Appeal.
(Scrutton and Sankey, L.JJ., and Romer, J.)

1928.
Apr. 3.

HARDIE AND LANE, LIMITED v. CHILTON AND OTHERS.*

Conspiracy—Duress—Trade union—Member's breach of rule—Threat to put on "stop list"—Offer to withdraw threat for payment—Payment—Whether money recoverable.

The plaintiffs were motor dealers and were members of a trade union which had rules providing that motor cars were not to be sold below a certain price and that persons breaking the rules might be put on the "stop list," in which case other members were forbidden to deal with them. By giving certain allowances to the purchaser of a car the plaintiffs sold it at less than the fixed price and the "stop list" committee of the trade union informed them that their names would be put on the "stop list" unless they paid £200 to the indemnity fund of the union. The plaintiffs paid a first instalment of £100 and brought an action against an official and two members of the committee of the union to recover it on the ground of conspiracy to obtain it from them under duress.

Held, that it was lawful to put a man on the "stop list" for breaking a rule, and the intimation of an intention to put him on it when he had broken a rule could not be unlawful, and the agreement to accept the payment was not unlawful but was a mere compromise of a dispute which involved no criminality, and therefore the action failed.

Rex v. Denyer (42 *The Times* L.R., 452 ; [1926] 2 K.B., 258) disapproved.

This was an application by the defendants for judgment or a new trial in an action tried before Mr. Justice Avory and a special jury.

In the action Messrs. Hardie and Lane, Limited, motor dealers, of Woodstock-street, New Bond-street, W., claimed from Mr. John Chilton, Mr. Harry Arnold Bennett, and Mr. Percy Ingram Denyer, of 157, Great Portland-street, W., officials of the Motor Trade Association, damages for alleged conspiracy and misrepresentation.

The Motor Trade Association was formed to protect the motor industry and the interests of manufacturers, wholesalers, and retailers of motor-cars and goods. Its rules forbade the sale of certain articles at a price above or below the "protected price." Persons who broke the rules could be put on the "stop list," in which case other members were forbidden to deal with them.

The plaintiffs' case was that in January 1926, a man named Neale, who was employed by the association, called on them, represented that he was an old customer, and that he wanted a Rover motor-car, but could barely afford to pay for it, and asked for a discount. The plaintiffs refused to give him a discount, but they agreed not to charge him for delivery, to pay a year's tax for him, and to give him some number plates. In March, 1926, they were charged by the association with having sold the motor-car at less than the proper price, which was £225, by the amount of the allowances. Later, they were told that the "stop list" committee had found the charges proved, but that the matter might be ended by their paying £200 to the indemnity fund of the association and signing an undertaking. Fearing that the only alternative was to be put on the "stop list," the plaintiffs paid £100 on account to the association, and £7 to advertise their undertaking, and they also bought back the motor-car, which they afterwards resold at a loss of £25. The plaintiffs complained that the association had no right to fine them, and that they had suffered damage through being influenced by the threats of the defendants.

The defendants denied that there had been any conspiracy or any misrepresentation.

The jury returned a verdict for the plaintiffs, assessing the damages at £132, and judgment was entered accordingly.

The defendants appealed.

Sir Patrick Hastings, K.C., and Mr. St. John Field

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appeared for the appellants ; Sir Henry Slesser, K.C., and Mr. Harold Simmons for the respondents.

Sir Patrick Hastings, in opening the appeal, said that it was based partly on misdirection, but primarily it was an application for judgment on the ground that there was no evidence on which the jury could find as they had done. The Judge had taken the view that there was no defence to the action.

The plaintiffs were a firm of motor dealers. The defendants were three persons connected with the Motor Trade Association since 1920. Mr. Denyer was a paid official and the two other defendants were members of the committee. Counsel referred to the objects of the association and said that there was also a practice, which was not specifically provided for by the rules, that in a case in which they had decided that a certain person ought properly to be put on the "stop list," that person was given an option, in the alternative, of paying a fine and of publishing an apology. The plaintiffs were members of the association and were aware of the rules and of the alternative which had been provided. Admittedly, the plaintiffs had committed an offence. They were told that they would be put on the "stop list," but that if they desired it they might pay a fine instead, and they agreed to do so. They then paid the first instalment of the fine, but, subsequently, on hearing of the decision of the Court of Criminal Appeal in *Rex v. Denyer* (42 *The Times* L.R., 452 ; [1926] 2 K.B., 258), which made the levying of such a fine an offence against the Larceny Act, 1916, they refused to pay the remaining sum.

No evidence was called at the trial on behalf of the defendants.

He (counsel) contended that what the plaintiffs complained of gave no cause of action, because the defendants had done nothing more than they were perfectly entitled to do in law or in fact. The action had been launched as one based on blackmail, and the defendants had been stigmatized as "highwaymen." On the question of conspiracy he referred to *Ware and De Freville, Limited v. Motor Trade Association* (37 *The Times* L.R., 213 ; [1921] 3 K.B., 40). He submitted that that case decided that what the defendants had done—namely, putting persons on the "stop list" for breaches of the rules—was perfectly lawful, and that it was, therefore, not unlawful to threaten to do so. In *Sorrell v. Smith* (41 *The Times* L.R., 529 ; [1925] A.C., 700) a threat to do what one was entitled to do was held not to be an illegal act. As to the decision of the Court of Criminal Appeal in *Rex v. Denyer* (*supra*), upon which the plaintiffs relied, he submitted that it was wrongly decided and was not binding upon the Court of Appeal. It was in direct conflict both with *Ware and De Freville's* case (*supra*) and with *Sorrell v. Smith* (*supra*).

Counsel also referred to *Williams v. Bayley* (L.R., 1 H.L., 200).

There was no evidence at all that the defendants had entered into a conspiracy, and on that question he submitted that the Judge had misdirected the jury with regard to the trap which it was alleged the defendants had laid to find out whether the plaintiffs had sold motor-cars at prices below the "protected price." All charges of misrepresentation with regard to those matters were abandoned. With regard to *Rex v. Denyer* (*supra*) the prosecutor in that case was not a member of the association. In this case, however, the plaintiffs were members of the association. Concluding, counsel submitted that the appeal ought to be allowed and judgment entered for the defendants.

Mr. St. John Field, following on the same side, said that the Court of Appeal were not bound by the decision of the Court of Criminal Appeal in *Rex v. Denyer* (*supra*). He submitted that the Court of Criminal Appeal was equivalent to a Divisional Court and that the Court of Appeal would treat the decisions of that Court as they would treat the decisions of any Divisional Court.

Sir Henry Slesser, for the respondents, supported the verdict and judgment of the Court below. He said that the association was really a trade union and was a body which had no power under its constitution to take any money from the plaintiffs at all. There was power to put the plaintiffs on the "stop list," but no power to fine them or penalize them by making any compromise with them by way of accepting money. If the money which the plaintiffs paid was not paid under an agreement, either it was paid as a gift, or it was paid under compulsion or duress, and the authorities were conclusive that money paid in such circumstances could be recovered.

Admittedly, in a proper case, the defendants were entitled to place the plaintiffs on the "stop list," but that was quite irrelevant to the issue, the whole question being whether the money was paid by the plaintiffs under coercion, lawful or unlawful ; if it were, it was quite immaterial whether the threat to put the plaintiffs on the "stop list" was lawful or unlawful. In all the cases, the test was not the legality or illegality of the act, but whether the payment was made under duress or coercion.

There was evidence to support the jury's findings, and the question had been properly left to them. He submitted that the plaintiffs were entitled to recover from the defendants the amount which they had been forced to pay. The verdict and judgment ought to be affirmed.

Sir Patrick Hastings, in reply, said that the whole cause of action as fought in the Court below was based on conspiracy. He submitted that the defendants had only done in this case that which the Courts had said they could do, provided that they did it in furtherance of their trade interests. There was no evidence of conspiracy by the defendants. The appeal ought to be allowed and judgment entered for the defendants.

Lord Justice Scrutton delivered the following considered judgment :—

This is an appeal from a refusal of Mr. Justice Avory to withdraw the case from the jury and enter judgment for the defendants.

The facts are these. An association, called the Motor Trade Association, is registered as a trade union. Its objects are to protect the interests of motor manufacturers and traders. One of the matters with which it endeavours to deal is to prevent the agents who sell cars for manufacturers from selling cars either above or below the manufacturers' list price. To sell below the list price, if this is done by competing agents, disturbs the manufacturers' system of regular prices and of agency ; as does selling above the list price in times of scarcity of cars. The association endeavours to enforce the list price, by putting those who contravene it, whether members of the association or not, on a "stop list." The effect of being on this stop list is that no member of the association will supply goods to the named person, or to any one who supplies him with the protected goods. The legality of this system, even against a non-member, was

determined by the Court of Appeal in *Ware and De Freville, Limited v. Motor Trade Association* (37 *The Times* L.R., 213 ; [1921] 3 K.B., 40), and this decision was approved by the House of Lords in *Sorrell v. Smith* (41 *The Times* L.R., 529 ; [1925] A.C., 700).

Hardie and Lane, Limited, were motor agents and had been members of the Motor Trade Association for some years. The directors were Captain Hardie and Captain Lane. Captain Hardie said that he knew that the objects of the association were to prevent alteration of list prices by agents and to promote fair dealing in the trade. He joined them for that reason, and because in some cases he could get a better trade discount by doing so. He knew that people were put on the "stop list" for selling at prices different from the list price, and he was anxious that such a system of underselling should be stopped. He knew also that sometimes the association, instead of putting on the "stop list" a man who had broken the rules, allowed him to escape it by paying a sum of money towards the expenses of the association and publishing an apology. He recognized that the latter was a more lenient course than putting a man on the "stop list," which was very serious.

In these circumstances, Captain Hardie sold to an agent of the association, who was sent to find out if he was keeping the rules about list prices, or, as he said, to "trap" him, a car for less than the list price, by taking the full list price, but including in the consideration for it a full year's tax—about £9—and some minor matters. Captain Hardie admitted that when he sold the car in this way, he knew that, if he was found out, he might go on the "stop list," but thought that he might only be warned. He was called before the "stop list" committee of the association, with notice of the charge against him, and the committee informed him by a letter of March 18, 1926, that if he would pay £200, buy back the car at its list price, and insert a signed undertaking in the association's journal, he would not be put on the "stop list." He assented on March 22, but got the fine altered to payment in two instalments.

On March 24 he sent the association a cheque for £332, being £225 for the repurchase of the car, £7 the cost of advertising the undertaking, and £100 for the first instalment, the balance to be paid in three months. In the summer a case of *Rex v. Denyer* (42 *The Times* L.R., 452 ; [1926] 2 K.B., 258), was reported in which the Court of Criminal Appeal decided that to obtain money by a threat of putting a person on the "stop list" was criminal. The plaintiffs thereupon declined to pay the last instalment and on October 28, 1926, issued a writ against the defendants. Denyer was the agent of the "stop list" committee who had communicated with the plaintiffs. Chilton and Bennett were probably selected as defendants and representatives because on a writ issued on July 17, 1926, their names had been selected to sue, as members representing the Motor Trade Association, on behalf of themselves and all other members of the Motor Trade Association, for the second instalment of £100. This action was discontinued, and on June 29, 1927, the Motor Trade Association, as sued in the name of representative members, was struck out of the present action by the Court of Appeal (43 *The Times* L.R., 709 ; [1928] 1 K.B., 663) on the ground that the fluctuating members of the Motor Trade Association had not the same interest so that any member could represent them, and that the Motor Trade Association being a trade union could not be sued in tort. As a matter of fact, Chilton was the chairman of the "stop list" committee ; all that was proved about Bennett was that he was believed to have been present at one meeting of the "stop list" committee, and that his name was put on the first writ as a representative member.

In the statement of claim the allegation of conspiracy was expanded into an allegation that Chilton, Bennett, and Denyer entered into a conspiracy to obtain money fraudulently and by duress from the plaintiffs without any consideration. The allegation of fraud was abandoned at the trial and the allegation "without consideration" was obviously unsupportable in view of the fact that the money was paid to procure that the plaintiffs should not be put on the "stop list," a most valuable consideration.

The case therefore resolved itself into an allegation of conspiracy to obtain money by duress, occasioned by the threat, menace, or intimation, that the plaintiffs would be put on the "stop list" if the money was not paid, and could escape being put on the stop list if the money was paid.

Conspiracy as a cause of action exists either when the end aimed at by the agreement is unlawful and causes damage, or when the means by which a lawful end is pursued are unlawful and cause damage. An agreement is not actionable when neither the end nor the means are unlawful.

An agreement to protect trade interests by refusing to supply a trader departing from fixed prices with any goods either directly or indirectly, and announcing that refusal by putting his name on a "stop list," has been held legal by this Court in *Ware and De Freville v. Motor Trade Association* (*supra*), as approved in *Sorrell v. Smith* (*supra*) by the House of Lords, although it causes damage to an individual, if it is done in reasonable protection of trade interests, as was found to be the case. If the action of putting on the "stop list" is lawful, it is not unlawful to say that you are going to do it. In *Sorrell v. Smith* (*supra*) the Lord Chancellor (Lord Cave) said, at p. 712 : "(1) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable. (2) If the real purpose of the combination is, not to injure another but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues."

And at p. 714 : "The second proposition, of course, assumes the absence of means which are in themselves unlawful, such as violence or the threat of violence or fraud. Your Lordships were asked to say that a threat to withdraw custom or supplies falls within this category, and of itself introduces an element of illegality ; but although there are passages in the books which appear to support that contention, it did not appear to me that the contention was made good. If a trader may withdraw his custom without breaking any law, he may with equal legality express his intention of withdrawing it unless his wishes are met, subject always to the condition that the purpose of the threat is to forward his trade interests and not wilfully and ultroneously to injure the trade of another : see on this point *Hodges v. Webb* (36 *The Times* L.R., 311 ; [1920] 2 Ch., 70) and *White v. Riley* (36 *The Times* L.R., 849 ; [1921] 1 Ch., 1) and the observations of Mr. Justice Holmes in the American case of *Vegelahn v. Guntner* (167 Mass., 92)." And Lord Dunedin said, at page 730 : "Expressing the matter in my own words, I would say that a threat is a pre-

intimation of proposed action of some sort. That action must be either *per se* a legal action or an illegal, *i.e.*, a tortious action. If the threat used to effect some purpose is of the first kind, it gives no ground for legal proceeding ; if of the second, it falls within the description of illegal means, and the right to sue of the person injured is established."

I adopt the language of Mr. Justice Holmes in *Vegelahn v. Guntner* (*supra*) that the unlawfulness of threats depends on what you threaten, and of compulsion on how you compel. Lord Justice Atkin expressed the same point in *Ware and De Freville's* case (*supra*). He said, at page 81 : "What is meant by coercion? If it means no more than procuring a person to do what he does not want to do, it covers many cases where no cause of action can be suggested to exist. The use of parental rights, the use of rights of property, the deprivation of social advantages, may be so applied as to make it plain to the person affected that he must yield or be ruined. A necessary servant or agent may compel advantages to himself or herself by offering as an alternative the withdrawal of his or her services ; and in the same way may compel disadvantageous treatment of third parties. I conceive that the logical mind of Mr. Justice Cave on his view of the law was working on lines of necessity in accepting the view that if the cook says to the master : 'Discharge the butler, or I leave you,' and the butler is consequently discharged, the cook is liable to an action (*Allen v. Flood* (14 *The Times* L.R., 125 ; [1898] A.C., 1, at p. 36)). Yet the decision in *Allen v. Flood* (*supra*) repudiates this view. In my opinion the wrongfulness of the inducement applied to the third person cannot depend upon its weight. Coercion therefore cannot simply mean successful or even inevitably successful inducement. I am satisfied myself that it means nothing at all on a question of tort except in reference to the means employed." There is also an excellent passage in the judgment of Mr. Justice Peterson in *Hodges v. Webb* (*supra*, at pp. 87-90).

I take it, therefore, to be clear law that, if it is lawful to put a man on the "stop list" for breaking a rule, to say that you are going to put him on the "stop list" when he has broken that rule cannot be illegal at common law. And I am quite unable to understand how it can be illegal to say, "I could lawfully put you on the 'stop list,' but if you will do something which is not illegal, and is less burdensome to you than the 'stop list,' I will not exercise my power." For instance, the Motor Trade Association has no express power to demand an apology, or an undertaking for future conduct, from a member who undersells, but it seems to me impossible to say that a statement, that such a member will go on the "stop list" unless he apologizes or gives an undertaking for the future, is a threat to do an illegal act, or a threat which is itself unlawful, and though the Motor Trade Association has no express power to ask for money as a more lenient alternative to the "stop list," which the plaintiffs admit it to be, it appears to have the ordinary power of any individual of compromising a dispute which involves no criminality but only a breach of rules. A member of a club after dinner, in a row, damages some club property. He is told that he is liable to expulsion, but that the committee will not enforce it if he makes good the damage. Are the committee conspirators who have obtained by threats money or money's worth which can be recovered by the member? In *Fisher and Co. v. Apollinaris Company* (L.R., 10 Ch., 297) Fisher was prosecuted for unlawfully using the company's trade-mark. The prosecution was abandoned on an agreement by Fisher to give an apology which might be published. Fisher afterwards endeavoured to stop publication on the ground that the apology was obtained under duress of the criminal prosecution. Lord Justice Mellish says, at page 303 : "There was no authority for saying that it was wrong in the prosecutors to withdraw from such a charge of this kind. The prosecutors allowed him to state that his offence was not wilful, and accepted an apology. Such compromises are constantly made before criminal Courts in cases of assault or libel. In some cases there is a payment of money ; in other cases, no payment at all ; and it has never been considered that there was anything wrong in such transactions. It would, of course, be different if there was any case alleged of extorting money under threats." All compromises of proceedings are induced by the desire to avoid the continuance of proceedings which will go on if the compromise is not arrived at, but there is nothing illegal in agreeing to do a legal act in order to avoid action which the other party may legally take.

When the end or means are illegal, the case is of course different. It was thought to have some bearing on the case below to introduce Dick Turpin's "Your money or your life." This when expanded is : "I will murder you," (crime No. 1) "if you do not allow me to rob you" (crime No. 2). What possible relevance this can have to a statement that I will not do an act that I may lawfully do, if you will do an act that you may lawfully do, but I shall do my act, if you do not do your act, I cannot understand. I regret that I did not add to my list of question begging epithets in *Ware's* case (*supra, at* p. 69), "Dick Turpin" and "highwaymen." A. has land facing a new house of B.'s. A. proposes to build on that land a house which will spoil the view from and the light to B.'s house, and depreciate the value of his property. B. implores A. not to build. A. says : "I will not build if you pay me £1,000 ; but I shall build if you do not." B. pays the money and A. does not build. Could it be seriously argued that B. could recover the money back as obtained by threats ? A valued cook comes to her mistress and says : "Raise my wages by £20 a year or I shall give you notice." The mistress foreseeing and much disturbed in mind by the tragedy that the loss of the cook will involve pays the money. Can she recover it as obtained by threats ? And examples innumerable could be quoted.

Cases involving agreements to abstain from prosecution in a matter of public interest if money is not paid are obviously different. To know of a felony and not to inform the King's officers is misprision of felony (Archbold, 27th Edn., p. 1430). An agreement not to prosecute for a misdemeanour of a public character is void as contrary to the public interest. An agreement to contrive to obtain money by an agreement not to prosecute would both have an unlawful end and be obtained by unlawful means. The learned Judge below carefully directed the jury in considered terms to which I refer but which I do not read in full. I shorten them, I hope accurately, into a direction that either for two or more to agree to obtain, or for one to obtain, money to which there is no legal claim either for themselves, or for a third person, by threats calculated to deprive a reasonable man of his voluntary power of action, is illegal.

In my opinion this direction is wrong in the following respects : (1) Where the money is not legally

due without an agreement, but is due under an agreement obtained by the threat to do an act which may be lawfully done if the agreement is not made, both the agreement and the threat are lawful; the direction would make them unlawful. If the agreement is unlawful, or the threat inducing it is a threat to do an unlawful act, the case would be different. In the present case, it was lawful to put a member who broke the rules in the "stop list"; it was lawful to say that one was going to do it; it was lawful, or not unlawful, to agree not to exercise the legal right to put a man who broke the rules on the "stop list," if a more lenient alternative in the shape of a payment of money was exercised. (2) This is a minor form of the same point. In my opinion the direction is wrong if it assumes that to threaten to do what you have a legal right to do can ever be a ground for obtaining back money alleged to be paid under duress. A man lawfully claims a lien on property of which you are in urgent need; because of your urgent necessity you pay, the necessity disturbing your power of judgment. Is it suggested that you can recover the money back? To do so, you must prove that the lien is unlawful. A Judge tells a prisoner who has stolen that if he makes restitution his sentence will be lighter; terrified by the prospect of a heavy sentence, the prisoner makes restitution. Can he obtain the property back as having been handed over under duress? (3) It appears to be clear at common law that duress to goods does not avoid an agreement. (See *per* Lord Denman in *Skeate v. Beale*, 11 Ad. and E., 983, at p. 990.) It is difficult to see, therefore, how a threat not to supply goods can be valid ground of duress. Money paid under duress to goods can only be recovered in an action for money had and received if the detention of the goods or refusal to supply them was illegal. But forbearance to do an act which you have a legal right to do is good consideration for an agreement otherwise lawful (*Jones v. Ashburnham*, 4 East, 455).

It follows from these reasons: (1) The Judge below should have withdrawn the case from the jury because the evidence only showed an agreement to forbear from doing a legal act, putting the plaintiffs on the stop list, if the plaintiffs would do an act which was not unlawful, *i.e.*, pay money which the plaintiffs might legally pay and the association legally receive; and such an agreement was not a conspiracy, there being neither unlawful end nor unlawful means and there being, therefore, no evidence of lack of reasonable and probable cause for the demand. (2) There was no case of obtaining money by duress, because the only duress was a threat, in effect, not to supply goods, and such a threat could not legally be held to deprive any reasonable man of his voluntary power of action or constitute any ground for twelve reasonable men making such a finding. Indeed, all that Captain Hardie said was that he was frightened of being put on the "stop list," and he paid the money to avoid going on the "stop list." He said: "It was better than going on the stop list." Persons who have broken rules and know it are often frightened of the consequences, but when the consequences are not unlawful an agreement to avoid them by doing something not itself unlawful is not illegal. (3) In my opinion, also, there was no evidence that Bennett was a party to any agreement, good or bad, and I doubt whether there was any as to Chilton, but the first two reasons are enough to justify the Court in setting aside the present judgment. It is to be noted that the plaintiffs themselves put in the answers to interrogatories of Chilton and Bennett, which state that neither of them knew of or authorized or sanctioned the visit of Neale to the plaintiffs; that neither of them published or was responsible for *Motor Commerce*; and that neither of them received any money from the plaintiffs, it being entirely a Motor Trade Association matter.

I think it better to say something about the case of *Rex v. Denyer* (*supra*), decided after the House of Lords had in *Sorrell v. Smith* (*supra*) upheld the legality of the "stop list," as decided by the Court of Appeal in *Ware's* case (*supra*). In *Rex v. Denyer* (*supra*) the Court of Criminal Appeal held that it was criminal to obtain money for the association by a threat of putting on the "stop list." The statute contravened was said to be the Larceny Act, 1916, section 29 (1), making it an offence punishable with penal servitude for life for any person, knowing the contents thereof, to utter a letter demanding of any person with menaces and without any reasonable or probable cause any valuable thing. On this I would remark that the language of the statute shows that you may demand a valuable thing with menaces with reasonable or probable cause without committing any offence; and the most obvious reasonable or probable cause appears to me to be when you have a legal right to do the thing which you threaten to do, on the assumption that the obtaining of the valuable thing thereby does not involve any criminal act such as an agreement not to prosecute or not to inform the authorities of a felony. In *Ware and De Freville's* case (*supra*) the person put on the "stop list" was not a member of the association, and had received an offer that if he paid a donation to a trade charity, gave an apology, not to be published, and an undertaking not to break the rules in future, he would not be put on the "stop list." He refused and was put on the "stop list." The conditional threat was not treated by the Court of Appeal or the House of Lords as having any effect on the legality of the transaction. In *Rex v. Denyer* (*supra*) the menace was to put a person not a member on the "stop list," *i.e.*, not to supply him with goods, both legal acts. In the present case the person was a member of the association who had broken the rules, thereby rendering himself liable to be put on the "stop list," though there would be nothing contrary to the public interest in not putting him on the "stop list." In such circumstances it appears to me clear that a person menacing or stating that he would do an act which he had a legal right to do and compromising the menace by an agreement to substitute a more lenient and not unlawful penalty was guilty of no criminal offence against the Larceny Act, 1916. In my opinion the case of *Rex v. Denyer* (*supra*) was wrongly decided. There was no evidence from which a jury could find want of reasonable or probable cause, no evidence of any menace constituting a crime, and the Judge should, as in this case, have withdrawn the case from the jury. I am not saying that there may not be cases where a threat to do an act not unlawful may come within the statute though I find it difficult to imagine them. Generally when the threat is to make public something which it is not desired to publish, but which is true, the publication may be good cause for a criminal prosecution for libel, on the ground that, though true, it is not for the public interest to publish a defamatory statement, which may lead to a breach of the peace. Cases of this class may afford evidence of lack of reasonable or probable cause.

Before coming to this conclusion I have, of course, carefully considered the reasons given for the judgment in *Rex v. Denyer* (*supra*). Section 29 of the

Larceny Act, 1916, after the general subsection acted on in *Rex v. Denyer* (*supra*), contains subsections dealing with threats to accuse of specified crimes of a serious character, *e.g.*, subsection (3), and this, in clause (*b*) of subsection (2), is enlarged into "any felony." Crimes not coming within these subsections must be dealt with under subsection (1) which limits the menaces or demands to those made "without reasonable or probable cause," a provision omitted in the other subsections. As I have pointed out, this assumes that there may be reasonable or probable cause for demanding money for not accusing of criminal acts, and the trade mark prosecution in *Fisher's* case (*supra*) would, with its compromise, be an example of such a case. Subsection (4) is not very intelligible. As some of the subsections make accusation of crime the offence, it is not quite clear why it is immaterial whether the threats are of accusation. I suppose the subsection means that it is not necessary that the threat be of violence, or personal injury, or injury to goods, injury meaning unlawful damage, and that there may be criminal threats which are not threats of an accusation ; but they must in my opinion be threats to do an unlawful act.

The Lord Chief Justice in *Rex v. Denyer* (*supra*) obviously recognized that some observations of members of this Court in *Ware and De Freville, Limited v. Motor Trade Association* (*supra*) were contrary to the view which he was expressing, but he thought that they were *obiter dicta*. As the case was one of a threat to place on the "stop list" if money was not paid, put into execution when money was not paid, I do not think that the observations were *obiter ;* anyhow, I think they were right. I selected the case of a proposal to abandon a libel action, which otherwise would be prosecuted, if money was paid to a charitable institution. The Lord Chief Justice says that the case is one in which *ex hypothesi* the person making the claim has a money claim sounding in damages. What does this mean ? The plaintiff in the libel action may be making a claim which in the opinion of the jury will fail, but he has a legal right to compromise it by accepting a payment of money. Does not the Lord Chief Justice's observation show that a threat to do what the claimant has a right to do, *i.e.*, to proceed with the action, does not invalidate, or render criminal, a proposal to settle that claim by payment of money, with a threat to proceed if the money is not paid ; which is contrary to what the judgment is saying. The quotation from *Rex v. Dymond* (36 *The Times* L.R., 421 ; [1920] 2 K.B., 260, at p. 265), which is directed to saying that belief that the person threatening has reasonable or probable cause for threatening is no justification for threatening if, in fact, the belief is erroneous, does not deal with what is to me the more obvious position that if there is no evidence on which a jury could find lack of reasonable or probable cause, in that the act threatened is one which the defendant had a right to do, the Judge should withdraw the case from the jury. And such a case is when a threatener has a legal right to do what he threatens. At the middle of page 268 the Lord Chief Justice states the proposition on which this judgment rests, and says, "it is not merely untrue ; it is precisely the reverse of the truth." I can only say that I think the proposition is, for the reasons given in this judgment, true, and supported by the judgments of the House of Lords, and, to me at any rate, it is obvious. The Lord Chief Justice says that it is an excuse which might be offered by blackmailers to an indefinite extent. I cannot understand this. The blackmailer is demanding money in return for a promise to abstain from making public an accusation of crime. The very agreement is illegal, even if a crime of a certain class has been committed. A man has no right to suppress his knowledge of a felony. How can this be analogous to proposing not to do a thing which you have a legal right to do, if money is paid to you, there being no public mischief in the agreement ? I do not understand the next sentence about "nexus or relationship." Supposing the person threatened with the "stop list" himself says, before any demand of money, "If you will not put me on the 'stop list,' I will pay £100 to any charity that you select, and give an undertaking not to break the rule in future," would there be anything illegal in accepting the offer, and would not there be the direct "nexus or relationship" between the offer and the consideration for which it is offered? Does it then make any difference from which side the proposal comes? Lastly, the judgment quotes a passage from the summing up of Mr. Justice Talbot : "A person has no right to demand money, according to the Act of Parliament, as a price of abstaining from inflicting unpleasant consequences upon a man." This, as expressed, is inaccurate, as it would include the cases which I have put above, of damaging a man's property, or light, or view, unless he pays money, or the cook's giving notice. Its inaccuracy is in not excepting the cases where the man has a legal right to inflict unpleasant consequences. In that case there is no evidence of want of reasonable or probable cause to go to the jury, and there is nothing illegal in the agreement to abstain from inflicting such consequences for a money consideration.

In truth, the judgment in *Rex* v. *Denyer* (*supra*), however well-intentioned, would make the case of members of trade associations who break the rules of their associations much worse than it is at present. They would no longer be able to avert the agreed consequences of their breach of rules by accepting the offer of a money payment, though they consider it more lenient than the agreed consequences. Anyhow, they can in future avert evil consequences by not knowingly breaking the rules of the associations of which they are members.

In my opinion, the Judge below should have withdrawn the case from the jury on the ground that there was no evidence of any lack of reasonable or probable cause to go to the jury and no illegal demand of money nor any evidence of duress, and the appeal must therefore be allowed and judgment entered for the defendants with costs here and below. In any event, there would have had to be an order for a new trial, as the Judge, in the respects I have mentioned, in my opinion, misdirected the jury as to the law.

Lord Justice Sankey.—In this case the plaintiffs sued the defendants for damages for conspiracy and alternatively for money had and received by the defendants to the use of the plaintiffs, upon the ground that the money in question had been obtained from them by the defendants by duress.

The action was tried by a Judge and jury and at the conclusion of the plaintiffs' case, the defendants submitted that there was no case to go to the jury. The Judge overruled the objection, whereupon the defendants elected to call no evidence, the jury returned a verdict for the plaintiffs for £132 (a sum arrived at after giving certain credits), and the Judge gave judgment accordingly. From that judgment the present appeal is brought upon the grounds

(1) That the learned Judge was wrong in leaving the case to the jury, and (2) That the learned Judge misdirected the jury. The facts are as follows : The plaintiffs and the defendants are all members or officials of a society known as the Motor Trade Association. That is an association composed of manufacturers, agents and dealers in motor-cars formed with the object of encouraging and protecting the motor industry in the United Kingdom, and, as admitted by the plaintiff Hardie, of ensuring that all members of the trade should deal fairly with each other. It has a number of regulations and by-laws and it seeks to maintain and stabilize the price of motor-cars. It has certain by-laws under which a "stop list" is created. It will be observed that there is no express power in the by-laws for the Association to take money in lieu of putting a person on the "stop list." In January of 1926 it came to the notice of the association that the plaintiffs had transgressed one of the rules of the association by selling a motor-car at a price below the list price. In fact, they had been induced to do so by one Neale, and one of the complaints in the statement of claim was that Neale acted in concert with the defendants and fraudulently induced the plaintiffs to enter into the above-mentioned transaction, but this charge of fraud against the defendants was abandoned at the trial. In these circumstances, the defendants upon March 3, 1926, wrote the following letter to the plaintiffs : "Dear Sirs,—As you are doubtless aware, this association exists for the purpose of protecting the fixed prices of its manufacturer and concessionaire members who desire that none of their goods be sold, offered or advertised above or below such fixed prices. We regret to have to inform you that facts have been brought to the notice of the association with which your name is connected and which will be brought before the "stop list" committee of this association meeting at this address on Wednesday the 10th instant at 11.45 a.m. Your attendance is invited, and if you attend you will have an opportunity of hearing the case submitted in your presence and of making any answer or explanation which you may think fit to place before the committee. We think it proper, however, to inform you that should you not attend, the matter will, nevertheless, be enquired into in your absence and such recommendation made to the council as is deemed appropriate. We enclose précis of the case which will be placed before the committee. Yours faithfully, The Motor Trade Association." The two directors of the plaintiffs' company—namely, Captain Hardie and Captain Lane—attended the meeting of the "stop list" committee when the charge against them was investigated. They said that they had always tried to carry out the rules of the association, but that the man, Neale, had pestered them into doing what they had done. On March 18 the defendants wrote to the plaintiffs the following letter : Dear Sirs,—With reference to your appearance before the "stop list" committee at their meeting on Wednesday, 10th instant, we beg to inform you the committee fully considered the evidence placed before them and came to the conclusion that the infringement of our recognized principles of price regulations alleged, as already stated to you, was proved to their satisfaction. The committee under all the circumstances are prepared to recommend to the council that if you will pay a sum of £200 to our indemnity fund (which is applied towards expenses) to mark your regret, sign and pay for the insertion of the enclosed undertaking in *Motor Commerce*, also re-purchase the car purchased from you, that this shall be regarded on this occasion as a satisfactory ending of the matter. Please let us hear from you by Wednesday, 24th instant, if you agree, and in that event let us have cheques for £200 and £225 made payable to this association and the signed undertaking with a cheque for £7 made payable to *Motor Commerce*. If we do not hear from you by the day named, we will assume that you do not desire to avail yourself of this method of concluding the matter." The plaintiffs acknowledge the receipt of that letter and they say : "We are quite prepared to re-purchase the car in question immediately, but would respectfully submit that the fine of £200 is extremely severe having regard to all the circumstances and we would be glad if you will kindly let us know by Wednesday next, the 24th instant, whether we may be permitted to appear again in person to appeal for a reduction of the fine." Captain Lane saw Mr. Denyer and it was agreed that he should pay £332 at once and the balance of £100 in three months. This was confirmed by the plaintiffs in their letter of the 24th and accepted by the defendants in their letter of March 25, the plaintiffs' letter being : "Dear Sirs,—Confirming our Captain Lane's call to-day when he saw your Mr. Denyer, we enclose herewith our cheque for £332, this sum being made up as follows : Re-purchase of car, £225 ; cost of insertion in *Motor Commerce*, £7 ; the remaining £100 being on account of the £200 fine, the balance of which to be paid within three months from this date." In his evidence Captain Hardie said that he knew the "stop list" committee had been adopting a similar course in other cases, that he was afraid of being put on the "stop list," and that he realized that to pay the fine and give the undertaking was a lenient alternative to going on the "stop list." The defendant, Chilton, was chairman of the "stop list" committee, Bennett is a member of the association, and Denyer is the secretary of the association and wrote the letters.

On July 17, 1926, the defendants, Chilton and Bennett, suing on behalf of themselves and of other members of the Motor Trade Association, issued a writ against the present plaintiffs for the balance of £100. Meanwhile, however, the defendant Denyer had been convicted at the Exeter Assizes under the Larceny Act, 1916, and his appeal against the conviction had been dismissed by the Court of Criminal Appeal. See *Rex v. Denyer* (42 *The Times* L.R., 452 ; [1926] 2 K.B., 258). The conviction was in respect of circumstances not dissimilar from the present case. The plaintiffs, therefore, refused to pay the £100 and brought the present action for damages and alternatively for the return of the £332 which they had paid to the defendants. It was contended by the defendants that there was no evidence of any conspiracy, that none of the defendants had done anything illegal, that all that they had done was to tell the plaintiffs what they, the defendants, were entitled to do, and would do, and to give the plaintiffs an option of paying a sum of money instead. On the other hand it was argued for the plaintiffs that the defendants were not entitled to demand money under coercion, and that it was immaterial whether the threat made was a lawful or an unlawful threat, and they pointed out on appeal that the finding of the jury was that the threat deprived the plaintiffs of their voluntary power of action.

The first matter to be considered is what are the circumstances which give rise to an actionable conspiracy. A conspiracy is defined in the Oxford Dictionary as being "a combination of persons for

an evil or unlawful purpose." In my view, a conspiracy is actionable in law where it is an agreement by two or more persons to do an unlawful act or to do a lawful act by unlawful means. One of the means by which a conspiracy can be carried out is by making threats, and, there again, threats may be lawful or unlawful. In *Sorrell v. Smith* (41 *The Times* L.R., 529 ; [1925] A.C., 700), Lord Dunedin says, at page 730 : "A threat is a pre-intimation of proposed action of some sort. That action must be either *per se* a legal action or an illegal, *i.e.*, a tortious action. If the threat used to effect some purpose is of the first kind, it gives no ground for legal proceeding ; if of the second, it falls within the description of illegal means, and the right to sue of the person injured is established." This makes clear the meaning of section 29 of the Larceny Act, 1916, which deals with demanding money with menaces and creates an offence where a person utters, knowing the contents thereof, any letter demanding of any person, with menaces and without any reasonable or probable cause, any property. That section clearly contemplates that there may be cases where there may be reasonable or probable cause for uttering a letter with menaces. Indeed, that must be so. Take, for example, the case of three persons who lend £1,000 without interest to a fourth person, and take a bond from him for repayment of the sum. Supposing the obligor refuses to repay and the three obligees meet together and write a letter to him threatening to bring an action unless he pays the money within a given time. That would be a case in which they would be demanding money with menaces, but with reasonable cause, and they could not be convicted under the section in question. There would be no evidence on which the Judge could leave to the jury whether there was a lack of reasonable or probable cause, and he should withdraw the case from the jury. Suppose, again, the same case, but the obligees, after sending the letter in question, agree to compromise their claim for £500 and demand that sum. There, again, they would not be committing an offence within the section.

Dealing now with the case before us, it must be admitted that since the decision of *Ware and De Freville, Limited v. Motor Trade Association* (37 *The Times* L.R., 213 ; [1921] 3 K.B., 40) the defendants' object was not an illegal one. The defendants in that case were this very same Motor Trade Association ; the plaintiffs were not members thereof, but it was held that the publication of the plaintiffs' name in the "stop list" was done by the defendants *bona fide* in the protection of the trade interests of the members of the association, and therefore was not unlawful and an injunction should not be granted to restrain them doing so. Lord Justice Scrutton, at page 64 of that case, said : "It is the commonest transaction to say in a libel action : 'I will not issue a writ or ask for damages if you will apologize and pay my costs,' but I never heard it called 'demanding money with menaces' before," and at page 69 : "If you may lawfully do a thing it cannot be unlawful to say you are going to do it ; if men may refuse to work for a master, they may surely tell him they propose to do so if he acts in a certain way." And further, at page 71, he says : "If so the question in this case is whether a combination (1) intended to secure that new goods shall be sold at a fixed price, neither higher nor lower, by refusing to supply with goods a person who sells those goods at other than the fixed price ; and (2) to inform the confederates who such persons are by means of a "stop list" ; and (3) to take steps to insure that the person who is not to be supplied with goods directly is not supplied with them indirectly, is a reasonable and legitimate means of protecting trade interests. In my view it is."

Starting therefore with the proposition that the defendants' object was not unlawful, and that the means by which they sought to attain it, viz., the threat and the "stop list," were not unlawful, there is not any ground upon which the plaintiffs have an action for conspiracy so far; but it is said that they had no power to take money in lieu of putting the plaintiffs upon the "stop list." I cannot think, however, that what they did with regard to taking money in the present case gives the plaintiffs cause of action for conspiracy. It will be observed that Captain Hardie himself said that he realized that to pay the fine and give the undertaking was a lenient alternative to going on the "stop list." There is no evidence that the fine itself was an excessive or extortionate amount. It cannot be maintained that the defendants had no right to forgo their full rights under the contract and to compromise their claim any more than that the obligees in the instance above given had no right to compromise their claim. In the case of *Fisher v. Apollinaris Company* (L.R., 10 Ch., 297) the headnote, which correctly states the facts, is as follows : "The prosecutors in a trade mark case offered no evidence against the offender, and he was acquitted, he giving a letter of apology, with authority to the prosecutors to make such use of it as they might think necessary. The prosecutors published this letter by advertisements, and continued to do so for nearly two months : *Held,* that the arrangement as to the apology was not void as made under duress, and that the prosecutors could not be restrained from continuing to publish the letter." And at page 303 Lord Justice Mellish said as follows : "But, in my opinion, there is no objection to the compromise of a charge of this sort on such terms. The complaint was that Fisher had used the trade mark of this company. Now, previously to the Trade Marks Act (25 and 26 Victoria, Chapter 88) the sole remedy for the wrong complained of by the company would have been by action at law or suit in equity, but under this Act the wrong became also the subject of a criminal prosecution. There was no authority for saying that it was wrong in the prosecutors to withdraw from such a charge of this kind. The prosecutors allowed him to state that his offence was not wilful, and accepted an apology. Such compromises are constantly made before criminal Courts in cases of assault or libel. In some cases there is a payment of money ; in other cases, no payment at all ; and it has never been considered that there was anything wrong in such transactions. It would, of course, be different if there was any case alleged of extorting money under threats." It is not necessary to speculate what may be the circumstances under which a conspiracy becomes actionable by reason of the unlawful means used to attain the object.

In *Sorrell v. Smith* (*supra,* at p. 719) Lord Dunedin said : "I entirely concur with what was said by Lord Justice Atkin in *Ware and De Freville, Limited v. Motor Trade Association* (*supra*). 'It appears to me,' he says, 'to be beyond dispute that the effect of the two decisions in *Allen v. Flood* (14 *The Times* L.R., 125 ; [1898] A.C., 1) and *Quinn v. Leathem* (17 *The Times* L.R., 749 ; [1901] A.C., 495) is this : that on the one hand a lawful act done by one does not become unlawful if done with an intent to injure another, whereas an otherwise lawful act done by two or more in combination does become unlawful if

done by the two or more in combination with intent to injure another.'" It would not only be dangerous but impossible to lay down by anticipation a category of unlawful means, and it is not difficult to postulate circumstances in which even the Motor Trade Association might use unlawful means to carry out their object, but in the present case there is no evidence upon which it was possible to say that their object was unlawful, or that the means which they used to attain it were.

In the case of *Rex v. Denyer* (*supra*), I think the Court was not correct in saying, at page 268 of the report, that there was not the remotest nexus or relationship between a right to put the name of Read on the "stop list" and a right to demand from him £257 as the price of abstaining from that course. On the contrary, I think there was a nexus in the circumstances. See the remarks of Lord Justice Mellish above referred to in *Fisher v. Apollinaris Company* (*supra*). There may be circumstances in connexion with a demand which may make it illegal, but I cannot see the presence of any such circumstance either in this or in *Denyer's* case (*supra*).

With regard to the second cause of action, that is, for money had and received by the defendants, we were much pressed by the learned counsel for the plaintiffs with the cases of *Cadaval v. Collins* (4 Ad. and E., 858) and *Williams v. Bayley* (L.R., 1 H.L., 200). In my view both those cases are distinguishable. In the first, there had been fraudulent use made of legal process; in the second, the Court found that an agreement to make an equitable mortgage of the property had been obtained from a father, he well knowing that if he did not make the agreement his son would be prosecuted with a moral certainty of conviction. Both those cases must be read with reference to the facts, which are entirely different from those now before the Court. Having regard to the evidence given in the present case, I am unable to see that there was any such duress as would entitle the plaintiffs to recover this money from the defendants. I have already referred to the learned Judge's note of the evidence, which is borne out by the transcript of the shorthand notes. The defendants had a perfect right to threaten to put the plaintiffs on the "stop list," just as the obligees in the instance given above had a perfect right to threaten the obligor to bring an action against him if he did not pay the £1,000. Both had a right to compromise their full rights for something more lenient, and it cannot be said in either case that the money so obtained was money obtained by duress.

I do not desire to add anything to what my Lord has said on the question of misdirection, but upon the ground that there was no evidence to go to the jury I am of opinion that this appeal should be allowed and judgment entered for the defendants with costs.

MR. JUSTICE ROMER.—The allegations of fraud with which the statement of claim is plentifully sprinkled having been abandoned, the relevant facts of this case are simple, and for the most part are not in dispute. The plaintiffs being suspected of having infringed a price regulation of the Motor Trade Association, of which they were members, were invited to attend a meeting of the "stop list" committee of the association on March 10, 1926. The two directors of the plaintiff company, Captain Hardie and Captain Lane, duly attended the meeting. The former stated in evidence that he thought the defendant Chilton was present, and the latter stated that he believed both the defendant Chilton and the defendant Bennett were present. As a result of the meeting the "stop list" committee appear to have come to the conclusion that the infringement by the plaintiffs of the price regulation had been proved. The plaintiffs accordingly became liable to have their name placed upon the association's "stop list." Had this been done, the result would no doubt have been a serious matter for the plaintiffs. The "stop list" committee were therefore prepared to take a more lenient course and to recommend to the council of the association to treat the matter as being satisfactorily ended if the plaintiffs, to mark their regret, would pay a sum of £200 to the indemnity fund of the association, would sign and pay for an undertaking as to their future conduct to be inserted in *Motor Commerce*, and repurchase the car, the sale of which by the plaintiffs to an emissary of the association for £225 had been the cause of all the trouble. This decision of the committee was in due course communicated to the plaintiffs by the defendant Denyer, who was the agent of the committee for such purposes, by a letter dated March 18, 1926. The association had no express power to accept a payment and undertaking in lieu of inserting an offending member's name in the "stop list"; but in mercy to the offenders this association in proper cases adopted this course from time to time, and this fact was known to the plaintiffs, who recognized that they were being offered a lenient alternative. They tried, however, to get the alternative made even more lenient, and at an interview with the defendant Denyer on March 24, Captain Lane was successful in obtaining an alteration of the terms, by virtue of which in lieu of an immediate payment of the £200 the plaintiffs were to pay £100 down and another £100 in three months' time. Thereupon the plaintiffs paid to the association the sum of £332, which was made up of the £225, the first £100, and £7 for the cost of insertion of their undertaking in *Motor Commerce*. The second sum of £100 was never paid by the plaintiffs, but on October 28, 1926, they issued the writ in this action against Chilton, Bennett, and Denyer, claiming, amongst other relief not now material, (1) damages for conspiracy, and (2) money had and received by the defendants to the use of the plaintiffs. By their statement of claim they asked for damages including the £332 as special damage, and alternatively, the sum of £332 as and by way of money had and received by the defendants to the use of the plaintiffs.

Inasmuch as it must be conceded that the defendants, whether acting individually or in combination, would have committed no wrongful act had they placed the names of the plaintiffs upon the "stop list" without the plaintiffs' being given the lenient alternative, it would seem at first sight to require some little ingenuity to discover, in the facts that I have mentioned, any cause of action vested in the plaintiffs. So far as the claim is for money had and received by the defendants to the use of the plaintiffs, it does not appear that the defendants, or any one of them, ever had or received anything. The plaintiffs' only remedy, if any, must therefore lie in damages, and it was a judgment for damages that the plaintiffs succeeded in obtaining in the Court below.

Now that judgment is based upon certain propositions of law which were enunciated by Mr. Justice Avory in the course of his summing up to the jury, and which involve the following one: If A, or A and B acting in agreement together, induce C to pay money, which he may lawfully pay, to some other person who has no legal claim to it, by means of

threats which are calculated to deprive any reasonable man of his voluntary power of action, and C thereby suffers damage, he is entitled to recover such damages from A or from A and B as the case may be, even though the threat be to do some lawful act. But I am not aware of any authority for so wide a proposition as this, and it is, in my respectful opinion, an unsound one in law.

It is not difficult to imagine cases that may arise in everyday life in which the proposition, if applied, would produce results that are nothing less than extravagant. Some of these have already been referred to by Lord Justice Scrutton, and I do not desire to multiply examples. "But"—say the plaintiffs—"however extravagant you may regard the proposition in its relation to your domestic or your club life, or any other situations your fancy may suggest, allow us to point out to you that in the present case the defendants have committed a felony for which they are liable to penal servitude for life."

This, I agree, is a serious matter indeed, if it be true, serious not only to the defendants in the present case, but to all who in analogous circumstances may seek to temper justice with mercy; and whatever modifications may have to be introduced into the proposition of law to which I have referred, that proposition must still be expressed in terms wide enough to cover the present case, if in the present case a felony has in truth been committed.

In order to ascertain whether this be the fact or no, it becomes necessary to consider section 29, subsection (1), of the Larceny Act, 1916. Now that subsection so far as material to the present case, provides as follows: "Every person who utters, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property or valuable thing; . . . shall be guilty of felony." Subsection (4) provides: "For the purposes of this Act it is immaterial whether any menaces or threats be of violence, injury, or accusation to be caused or made by the offender or by any other person."

It is said that the letter of March 18, 1926, was such a letter as is mentioned in the first subsection. It was actually written by Denyer alone, and, speaking for myself, I am unable to find anything worthy of the name of evidence to show that the other defendants had anything to do with the uttering of it. But for the purposes of this judgment I am willing to assume that the three defendants agreed together to have the letter written and sent to the plaintiffs.

The question then arises whether the demand contained in the letter was made with menaces and without any reasonable or probable cause. In my opinion, this question must be answered in the negative, for in my opinion the demand was not made without reasonable or probable cause. What the meaning of the word "probable" may be in this connexion, is the question that I am content to leave to others who are more familiar with the criminal law than I am. For it is sufficient for the defendants if they had reasonable cause for making the demand—and that they had I can feel no doubt. Having it in their power to place the plaintiffs on the "stop list," but being desirous of taking a more lenient course, they gave the plaintiffs the option of paying a fine. I am wholly unable to understand how it can be suggested that this was not an eminently reasonable thing to do.

The question of reasonable or probable cause appears to be one for the jury, but only, of course, where there is some evidence of its absence. In the present case there is, in my opinion, none. I cannot find that the defendants have done anything of which complaint can be made in a Court, whether of civil or of criminal jurisdiction. In my opinion the evidence shows at the most no more than that the defendants in good faith proposed and agreed to abstain from doing something that they could lawfully do, on condition that the plaintiffs made a payment that they could lawfully make.

This being so, the case should have been withdrawn from the jury, and judgment entered for the defendants with costs. That must now be done, and the appeal allowed with the usual consequences.

[Solicitors—Messrs. Kenneth Brown, Baker, Baker; Mr. C. S. Tomlinson.]

At the sitting of the Court of Criminal Appeal on April 23, 1928, the LORD CHIEF JUSTICE (Lord Hewart) referred to the decision of the Court in *Rex v. Denyer* (42 *The Times* L.R., 452; [1926] 2 K.B., 258). His LORDSHIP said * :—

Since the last sitting of this Court a situation has arisen, affecting the jurisdiction of the Court, which calls for some comment.

By the Criminal Appeal Act, 1907, this Court is constituted the final Court of Appeal in criminal cases, subject only to an appeal to the House of Lords on the certificate of the Attorney-General.

On March 22, 1926, this Court affirmed the conviction of one Denyer, who had been convicted by a jury of the offence of demanding money by menaces, contrary to section 29 of the Larceny Act, 1916.

At the end of last sittings judgment was given in Appeal Court II. in the case of *Hardie and Lane, Limited v. Chilton and Others,* in which a claim had been made to recover money alleged to have been paid under duress in circumstances similar to those in *Rex v. Denyer* (*supra*).

The Lord Justice who delivered the leading judgment in the Court of Appeal is reported to have said, in the course of it, that in his opinion the case of *Rex v. Denyer* (*supra*) was wrongly decided. It may be well, therefore, to make it clear, for the purposes of the administration of the criminal law, that, unless and until the decision in *Rex v. Denyer* (*supra*) in this Court is reversed by the only competent tribunal, it is binding upon and will be enforced by this Court against any person or persons offending in like manner.

K.B. Div. (Acton, J.) } 1928. Apr. 4.

ST. ANNE'S WELL BREWERY COMPANY v. ROBERTS AND OTHERS.†

Negligence—Duty to adjoining owner—Ancient wall.

The defendants were the owners of a part of the ancient City Wall of Exeter, which also formed the back wall of an ancient inn owned by the plaintiffs. The portion of the wall belonging to the defendants collapsed, demolishing the plaintiffs' inn. As the Judge found, in an action for damages, excavations had been at some time made in the wall (which was of

* Reported by W. E. HURT, Esq., Barrister-at-Law.

† Reported by J. W. HALL, Esq., Barrister-at-Law.

great thickness) to form recesses in the kitchen of the inn, but these excavations were not made by the plaintiffs.

Held, (1) that the ancient wall was not a thing essentially dangerous within *Rylands v. Fletcher* (L.R., 3 H.L., 330), but (2) that there was a duty on the defendants to keep it in such a state that their neighbours might not be injured by its fall; (3) that the plaintiffs had not been guilty of contributory negligence in failing to discover the dangerous state of the wall; (4) that the action was maintainable against the owners and not merely against the occupiers of the wall.

Todd v. Flight (9 C.B., N.S., 377) followed.

This was an action tried before Mr. Justice Acton at Exeter Assizes. The facts appear fully from his Lordship's reserved judgment.

Mr. Holman Gregory, K.C., and Mr. G. D. Roberts appeared for the plaintiffs; Mr. du Parcq, K.C., and Mr. J. L. Pratt for the defendants.

Mr. Justice Acton.—In this case the plaintiffs' claim as it appears from the statement of claim is as follows:—" (1) The plaintiffs are the owners of the house, premises and grounds known as the Custom House Inn, Quay Hill, in the City of Exeter. The said premises are bounded on one side thereof by a portion of the ancient wall of the said city, which portion is vested in the two first named defendants as trustees under the will of Robert William Wreford. The defendant Harriett Roberts is tenant for life of the said portion of the said wall under the settlement created by the said will. (2) On March 11, 1927, the said portion of the said wall fell upon the said premises, destroying the greater part of the said house, and covering the grounds thereof with debris to the height of 30 feet or thereabouts. (3) At the time of the fall thereof, as the defendants well knew or ought to have known, the said portion of the said wall was in a dangerous condition and constituted a nuisance. (4) Further and in the alternative, the fall of the said portion of the said wall was occasioned by the negligence and/or breach of duty of the defendants in failing to maintain the said wall in a safe condition. The plaintiffs will rely upon the fall of the said portion of the said wall as evidence of its condition." And the amended defence is to the following effect:—" (1) The defendants admit that the plaintiffs are the owners of the house, premises and grounds known as the Custom House Inn, Quay Hill, in the City of Exeter and the said premises are bounded on one side thereof by a portion of the ancient wall of the said city. The defendants further admit (1) that until December 31, 1925, under an indenture dated August 27, 1919, the defendants R. C. Roberts and A. Webber were the trustees and the defendant Harriett Roberts was the tenant for life of a parcel of land and of the said portion of the said ancient wall forming the boundary of the said land on one side thereof and (2) that as from January 1, 1926, the legal estate in the said parcel of land and portion of the said wall has been and is vested in the defendant Harriett Roberts by virtue of the provisions of the Law of Property Act, 1925, and the Settled Land Act, 1925, and not in the defendants Reginald Charles Roberts and Arthur Webber. Save as aforesaid, paragraph 1 of the statement of claim is denied. (2) The said portion of the said wall was, at all material times, in the possession of one John Wilson and not in that of the defendants or any of them. (3) The defendants admit that on March 11, 1927, the said portion of the said wall fell upon the said premises and caused damage thereto. Save as aforesaid no admissions are made as to paragraph 2 of the statement of claim. (4) If (which is expressly denied) the said portion of the said wall was ever in a dangerous condition or constituted a nuisance the defendants were not, nor was any of them, ever aware of the said fact nor ought they, or any of them, to have been aware thereof." Then there follows a denial of any negligence on the part of the defendants, and then, in paragraph 6, a plea that: "The fall of the said portion of the said wall was solely due to the negligence of the plaintiffs," particulars of that negligence being subjoined to that paragraph; and in paragraph 7 of the defence there is a plea of contributory negligence on the part of the plaintiffs, the particulars of that contributory negligence being the same as the particulars of negligence under paragraph 6.

On those pleadings there was no question that the defendants were the owners of that portion of the ancient wall of the City of Exeter, a length of which fell upon and destroyed the greater part of the Custom House Inn, a very ancient inn which was the property of the plaintiffs. This portion of this very massive and ancient wall formed the boundary of the defendants' property which was behind and above the plaintiffs' land upon which the Custom House Inn was built. The wall which so bounded the defendants' property was also a containing wall for the plateau above and behind the plaintiffs' land, and the defendants' property upon this plateau consisted of a small house and garden which were occupied by one John Wilson as a weekly tenant at a rental of 4s. 3d. a week. The lower part of this length of the City wall also formed the back wall of the premises known as the Custom House Inn, the property of the plaintiffs. The wall was about 40ft. in height from the top to the floor level of the inn, and about 6ft. 4in. thick. Of this wall a length of about 30ft. fell.

The first question to be determined was what caused this length of about 30ft. to fall. This question was a very difficult question of fact, because that part of the Custom House Inn which was destroyed by the fall was practically completely buried under the masonry, earth and *débris* which fell, and it was impossible to determine with anything like certainty what had been the condition of the wall itself or of that part of the buildings which was buried beneath it when it fell. After the fall there was nothing to be seen of the lower part of the structure of the wall, or of the buried portions of the inn, but a huge mass or mound of masonry, earth, rubble and *débris*, as shown in the photographs which were produced.

The plaintiffs' case was that the fall was due to the wall having no footings or foundations, but being built upon soft sandstone which was liable to be affected in time by moisture, to the absence of bonding in the wall, and to the continual percolation of moisture running down from the defendants' property, coupled with the omission to provide any system of drainage, to have any inspection of the wall made, or to carry out any repairs of any kind, or to provide any weeping holes in the structure of the wall. I have no doubt that these were matters which materially contributed to the ultimate collapse of the wall. There was no suggestion that there had been any sort of examination of the wall or anything whatever done for the maintenance or

repair of the wall at any time. It is, however, right to say that the allegation that there were no footings or foundations to that part of the wall which fell was merely a matter of inference from the condition of adjacent lengths of the wall where the base of the wall could be seen to rest upon the soft sandstone, or upon stones which themselves rested upon the sandstone, and where there were no footings or foundations whatever.

The defendants in their turn then adduced evidence to prove the facts set out in the particulars to paragraph 6 of the defence. These particulars were as follows : "The said fall was caused by excavations made from the plaintiffs' premises under and into the said wall which formed the back wall of part of the said premises. Prior to the said fall the defendants were unaware of the said excavations, but the plaintiffs were always aware thereof and of the danger to the said wall caused thereby. The plaintiffs were negligent in making, or permitting to be made, the said excavations and/or in failing to fill up or properly arch over the said excavations and/or in failing to take any steps to guard against the danger caused by the withdrawal of support from the said wall and to prevent the same from collapsing."

Upon this part of the case the dispute between the parties to this action was in substance this : The defendants maintained and sought to prove that the two recesses one on either side of the fireplace in the kitchen of the inn were in fact excavations which had been made in the masonry of the City wall which formed the back wall of the kitchen, though nobody could tell when or by whom these excavations had been made. The plaintiffs maintained and sought to prove that the recesses were formed by buttresses supporting the masonry of the City wall, and that these buttresses were, of course, an added support and strength to the fabric of the wall. The rival theories were accordingly either that there were two recesses sunk into the City wall itself, one on each side of the chimney breast in the kitchen, or that there were three buttresses within a space of about 30ft. in length, forming two recesses, with a central buttress so placed as to admit of the chimney breast being erected against it. I was invited to determine which of these two theories was the correct one, upon the hypothesis that one of the two must be the correct one, and that no other was suggested. In either event it was agreed that it was to be assumed that what lay at the back of the recesses (behind a lining of 4½in. brickwork) was the masonry of the City wall.

The evidence satisfied me that there was a rending away of a huge block of masonry from the bottom. The upper part of that block in fact fell in a solid mass, and, even after the rending and shock of the fall, remained as a solid mass of undisintegrated masonry. The rending was practically co-extensive in length with the kitchen of the Custom House Inn. I have no doubt that this was more than a mere coincidence. Within the inn there had been indications of movement years before the fall. Moisture had been finding its way into the kitchen at the back continuously and progressively, necessitating somewhat extensive renewals and repairs. As a consequence there had been a continuous thrust forward of what the plaintiffs' witness Ball, their clerk of works, called the buttress (that is, the central buttress) causing ultimately a grinding and crumbling of the stone which found its way into the kitchen, at first from the bottom of the right-hand side of the left recess, in a comparatively small quantity. There was a handful or two to be seen on February 11, 1927. Shortly before the fall (early in March) there was a sort of explosion of a very large quantity (about 30 tons) of stone fillings and earth which was thrown right across the kitchen. This seems to show that for some reason there was a weakening of the wall at this point where the burst took place, rather than a strengthening of it by buttresses. There was no suggestion of any other buttresses in this vicinity, or, indeed, anywhere else throughout the ancient City wall ; and if there were buttresses at this point they must have been so constructed as to adapt themselves conveniently to the kitchen of the inn, and in such a way that there was no sign of any other buttress outside the limits of this kitchen.

Upon this question there was a strong conflict of evidence. For the plaintiffs there was that of Mr. Ball, clerk of the works to the plaintiffs, and his assistant. Their evidence was very loose and unsatisfactory. There was no evidence to show at what height the buttresses were supposed to begin to project from the wall. They were apparently seen only just before the collapse of the wall, and it seemed most strange that nobody had ever seen them, at any rate clearly, before. The Club room over the kitchen had at the back a lath and plaster partition, and to the outside of this there must have been from time to time something done in the way of painting or repairs, and for that some light must have been necessary. Yet apparently nobody (except possibly Ball) had ever observed the existence of the supposed buttresses. It is also remarkable that the supposed buttresses were not mentioned to Bennett and Pickering, two representatives of the Corporation of the City, when they visited the premises in February to inquire into the cause of the indications of movement in the house which were making themselves apparent then. The plaintiffs' comment upon this is that it was not known then that it was to be suggested that recesses had been made in the wall and had weakened it. That is true : but Bennett and Pickering were there to inquire into the cause of the apparent movement in the house, and Ball had known for years of the forward thrust and the grinding and crumbling observed in what he says he regarded as the central buttress. It seems surprising, if he knew of the buttresses projecting from the City wall, that he did not indicate or even mention them to Bennett and Pickering, and, indeed, it was very careless to omit to do so if he really knew that they were there.

On the other hand there was the evidence of Bennett, the City architect, and his assistant Pickering, who were called as witnesses for the defendants, and, of course, so far as this action is concerned were, of course, quite disinterested. They made a very thorough examination. Pickering's was so thorough as to enable him to make detailed plans and sections to scale, which were produced by him and put in evidence, though it is indeed true that they were inevitably based to some extent on inference or surmise. Both Bennett and Pickering say that there were no buttresses. The plans prepared by Pickering, and showing no buttresses, but recesses, were shown to Ball about November last. He looked at them and described them as excellent. By that time the defence had been delivered, the existence of the "recesses" had been pleaded, and it was known to the plaintiffs and their advisers that there was a substantial issue as to this. Ball said that he looked at the plans only for a few minutes ; but he is a skilled man familiar

with plans, and there seems to have been no suggestion from him that they were incorrect. Yet it leaps to the eye that there is no sort of indication of buttresses from the City wall projecting into the kitchen.

In these circumstances, upon what seems to me to be a very difficult question of fact, I accept, upon a review of the whole of the evidence, the contention of the defendants that there were no buttresses. On the materials before me the strong preponderance of probabilities seems to be that the plaintiffs are mistaken upon this point.

This leads to the conclusion that at some time or other—no one knows when or by whom—these recesses were made in the fabric of the City wall. No other conclusion (if the theory of the buttresses be excluded) is invited or suggested. Nobody questions that this was an unwise and dangerous thing to do, and had necessarily a tendency to weaken the wall where it was done. I think the collapse of the wall was partly caused by the continuous lateral thrust or pressure of the earth and other matter behind and above it, upon a part of it which had been weakened by the recesses made in it. In course of time that led to the wall bursting at the weak spot, with the ultimate result that there was a downward rending of all the upper fabric of the wall, practically co-extensive in width with the width of the weakened region. Accordingly at the top the collapse tore out a block about 30ft. in width, which fell in a solid block, and remained up at the top a solid block after the fall, leaving the masonry on either side of the gap almost sheer and apparently sound so far as the actual masonry was concerned. This, however, does not mean that the continual percolation of moisture over a very long period of time was not also a factor in causing the collapse of that length of the wall which fell upon and to a great extent demolished the Custom House Inn.

Upon these facts Mr. Holman Gregory contended that this was a case to which the principle of *Rylands v. Fletcher* (L.R., 3 H.L., 330) applies, and that it was unnecesssary to consider any question of negligence, since the fabric of this ancient wall was something which the defendants were bound to keep in at their peril, and, if they did not do so, they were answerable for all the damage naturally consequent upon its escape. As to this I think that what was said by Lord Justice Fletcher Moulton in the case of *Barker v. Herbert* (27 *The Times* L.R., 488 ; [1911] 2 K.B., 633, at p. 642) is very much to the purpose. "We are not dealing in this case," he said, "with anything analogous to the subject-matter of the decision in *Rylands v. Fletcher* (*supra*). This is not a case where a landowner has erected or brought upon his land something of an unusual nature, which is essentially dangerous in itself." It is reasonably clear from this what the learned Lord Justice considered to be the true principle of *Rylands v. Fletcher* (*supra*). There is also authority, with which I find myself in complete agreement, that in ordinary circumstances a retaining wall is not within the principle of *Rylands v. Fletcher* (*supra*). See *Ilford Urban District Council v. Beal* (41 *The Times* L.R., 317 ; [1925] 1 K.B., 671, at p. 675). There Mr. Justice Branson says : "Lord Justice Farwell (in *Barker v. Herbert, supra*) draws the distinction between the absolute duty owed to others by one who is making an abnormal use of land . . . and that owed by those whose use of land is merely normal. There can be no question that in the present case the use of the land by erecting a retaining wall upon it is a merely normal use, and the principle illustrated by such cases as *Nichols v. Marsland* (L.R., 10 Ex., 255 ; 2 Ex. D., 1) and *Rylands v. Fletcher* (*supra*) can have no application to it."

It might, indeed, possibly be a question of fact whether such an unusually heavy, massive, and antique structure as this very ancient wall, with its somewhat primitive method of construction and its fabric of materials ages old, might not be regarded as something both "unusual" and "essentially dangerous in itself" ; but I prefer to decide this case upon other grounds.

There is no doubt that there is a duty upon the owner of a building as such to keep it in such a state that his neighbour may not be injured by its fall. (See *Chauntler v. Robinson* (4 Ex., 163, at p. 169) and *Todd v. Flight* (9 C.B.N.S., 377).) The head-note of this latter case is as follows : "An action lies against the owner of premises who lets them to a tenant in a ruinous and dangerous condition, and who causes or permits them so to remain until by reason of the want of reparation they fall upon and injure the house of an adjoining owner." There can also be no doubt that there was a breach of this duty by the defendants, for though they owned this very picturesque and imposing length of ancient wall, they did nothing whatever to see whether it was safe or unsafe, but simply left matters to chance, unfortunately with the most disastrous consequences. There can be little doubt that it was assumed by them that what had stood unshaken for so many hundreds of years might be trusted to stand indefinitely without having anything done to it, and without even being inspected from time to time with the view of seeing in what condition the fabric of the wall was throughout, and whether anything was required to be done to any portion of it.

The suggested defence of contributory negligence which was raised but not very strenuously pressed, must, I think, be considered with special and careful reference to the particulars under paragraph 6 of the defence. The defendants do not anywhere seek to raise an issue of this kind—namely, that they were unable to discover, or were prevented from discovering, the unsafe condition of the wall by the fact that the lower part of it had been absorbed into and was being used as part of the plaintiffs' premises so that the defendants lost access to it, and that it in fact formed the back wall of those premises. Nor do the defendants allege as negligence on the part of the plaintiffs that they ought to have discovered the unsafe condition of the wall and communicated their discovery to the defendants. This is perhaps not surprising, for it could hardly be an answer to a claim for damages against the owner of a wall by an adjoining owner consequent upon the wall having been allowed to become unsafe and to fall on the adjoining owner's land, that the adjoining owner ought himself to have discovered that the wall was unsafe, and to have warned the owner that it was so.

Dealing then with the particulars as they stand, I am satisfied that the plaintiffs were not aware of the excavations or of the danger to the wall caused thereby. It is clear, I think, that the plaintiffs did not themselves make the excavations or permit them to be made, or indeed know that they had been made, and there is accordingly no evidence that satisfies me that there was any negligence of the kind

alleged in the particulars. Moreover, in any event, the defendants by the exercise of all reasonable and proper care in the performance of what was beyond all doubt their duty to the plaintiffs as neighbours and adjoining owners, might, in my view, have prevented any damage resulting from any alleged want of care, even if there had been such want of care on the part of the plaintiffs.

The last point relied upon by Mr. du Parcq for the defendants was that this action was not maintainable against the defendants as owners and landlords, but only against the tenant John Wilson as occupier, on the principle of the well-known case of *Nelson v. Liverpool Brewery Company* (2 C.P.D., 311). The answer to this point was, as Mr. Holman Gregory contended, and in my opinion rightly contended, a two-fold answer. In the first place it was said that upon the evidence in this case John Wilson was not the tenant of that part of the City wall which fell, nor was he ever in occupation or possession of it. It is true that he became a weekly tenant of the small house or cottage and of the garden at a weekly rental of 4s. 3d., but nothing was said about the City wall. Moreover, in any event, *Todd v. Flight* (*supra*) is an authority that even if Wilson were tenant of that part of the City wall which fell, the defendants might still be made liable in this action. I think the law is quite accurately stated in "Foa on Landlord and Tenant," last edition, at page 272, in the following passage: "Liability can be enforced against him (*scilicet* the landlord) where the premises are demised in a ruinous or unsafe condition, and injury is consequently caused . . . to a person with regard to whom he has a duty, by reason of all the circumstances, imposed on him, as to a member of the public using the highway, or an occupier of adjoining property." For this the case of *Todd v. Flight* (*supra*) is cited as the appropriate authority.

I think it is correct to say that where the physical condition of a wall or other structure is the result of a wrong or omission by the owner, as, for instance, where the owner suffers it while in his possession to get into an unsafe state so that the whole of it or portions of it are likely to fall upon the land of an adjoining owner and do damage, such owner cannot rid himself of liability for the possible consequences of his breach of duty merely by letting the wall or other structure as a part of the premises let to a tenant, without taking a covenant from the tenant to repair; and that the liability of the lessor in such a case is independent of the question whether at the time of the letting he had or had not actual knowledge of the state of disrepair. (See per Chief Justice Erle, in *Gandy v. Jubber*, 5 B. and S., 485, at p. 492.) It is enough if he might have known of it if he had exercised all reasonable and proper care, or, in other words, if he ought to have known of it but did not know of it through his own default.

I am accordingly of opinion that the plaintiffs in this action are entitled to succeed. I was not asked to deal with the question of the amount of the defendants' liability, which I understand is to be dealt with elsewhere. It is, no doubt, in some ways a hard case; but I find myself unable to come to any conclusion other than that at which I have arrived.

[Solicitors—Messrs. Sparkes, Pope, Thomas, and Mathew, Exeter; Messrs. Parker, Garrett and Co., for Messrs. Michelmores, Exeter.]

K.B. Div. (Salter and Talbot, JJ.) 1928. Mar. 29.

JENKINS v. JENKINS.*

Executors—Debt due to testator—Executor one of joint and several makers of promissory note—Right to sue co-makers—Release of debt by appointment of executor.

A testator made his will appointing the plaintiff executor thereof. The plaintiff and the defendant and two others subsequently made a joint and several promissory note whereby they promised to pay the testator £100. The note was unpaid at the death of the testator.

Held, that the plaintiff, as executor, could not sue his co-debtors, since his appointment as executor released the debt at common law, and even if he would have been liable in equity the debt was deemed to be paid at probate.

This was an appeal by the defendant in an action tried at the Swansea County Court. The following statement of facts is taken from MR. JUSTICE SALTER'S considered judgment.

By his will, dated February 24, 1912, Joseph Elliott appointed the plaintiff, Lewis Jenkins, to be his sole executor. On December 1, 1923, the plaintiff, the defendant, Isaac Jenkins, and two others made a promissory note by which they jointly and severally promised to pay Joseph Elliott the sum of £100. Joseph Elliott died on March 18, 1924, and probate of his will was granted to the plaintiff on May 9, 1924. On August 15, 1927, the plaintiff began these proceedings in the county court, suing as executor and claiming on the promissory note. He obtained judgment, and the defendant appealed.

Mr. P. B. Morle appeared for the appellant; Mr. Roland Burrows for the respondent.

MR. JUSTICE SALTER, after stating the facts, continued:—

In my opinion the claim should have been dismissed on the ground that the debt sought to be recovered had been discharged before action. By the common law the effect of the appointment by a creditor of his debtor to be executor of his will is to release the debt on the death of the testator, because a debt is a right to sue and the executor cannot sue himself. Where, as in this case, the executor is one of a number of persons jointly and severally indebted to the testator, the effect in law of the appointment of the executor and the death of the testator is to release the debt as between the testator and all and each of the debtors. The present case is the same as the case cited from 21 Edward IV., 81*b*, in the report of *Cheetham v. Ward* (1 Bos. and P., 630, at p. 632): "*Copley*, prothonotary, asked of BRIAN (Chief Justice), if three be bound to a man in an obligation jointly and severally, and the obligee make one of the obligors his executor and die, whether he who is made executor shall have an action against any of the others? And BRIAN said that he should not, for if one was discharged, all shall be discharged; because the making one of them executor is as perfect a discharge in law, as if he had released to one in deed. *Copley*: Sir, the obligation is several. BRIAN: This does not matter; for a recovery

* Reported by J. W. HALL, Esq., Barrister-at-Law.

against one of them and execution sued, will be a discharge to the others. And so of a discharge made to one of them." This was approved and followed in *Wankford v. Wankford* (1 Salkeld, 299) and in *Cheetham v. Ward* (*supra*). A century ago, when *Freakley v. Fox* (9 B. and C., 130) was decided, the rule was so well settled that counsel confined himself to arguing, unsuccessfully, that the doctrine did not apply to negotiable instruments. In that case the payee and holder of a promissory note appointed the maker the executor of his will. The executor endorsed the note to the plaintiff, and it was held, that the plaintiff could not recover because the debt had been released from the date of the death of the testator.

In equity the executor is held liable to pay the debt if the interests of the creditors require it and unless he can show a continuing intention on the part of the testator to make him a gift of the debt, *Strong v. Bird* (L.R., 18 Eq., 315), *In re Applebee—Leveson v. Beales* ([1891] 3 Ch., 422). When the executor is thus held liable, equity enforces payment by treating the debt as assets in his hands. He can be declared accountable in an administration action and ordered to pay, and on default he may be liable to attachment. In equity, therefore, it is plain that his debt to the estate has been paid. See *In re Bourne—Davey v. Bourne* (22 *The Times* L.R., 417 ; [1906] 1 Ch., 697). In that case Lord Justice Romer said of the executor debtor who was sought to be made liable : "He was indebted to the testator in his lifetime, and by the will he was appointed executor, and he proved the will. The effect of that was that at law the debt was extinguished because there was no one to sue or be sued, but in equity he as debtor is held to have paid himself as executor, and therefore as executor to have in his possession the full amount of the debt as having been paid to him as executor. That is the view of equity, and it is on that view that he can be made liable in an action to administer the estate of the testator."

The result is that, if the plaintiff was not liable in equity to pay the debt, it was discharged by release at the date of the death of the testator ; if he was liable in equity, then it was satisfied and discharged by payment at the date of probate. In either case, the debt now sought to be recovered had ceased to exist before action brought.

For the plaintiff reliance was placed on *Beecham v. Smith* (E., B. and E., 442). In that case, A., B., and C. promised jointly and severally to pay £1,000 to C. and D. on demand, and it was held, that C. and D. could enforce against A. his several promise. In that case, however, the debt was in existence when the action was brought ; in this case it was not. Reference was also made to the Bills of Exchange Act, 1882, section 61, to the Supreme Court of Judicature (Consolidation) Act, 1925, sections 42, 43, 44, and 202, and to Order XVIII., Rule 5, and Order XVI., Rule 8. I can find nothing in those statutes and rules to alter the view which I have expressed.

The appeal must be allowed and the judgment for the plaintiff set aside and judgment entered for the defendant.

Mr. Justice Talbot.—I am of the same opinion. I need not restate the facts. If a creditor makes his debtor his executor he thereby releases the debt. It is "sanctioned by unquestionable authority that the debtee's discharge of one joint and several debtor is a discharge of all." See *Nicholson v. Revill* (4 Ad. and E., 675, at p. 683). The reason is that otherwise the co-debtors, if not released, could, by recovering contributions from the one who was released, defeat his release : see *North v. Wakefield* (13 Q.B., 536). Therefore if an obligee makes one of two or more joint and several obligors his executor all are released : see *Cheetham v. Ward* (1 Bos. and P., 630), following a case in the Year Book of Edward IV. And in the case of a negotiable instrument such a release is a good defence to an action not only by the executor but by his indorsee, because the note or bill is discharged and the debt gone : see *Freakley v. Fox* (9 B. and C., 130). The release is, as is said in the Year Book, equivalent to a release by deed. *Beecham v. Smith* (E., B. and E., 442), on which the learned Judge appears to have founded his judgment, has, I think, really nothing to do with this case. It mainly decides that one of joint and several obligors may be sued alone on his several debt ; in other words, that the debt is several as well as joint ; see *King v. Hoare* (13 M. and W., 494, at p. 505). The defence here is not that the note is joint and several but that the plaintiff who sues as executor is one of the makers of the note and has been released by the payee, his testator. In *Beecham v. Smith* (*supra*) there was no question of a release. It was argued for the plaintiff that the effect of section 61 of the Bills of Exchange Act, 1882, is that the fact that one of the makers of a note is holder as executor does not discharge it, though if he were holder in his own right the note would be discharged. It appears, however, from *Nash v. De Freville* (16 *The Times* L.R., 268 ; [1900] 2 Q.B., 72) that the words "in his own right" in the section are not used by way of contrast with "in a representative capacity." I do not think that this section has anything to do with discharge by release.

There is another ground upon which in my opinion there was a good defence to the action. Where a debtor is released by being made his creditor's executor, the effect in equity, and perhaps at law, is that the debt is deemed to have been paid by the debtor to himself as executor, and therefore he is deemed to have assets of the testator in his hands : see *Wankford v. Wankford* (1 Salkeld, 299, at p. 306), *per* Chief Justice Holt, and *In re Bourne—Davey v. Bourne* (22 *The Times* L.R., 417 ; [1906] 1 Ch., 697). If the debt has been paid, it clearly cannot be sued for by the executor as such, though he may have a right personally to recover contributions from his co-debtors.

In the case before us the will was made before the note, but I think this makes no difference, though at first sight it seems strange that by the appointment of an executor the testator should release a debt which was not then in existence. But an executor is not executor until the testator's death. Until then the will may be revoked or altered and until then, therefore, it is not known that it is the testator's last will. It is then, therefore, that the executor is really appointed and that the release effected by the appointment operates. Where debts are expressly released by a will it is at the testator's death that it is to be ascertained what debts, if any, are so released : see *Everett v. Everett* (7 Ch. D., 428). The same must be true of the implied release effected by making the debtor executor.

In my opinion judgment ought to have been entered for the defendant, and I agree that the appeal should be allowed.

[Solicitors—Messrs. T. D. Jones and Co., for Mr. Edward Harris, Swansea ; Messrs. F. C. Mathews and Co., for Messrs. Beor, Wilson and Lloyd, Swansea.]

Chan. Div. (Astbury, J.) 1928. Apr. 18.

IN RE VILLAR—PUBLIC TRUSTEE v. VILLAR.*

Will—Rule against perpetuities—"Period of restriction"—Validity.

A testator by his will, which was made in 1921, left his residuary estate to trustees to pay the income to certain of his issue during "the period ending at the expiration of 20 years from the day of the death of the last survivor of all the lineal descendants of her late Majesty Queen Victoria who should be living at his death." After the expiration of that period the capital was to be distributable. The testator died in 1926.

Held, that as it would not be impracticable to obtain legal testimony so as to ascertain the period when the capital would become distributable the limitation was good.

This summons raised the question whether a "period of restriction" of 20 years from the day of the death of the last survivor of all the lineal descendants of her late Majesty Queen Victoria living at the time of the death of a testator, which was formerly usually found as a limitation in the books of precedent, was in the present circumstances valid or void for uncertainty and impracticability.

Mr. William James Villar, of Taunton, Somerset, by his will dated June 14, 1921, appointed the Public Trustee and any of his (the testator's) sons who should be of full age and ordinarily resident in England at the time of his death executors and trustees of his will, and defined the meaning of certain expressions used in the will. Among others, he defined "the period of restriction" as meaning "the period ending at the expiration of 20 years from the day of the death of the last survivor of all the lineal descendants of her late Majesty Queen Victoria who should be living at his death."

After making certain specific gifts he devised, bequeathed, and appointed unto his trustees his residuary estate upon trust thereout to pay an annuity to his wife, and subject thereto to stand possessed during the period of restriction of the income of his residuary estate upon trust to pay and divide the same to and equally *per stirpes* between or among his participating issue, as defined in his will, subject to certain provisions as to forfeiture of shares. The testator declared that after the expiration of the period of restriction his trustees should stand possessed of the capital of his residuary estate upon trust for the participating issue, as defined, who should then be living, in certain proportions.

The testator died on September 6, 1926, and his will, with a codicil thereto, which did not affect the question, was duly proved by the Public Trustee and one of the testator's sons. Five children and two grandchildren survived the testator. His estate was of considerable value.

The children of the testator contended that at the present time such a limitation of the estate as was made by the will, though within the limits of the rule against perpetuities, was invalid on the grounds of uncertainty and impracticability of carrying it into effect and that there was an intestacy.

An affidavit was made by Mr. Alfred Trego Butler, Portcullis Pursuivant of Arms, that he had made a pedigree of the lineal descendants of Queen Victoria living in 1920. They amounted to about 120 persons and were to be sought in Germany, Russia, Sweden, Denmark, Norway, Spain, Greece, Yugoslavia, and Rumania, as well as in the United Kingdom. It would be a matter of enormous expense to prove strictly all the births, marriages, and deaths involved and it would be extremely difficult and probably impossible in the future to prove who was the last survivor of such descendants living on September 6, 1926. He instanced the great difficulty of ascertaining the real fate of the family of the late Tsarina of Russia, who was a granddaughter of Queen Victoria. A large number of the descendants were members of German Royal families, who since the revolution in 1918 had become private persons and whose existence in the future would be difficult to establish. It was possible that the period of 20 years from the death of the last survivor might extend to 100 years from the death of the testator.

The Public Trustee took out this summons to have this question, with others arising on the will, decided.

Mr. J. H. Stamp appeared for the Public Trustee.

Sir Thomas Hughes, K.C. (with him Mr. J. W. F. Beaumont), appeared for the children of the testator and said that the form in question had formerly been in the precedent books when the descendants of Queen Victoria were not numerous and were easily ascertained, but it was not now found in such books. Since the War and the great upheavals consequent thereon the difficulty both of ascertaining the class and of following the fortunes of its members had become enormous. Questions of the law of many foreign countries might arise as to legitimacy and also the question of the validity of morganatic marriages, while in the case of many of the descendants in question it would have to be shown whether the assent of the English sovereign was given to the marriages. It might cost the whole of the value of the estate to show the death of the survivor. He relied on the opinions of the Judges and the judgment of Lord Eldon in *Thellusson v. Woodford* (11 Ves., 112) as showing that a limitation might be void as being impracticable to ascertain.

Mr. Topham, K.C. (with him Mr. Bischoff), for the grandchildren, said that this was a most important and serious question as the decision might disturb a number of limitations made under what was once a common form. He submitted that the opinions and judgments in *Thellusson v. Woodford* (*supra*) showed that the number of persons in question did not matter, and that, if legal testimony as to the facts could be obtained, difficulty and expense could not be considered. There was no difficulty in ascertaining the class as it existed in 1926, and, though it might be expensive, there would be no real difficulty in tracing the survivor. The persons in question were all resident in civilized countries. The Court ought not to cut out of participation unborn persons.

Mr. Baden Fuller appeared for the testator's widow.

Mr. Justice Astbury, after stating the facts, said that the testator had desired to tie up his property to the fullest extent allowed by law, and the question was whether effect could be given to "the period of restriction." The question depended on the construction of the opinions in *Thellusson v. Woodford* (11 Ves., 112). If, in the circumstances of a gift dependent on the existence of selected lives, it was substantially impracticable to ascertain the date of

* Reported by E. K. Corrie, Esq., Barrister-at-Law.

the extinction of the lives, the gift would be bad; but if, although the lives were numerous and the ascertainment of deaths might be difficult or expensive, ordinary legal testimony would be available, the gift would not be bad.

Here the testator had made use of an obsolete form which would involve a long postponement of vesting, but, having regard to the character of the lives in question, he (his Lordship) could not say that it would be impracticable to obtain legal testimony so as to ascertain the period when the capital would become distributable.

The expense involved would probably be very great and, if he could have seen his way to stop the tying-up of the property involved he would have gladly done so. He did not think, however, that in the circumstances he was at liberty to invalidate the gift, especially as there were probably many other trusts in existence with similar limitations made many years ago. He must hold that the limitation was good.

[Solicitors—Messrs. Gregory, Rowcliffe, and Co., for Mr. T. Broomhead, Taunton; Messrs. Church, Rendell, Bird, and Co., for Messrs. Bird and Lovibond, Uxbridge.]

K.B. Div. (Humphreys, J.) } 1928. Apr. 18.

CANNON BREWERY COMPANY, LIMITED, v. SIGNAL PRESS, LIMITED, AND OTHERS.*

Landlord and Tenant—Covenant by tenant to repair — Breach — Notice — Service — Requisites—Law of Property Act, 1925 (15 Geo V., c. 20), s. 196 (3).

Under s. 196 (3) of the Law of Property Act, 1925, a notice of a breach of covenant is properly served on the premises and if there are reasonable grounds for supposing that that person will, if possible, pass it on to the tenant.

His Lordship gave judgment in this action for the plaintiffs, the Cannon Brewery Company, Limited, of 156, 158, and 160, St. John-street, Clerkenwell, London, who sought to recover possession of premises at 170, St. John-street, on the ground of breach of a covenant contained in a lease to keep the premises in good and substantial repair.

The defendants, Mr. George Lewis and Mr. Percy Lewis, trustees of the estate of Mr. Joseph Lewis, who applied to be joined as defendants after the issue of the writ and before the statement of claim was filed, and/or their tenants were in possession of the premises as under-lessees by way of mortgage, the mortgagor, the original lessee of the premises, not having been heard of since. There was a covenant between the lessee and the under-lessees to pay the rent directly to the plaintiffs. It was now admitted that the reversion expectant on the termination of the lease was vested in the plaintiffs. A schedule of dilapidations specifying breaches of the covenant to repair was served by the plaintiffs on January 14, 1927.

The defendants relied on two points: (1) that the yearly payments of the rent by them to the plaintiffs instead of the original lessee created a new implied yearly tenancy, so that they were not bound by the covenant to repair contained in the lease; and (2) that there had been no valid service of the notice of dilapidations.

Mr. Cartwright Sharp and Mr. E. H. Blain appeared for the plaintiffs; Mr. C. L. Henderson appeared for two defendants, Mr. George Lewis and Mr. Percy Lewis. The other defendants did not appear and were not represented.

Mr. Justice Humphreys, in giving judgment, said that the plaintiffs claimed possession of the premises. They said that they had served the notice of dilapidations, which was a condition precedent to this action as required by section 146 of the Law of Property Act, 1925. The defendants contended that no valid notice had been served. The notice, which was addressed to John B. Lemaitre, the original lessee of the premises, was in fact taken by a clerk of the plaintiffs' solicitors on January 14, 1927, and handed to a forewoman on the premises. What service was good service of such a notice?

His Lordship referred to sections 146 and 196 of the Law of Property Act, 1925, and said that counsel for the defendants had argued that the notice must be physically affixed to the building or left on the building, and that it was not sufficient that it should be left with any person, other than the lessee, unless he was specifically authorized by the lessee to accept service. In his view the expression "left for him" in subsection 3 of section 196 included the case of a notice which was left with some person on the premises if there were reasonable grounds for supposing that that person would pass it on to the lessee if possible. On the facts of this case he was satisfied that the notice was left for the lessee, and "left for him" on the premises.

The next point was this. It was said that a yearly tenancy must be assumed and implied in law because the rent was regularly paid to and accepted by the plaintiffs from the defendants. He did not think, either in law or as a matter of common sense, that that was the finding to which he ought to come. He could only decide that the payments showed that the defendants were, and remained, under-lessees of the premises, and that they paid rent, not as yearly tenants, but because they had covenanted with the original lessee. The defendants were not assignees but under-lessees. There must be judgment for possession for the plaintiffs, with costs.

His Lordship added that it was a proper case for relief on terms to be agreed, with liberty to make further application, if necessary.

[Solicitors—Messrs. Boulton, Sons, and Sandeman; Messrs. Field, Roscoe, and Co.]

K.B. Div. (Sankey, L.J., and Talbot, J.) } 1928. Mar. 19.

CONQUER v. BOOT.*

Judgment—*Res judicata*—Contract for erection of bungalow "in a good and workmanlike manner"—Breach—Action in County Court giving particulars of defects — Recovery of judgment — Subsequent action on same contract alleging different defects.

The plaintiff contracted with the defendant, a builder, for the erection of a bungalow "in a good and workmanlike manner." He subse-

* Reported by Charles Clayton, Esq., Barrister-at-Law.

* Reported by J. W. Hall, Esq., Barrister-at-Law.

quently brought an action in the County Court alleging that the bungalow was not completed in a good and workmanlike manner, and giving particulars. In this action the plaintiff recovered £24 damages. He subsequently commenced a second action in the same Court, alleging the same contract, but with new particulars. The defendant *inter alia* pleaded *res judicata.* The County Court Judge held that the plea succeeded so far as the damages claimed in the second action were known to, or ascertainable by, the plaintiff at the date of the first action, but gave judgment for the plaintiff for the balance of his claim.

Held by the Divisional Court, allowing the appeal of the defendant, that the cause of action was the same in both actions, and that the plea of *res judicata* was sufficient. To sustain a second action on the same contract or the same facts there must be a distinct cause of action, not merely different damages.

This was an appeal from Brentford County Court, and was heard before Mr. Justice Sankey and Mr. Justice Talbot on November 30 and December 1, 1927, when it was adjourned. Before the hearing was resumed on March 19, 1928, Mr. Justice Sankey was appointed a Lord Justice of the Court of Appeal, but to avoid the inconvenience of a re-hearing his Lordship sat as an additional Judge of the King's Bench Division to complete it. The facts are fully set out in his Lordship's judgment.

Mr. F. J. Powell appeared for the appellant ; Mr. A. M. Trustram Eve for the respondent.

Lord Justice Sankey.—This is an appeal from the learned Judge sitting at the County Court of Middlesex holden at Brentford in a case where Mr. Conquer was the plaintiff and Mr. Boot was the defendant. The learned Judge at the conclusion of the case and after hearing arguments on points of law gave judgment for the plaintiff for £81 19s., and it is from that judgment that the present appeal is brought.

It is brought upon a variety of grounds, one of which is that the matter was *res judicata,* or, in other words, that the plaintiff had already brought an action in respect of the matters complained of and had judgment given in his favour, and that that precluded him from bringing a second action in respect of the matter. The appeal came on for hearing before Christmas. Unfortunately both my learned brother and I had to go circuit, and in the result there has been considerable delay, which was quite unavoidable in this case. The only point argued has been *res judicata,* which goes to the whole of the appeal, and we thought it better to have that point argued first. This is the last case I shall try in the Divisional Court, and I would like to say that we have had the greatest possible assistance from both the learned counsel in this case, and I have seldom heard a case better argued by two junior counsel.

The present action was started in the County Court by particulars of claim in the following words : "The plaintiff's claim is against the defendant for the sum of £75 14s. damages for breach of contract to complete a bungalow known as 'Faulds Hope,' Millet-road, Greenford, Middlesex, in a good and workmanlike manner and with proper materials. The plaintiff also claims the sum of £6 6s. as damages for linoleum ruined through dampness arising from the said negligence." The plaintiff was asked to give further and better particulars of his particulars of claim, and he did so on July 11, 1927, as follows :—

"1. The contract referred to in the particulars of claim is the contract which was dated on or about July 17, 1924, proved in an action entitled *Conquer v. Boot* which was tried at the Brentford County Court of Middlesex on November 5, 1926, of which action the plaint number was F.2623.

"2. The defendant is in breach of the said contract by reason of the fact that he failed to complete the work thereby contracted to be done in a satisfactory and workmanlike manner."

On pausing there for a moment it is obvious on the plaintiff's own particulars that in each action he was suing on the same contract. I am not at all saying that that is an impossible position in law so far as one contract may give rise to several causes of action, but I do desire to point out this : that the effect of what the plaintiff has done in this case is to obtain in the two actions—*i.e.,* the action with which we are now concerned and the previous action—a sum which is beyond the jurisdiction of the County Court ; and if the plaintiff's contentions are right I can see no reason why on some future occasion he may not bring another action on the same contract in the same County Court. It therefore becomes necessary to look at the particulars of the first action, which are as follows :—

"The plaintiff's claim is against the defendant for the sum of £24 10s. for breach of contract to complete in a good and workmanlike manner a bungalow known as 'Faulds Hope,' at Millet-road, Greenford, in the county of Middlesex" ; then followed particulars of the matters complained of. The words are precisely the same in both actions, the only difference being that in the second action the words "and with proper materials" are added. The plaintiff in the first action gave particulars of a number of matters which he stated constituted a breach of contract to build in a good and workmanlike manner. These particulars are fairly numerous and are set out with great particularity. In the second action the particulars are of similar character ; they also are fairly numerous and are set out with great particularity. But so far as this claim is concerned it appears to me to be identical in both cases: it is for breach of contract to complete in a good and workmanlike manner the bungalow in question.

Now that was a matter which obviously struck the learned Judge : in the first action he went into the matter, and he found a sum of money to be due to the plaintiff by reason of the defendant's failure to complete the bungalow in a good and workmanlike manner. When he came to the second action he was faced with the difficulty that this point of *res judicata* was taken ; and this is his judgment : "As to the plea of *res judicata,* I allow this so far as the claim in respect of the manhole and airbricks was concerned, because these defects were obvious at the time of an earlier action in November, 1926, between the same parties. So far as the bulk of the claim is concerned I disallow it, as the state of dampness and rottenness of the premises, and particularly of the flooring, was not apparent at the time of the earlier action." The question remains whether this is a correct determination in point of law.

Now with regard to the plea of *res judicata* a great number of cases have been cited to us, the most informative of which is that of *Brunsden v. Humphrey*

(14 Q.B.D., 141). The headnote to that case is as follows :—

"Damage to goods and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action ; and therefore the recovery in an action of compensation for the damage to the goods is no bar to an action subsequently commenced for the injury to the person.

"So held by Sir Baliol Brett, M.R., and Lord Justice Bowen, Lord Coleridge, C.J., dissenting.

"The plaintiff brought an action in the County Court for damage to his cab occasioned by the negligence of the defendant's servant, and, having recovered the amount claimed, afterwards brought an action in the High Court of Justice against the defendant, claiming damages for personal injury sustained by the plaintiff through the same negligence.

"Held by Sir Baliol Brett, M.R., and Lord Justice Bowen, Lord Coleridge, C.J., dissenting, that the action in the High Court was maintainable and was not barred by the previous proceedings in the County Court.

"Judgment of the Queen's Bench Division (11 Q.B.D., 712) reversed."

Now it will be observed that there was one wrongful act, but there were two distinct causes of action—viz., the injury to the cab and the injury to the man's person—and Lord Justice Bowen at page 147 says this : "It is a well-settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all." Pausing there for a moment and taking the case of *Brunsden v. Humphrey* (*supra*), in my view of that case it would have been impossible for the plaintiff to bring several actions in respect of the damage to his cab. He could not have sued one day for a broken wheel and next month for a broken shaft and later for a broken window and so forth ; and so, too, with regard to the personal injuries, it would have been impossible for the plaintiff to sue one day for the loss of a leg and another day for the loss of another leg, and later to sue because he lost his fingers or had injured his head. One knows that in personal injury cases damages are assessed once for all. This may be a difficulty to a plaintiff in a personal injury case, but I am not so sure that in this case a like difficulty could have arisen.

Sir Baliol Brett, M.R., said in this same case, "Different tests have been applied for the purpose of ascertaining whether the judgment recovered in one action is a bar to a subsequent action" ; then he discusses the sort of evidence which would have to be given to prove injuries to the cab and injuries to the person. In the present case, adopting the same analogy, it seems to be quite impossible here to say that in the first month of the year the plaintiff could have brought this action for failure to complete in a proper and workmanlike manner the dining room, and next month for failure to complete the drawing room, and so forth. If that could be done I do not at all see why any of these cases should ever be brought into the High Court, because all the plaintiff would have to do would be to issue separate plaints for damages up to £100 and try the whole in a County Court. Mr. Eve, in his excellent argument, referred us to what appeared to me to be the strongest case in his favour, the case of *Bristowe v. Fairclough* (1 M. and G., 143). I need not go into all the facts of the case, because the difference is set out in the well-known judgment of Chief Justice Tindal. He says : "The plaintiff, it seems, brought an action in the Court of Exchequer upon the agreement, in which the breach assigned was the not giving the note for £730 ; and it appears that an order was made in that action whereby the defendant was directed to give to the plaintiff a note for £505. In the present action a second and a different breach is alleged, namely, that although the mortgage money had been called in, the defendant had neither paid the balance, nor obtained another loan for the plaintiff. The answer set up by the plea is that the present action is brought upon the same agreement, and to recover the same damages, as the suit in the Exchequer. The plaintiff replies that although it is true that the action is on the same agreement, yet he does not sue for the same breach but for another and different breach. It seems to me that this is a good answer to the plea which, *prima facie*, would lead the plaintiff to suppose that it alleged that he was suing for the same cause of action. . . . The present breach could not be sued for in the former action, as it has been occasioned subsequently by the calling in of the mortgage money." I do not think these words can apply to circumstances like those of the present case. If they were carried to the extremity, the failure to put proper material into the house might be so construed that an action could be brought in respect of each bad brick that was put into the house, on the ground that each bad brick was a separate cause of action. I think that the present case falls within the rule laid down by Lord Justice Bowen in *Brunsden v. Humphrey* (*supra*), "It is a well-settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all."

The cause of action here is (1) the contract to complete in a good and workmanlike manner a bungalow, and (2) the breach of it. I do not think that every breach of it, every particular brick or particular room that is faulty, gives rise to a separate cause of action. I am of opinion that the cause of action here was the contract and the breach of it, which had been assigned in the original action. I do not think it is possible to say that every one of these breaches is a separate cause of action. In that I am confirmed by the notes in *Bullen v. Leake* (3rd edition [1868] p. 625) where, in my view, the law is correctly stated as follows : "Where the plaintiff has recovered judgment in a previous action for part only of the amount claimed, the judgment affords a good defence to a subsequent action upon the same claim." Numerous cases are there cited which show that it is quite impossible to treat every breach of contract of this sort as giving rise to a separate cause of action. The cases are all discussed in Mr. Spencer Bower's recent book on *Res Judicata*, at pages 192, 193, and he quotes the case of *Brunsden v. Humphrey* (*supra*), which lays down that there may be two actions in respect of the same facts where the facts give rise to two distinct causes of action.

In my view the plaintiff in this case, having recovered on the contract for the breach he alleged, cannot recover in another action upon precisely the same particulars of claim but adding further particulars of damages only. Having recovered judgment in the one action, he is debarred from bringing a second action. For these reasons I am of opinion that the judgment of the County Court Judge was wrong and that this appeal should be allowed.

Mr. Justice Talbot.—I had an opportunity of considering this case a few days after the argument, and of coming to the conclusion to which, indeed, I was inclined to come at the time when the case

was argued. I wrote a judgment to that effect, and will now read it. [His Lordship then read the following judgment.]

The plaintiff in 1926 by action in the County Court recovered from the defendant damages for breach of contract to complete a bungalow for him at Greenford in a good and workmanlike manner. The particulars of claim in that action set out certain matters as needing to be done in order to make the bungalow what the defendant had contracted to make it. In the present year the plaintiff brought a second action expressed to be for breach of the same contract (adding the words " and with proper materials ") but with another list of particulars. Amongst other defences the defendant raised in the County Court the defence of *res judicata* or judgment recovered, on which the Judge decided against him. The defendant appeals to this Court, and the question is whether the Judge ought to have entered judgment for him.

The rule of law on which the defendant relies is thus stated by Lord Justice Bowen in *Brunsden v. Humphrey* (14 Q.B.D., 141, at p. 147) : " It is a well-settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all " ; and by Lord Halsbury in *Darley Main Colliery Company v. Mitchell* (2 *The Times* L.R., 301 ; 11 App. Cas., 127, at p. 132) : " No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever." See the form of plea in Bullen and Leake, 3rd edition, page 624. The defendant contends that there is here but one cause of action—namely, that the defendant, having promised properly to complete a bungalow for the plaintiff for a sum of money to be paid on completion, has failed to do what he promised—and that the particulars subjoined in the two actions are mostly details of the manner in which he has failed to perform the one contract and of the damages payable for his breach of it.

The plaintiff, on the other hand, says that the first action was brought for the various breaches of contract specified in the particulars, that each of them is a separate breach of a separate contract and a separate cause of action, and that therefore the former judgment is no answer to the present action.

It appears to me that as to this the defendant is right, and that the cause of action sued on in the second action is the same as that sued on in the first. It is the same in point of form. The form is substantially that in Bullen and Leake, 3rd edition, page 271, and the precedents there referred to. It is the same also in substance. The contract is an entire contract. No claim for payment could have been made by the defendant unless and until he had finished the bungalow. There is one contract and one promise to be performed at one time, although, no doubt, the defendant may have failed to perform it in one or in many respects. There may, of course, be many promises in one contract, the breach of each of which is a separate cause of action. An example is *Bristowe v. Fairclough* (1 M. and G., 143), quoted by Mr. Eve in his excellent argument. There the contract contained two separate promises by the defendant to be performed at different times and in different events ; and it was accordingly decided that judgment in an action for breach of one was no bar to an action for breach of the other. The period of limitation would be different for the two. Here there is but one promise, to complete the bungalow ; and the question whether or not it has been performed is to be decided by the state in which the bungalow was when it was handed over by the defendant to the plaintiff as complete. From the moment when the Statute of Limitations began to run as to the whole, the plaintiff could not alter the fact that he was recovering damages for the breach of this single promise by failing to specify in his action all the particulars of the breach and all the damages to which he was entitled. " The test whether a previous action is a bar is not whether the damages sought to be recovered are different, but whether the cause of action is the same," per Chief Justice Bovill in *Gibbs v. Cruikshank* (L.R., 8 C.P., 454, at p. 460). If this were not so the rule would be nullified. The plaintiff relied on the judgment of Sir Baliol Brett, M.R., in *Brunsden v. Humphrey* (*supra*), which mentions, as a test for deciding whether two causes of action are the same, whether the same evidence will support both ; and he urged that on his first action no evidence would have been admitted of breaches of contract by the defendant other than those specified in the particulars. But the question is not whether, as the action was actually brought, the plaintiff could or could not go into certain matters, but whether he could if he had given the proper particulars have proved the whole of what he claims in the second action under the cause of action for which he sued in the first. See *Death v. Harrison* (L.R., 6 Ex., 15), especially the judgment of Baron Cleasby, at page 19 ; *Newington v. Levy* (L.R., 6 C.P., 180). He could not justify an action for the loss of an eye by the defendant's negligence when he had already recovered for the loss of a foot by the same negligence, by saying that in the first action he only gave particulars of the loss of his foot. No more can he recover in one action for breach of a single promise in ten respects and in another for breach in ten other respects of the same promise. The giving of such particulars as are necessary to enable the defendant to know what case he has to meet is merely incidental to the bringing of the action, and a plaintiff cannot give himself a right to bring an action which otherwise he could not bring by failing to specify all the matters which go to make up his one cause of action, or to claim all the relief to which he is entitled in respect of it. This is well illustrated by *Serrao v. Noel* (1 *The Times* L.R., 581 ; 15 Q.B.D., 549). There the plaintiff alleged that the defendant was detaining certain shares, the plaintiff's property. He first brought an action in the Chancery Division claiming an injunction to restrain the defendant from parting with the shares. In this action the defendant consented to an order for the delivery of the shares to the plaintiff. The plaintiff afterwards sued in the Queen's Bench Division for damages for the detention. It was held that he could not recover, since the damages could have been claimed in the former action, injunction and damages being only different forms of relief applicable to the same cause of action. " The principle," said Lord Justice Bowen at page 559, " is that where there is but one cause of action damages must be assessed once for all," and this was enforced although in the former action damages had not been claimed and consequently could not be assessed.

There are many authorities on this subject, or connected with it, but they all come back to the same test : is the cause of action in the second action the same as that for which the plaintiff had judgment in the first ? If it is, the second action cannot be maintained, and (speaking generally) it is immaterial whether the plaintiff knew, or might have known, when he brought the first action, the facts on which he relies in the second. See, for example, *Clegg v. Dearden* (12 Q.B., 576) and the judgment of Mr. Justice Holroyd in *Howell v. Young* (5 B. and C.,

259). In *Lord Bagot v. Williams* (3 B. and C., 235) the knowledge of the plaintiff or his agent as to what was owing to the plaintiff when the first action was brought was considered, not because a plea of judgment recovered would not have been good although when the first action was brought the plaintiff did not know of the debt sued on in the second action, but in order to ascertain for what debts in fact the former action (in an inferior Court in which there were no pleadings) was brought.

I think, therefore, that the plea of *res judicata,* or judgment recovered, is an answer to the whole of this action, and that the defendant is entitled to judgment. This being so, it is unnecessary to consider the other points which the defendant takes in his notice of appeal, and on which we have heard no argument.

[Solicitors—Messrs. Champion and Co., for Messrs. Gardener and Smith, Uxbridge; Mr. Edward Mackie.]

K.B. Div. (Swift, J.) 1928. Apr. 3.

ATTORNEY-GENERAL v. PRITCHARD AND OTHERS.*

Sale of Goods — Payment by instalments — Death of purchaser — No instalments ever paid—Resumption of possession of furniture by vendor — Claim against purchaser's executors for instalments.

By the terms of a lease of a house granted by the Crown the lessee agreed to pay six yearly instalments in respect of furniture on the premises which on completion of the instalments was to become his property, but *in interim* belonged to the Crown. The lessee died without paying any instalments and the Crown subsequently brought an information against his executors and his widow, to the latter of whom he had bequeathed his interest under the lease, claiming three instalments which had become due at the time when the widow had surrendered the lease, and, together with the executors, her sons, had vacated the premises owing to financial difficulties. When the defendants left the premises the Crown took charge of and dealt with the furniture in a manner prejudicial to the defendants' interests in it.

Held, that there was an agreement for the sale of the furniture, payment to be made by instalments, the property not to pass until the price was fully and finally satisfied ; and that by resuming possession of the furniture when it was abandoned by the defendants the Crown had disentitled itself to sue for a part of the purchase price. The proper course of action was to sue for damages for breach of agreement to purchase.

This was an information preferred by the Attorney-General for sums due to the Crown in respect of unpaid instalments on furniture let on hire under the terms of a lease. By an indenture of lease dated October 14, 1921, the Crown demised to Mr. Henry Pritchard for the term of 14 years certain premises known as the Speech House, in the Forest of Dean, near Coleford, Gloucester, at a rent of £80 per annum, rising by £10 yearly to a maximum of £140. By clause 2 of the lease certain furniture, fixtures, goods and effects upon the premises were let on hire to Mr. Henry Pritchard, and in consideration thereof he bound himself to pay to the Crown in each of the six years 1922, 1923, 1924, 1925, 1926, and 1927, the yearly sum of £350 19s. 9d., the payments to be made on May 10 in each of those years, the lessee also covenanting to pay interest quarterly at the rate of 7 per cent. per annum on so much of the aggregate amount of the six yearly sums as was for the time being unpaid. The clause further provided that the furniture was to become the property of the lessee on completion of the payments, but pending that, to remain in the Crown.

Mr. Henry Pritchard died on July 17, 1923. He appointed the present defendants, his two sons, Mr. John Owen Pritchard and Mr. Edward Stephen Pritchard, his executors, and bequeathed to his wife, the defendant Mrs. Alice Pritchard, all his interest under the lease. The executors duly proved the will on February 22, 1924, and assented to the bequest to their mother, who entered on the premises and attorned tenant to the Crown and became bound by the covenants in the lease. Owing to the inability of the defendants to make a financial success of the business on the premises they decided to dispose of the premises to other tenants and a surrender of the lease was executed on March 24, 1926, the defendants having previously left the premises and the Crown having taken possession of the furniture. Neither the original lessee nor any of the defendants paid any of the instalments which were due for the years 1922, 1923, 1924, in all amounting to £1,052 19s. 3d., and the Attorney-General claimed from the executors in respect of the first two years and against the widow for the last year.

The two executor defendants alleged that the Crown could not claim the instalments inasmuch as they had taken possession of the whole of the furniture comprised in the lease, which, they alleged, was not only a lease but a purchase agreement. They further said that they had fully administered the estate and had no assets whatsoever belonging to it ; that the estate of their late father was liable for the covenants under the lease and not they personally. They also said that there was a hire-purchase agreement which was determined by the Crown taking possession of the furniture. Mrs. Alice Pritchard also denied liability on this last ground.

The material clauses of the lease and the finding of the jury appear in the judgment.

Mr. Hubert Hull appeared for the Crown ; the defendants appeared in person.

MR. JUSTICE SWIFT.—By an indenture of lease made on October 14, 1921, the Crown leased to Mr. Henry Pritchard the dwelling-house known as the Speech House in Dean Forest in the county of Gloucester for a term of 14 years from October 10, 1920, at a rent of £80 for the first year of the term, £90 for the second year, and so on, increasing by £10 per annum for each year of the term until the annual rent should amount to £140, and thereafter at the annual rent of £140. The second clause of that indenture is as follows : "(*a*) The Commissioners shall let to hire to the lessee the furniture, fixtures, goods and effects which are in or about the Speech House but are the property of His Majesty and

* Reported by CHARLES CLAYTON, Esq., Barrister-at-Law.

which are set forth in inventory B (subject to the variation made therein by the fourth schedule to these presents) attached to a valuation dated October 13, 1920, and made by Messrs. Bruton, Knowles, and Co., on behalf of the Commissioner, and by Messrs. Bill and Son on behalf of the lessee, which valuation and inventory is deposited in the office in London of the Commissioners, and also the wooden pavilion now standing on the field adjoining the garden of Speech House and being of the value as is hereby agreed of £50. (*b*) In consideration of the said letting to hire the lessee shall pay to His Majesty's Receiver on behalf of His Majesty, His Heirs and Successors in each of the six years 1922, 1923, 1924, 1925, 1926 and 1927 the yearly sum of £350 19s. 9d., such payments to be made on May 10 in each of such years and the first of such payments to be made on May 10, 1922, and shall also pay to His Majesty's Receiver on behalf of His Majesty, His Heirs and Successors on each of the quarter-days hereinbefore appointed for the payment of rent interest to such quarter-day at the rate of 7 per cent. per annum on so much of the aggregate amount of the said six yearly sums as is for the time being unpaid, the first of such payments of interest having become due on July 5, 1921. (*c*) Upon the payment at the times and in the manner aforesaid of all the said six yearly sums together with interest as aforesaid, the property in the said furniture, fixtures, goods and effects hereby let to hire shall pass to the lessee but until all such sums and interest shall have been paid as aforesaid the property in the said furniture, fixtures, goods and effects shall remain in His Majesty."

Then by clause 6 of that indenture it is provided that: "If the said yearly rent hereby reserved or any payment hereby made payable or any part of such rent or payment shall at any time be in arrear and unpaid for forty days after the same shall have become due (whether any formal or legal demand thereof shall have been made or not) or if the lessee shall at any time fail or neglect to perform or observe any of the covenants, conditions or agreements herein contained and on his part to be performed and observed or if the lessee while the said demised premises or any part thereof shall remain vested in him shall become subject to the bankruptcy laws or make any arrangement or composition with his creditors or permit any execution to be levied on the demised premises or if the assigns of the lessee being a company shall enter into liquidation whether compulsory or voluntary or if the said licences shall be forfeited or not renewed or if the lessee shall be convicted of any offence against any of the laws affecting publicans or licensed victuallers then and in every such case it shall be lawful for the lessor or any person or persons duly authorized by him in that behalf into or upon the said demised premises or any part thereof in the name of the whole to re-enter and the said premises peaceably to hold and enjoy thenceforth as if these presents had not been made without prejudice to any right of action or remedy of the lessor in respect of any antecedent breach of any of the covenants by the lessee hereinbefore contained."

Mr. Pritchard did not pay any yearly instalments of £350 which he had undertaken to pay on account of the furniture, but apparently the interest was paid at 7 per cent. per annum on so much of the aggregate amount of the said six yearly sums as remained unpaid—that is, on the whole £2,105 18s. 6d. He died on July 17, 1923, having by his will, dated March 30, 1920, appointed the defendants, Mr. John Owen Pritchard and Mr. Edward Stephen Pritchard, his executors and having bequeathed to his wife, the defendant Mrs. Alice Pritchard, all his interest in the said indenture of lease. The executors proved the will and assented to the bequest to Alice Pritchard. From the time of the testator's death Mrs. Pritchard and her two sons (her co-defendants) lived at the Speech House and carried on there the business of a licensed victualler, and for that purpose used the stock-in-trade and furniture in the house. They did not pay either the instalments which had become due for the years 1922 and 1923 in the testator's lifetime, nor the instalment which became due on May 10, 1924.

The business was not prosperous. From the beginning of the lease the Crown was pressing—and quite properly pressing—for the payment of the instalments and the interest on the unpaid aggregate of the instalments. That pressure was not effective because the Pritchards had not got and could not raise the money, and in the early part of 1925 they recognized that they must abandon the struggle to make the business of the Speech House—encumbered as it was by their indebtedness to the Crown—a paying concern. After some protracted negotiations, it was ultimately agreed that Mrs. Pritchard should surrender the premises demised to her late husband, and on March 24, 1926, a deed of surrender was made by her, by which "Alice Pritchard as beneficial owner hereby assigns, surrenders and confirms unto the Commissioners all and singular the premises comprised in and demised by the said indenture of lease as from the said February 24, 1925, to hold unto the Commissioners and their assigns for all the unexpired residue of the said term, to the intent that the said term of 14 years granted by the said indenture of lease may merge and be absolutely extinguished in the freehold and inheritance of the said premises." That deed has, so far as I observe, nothing whatever to do with the furniture dealt with by clause 2 of the original indenture of lease—it does not purport to be a surrender of that furniture, and in no way settles any dispute or questions of liability as to it—and it does not in any way allude or refer to it, except that, in words immediately following those which I have quoted, it proceeds to state: "Provided always and it is hereby agreed and declared that nothing herein contained shall prejudice any rights which may have accrued to the Commissioners prior to the date of these premises in respect of the covenants on the part of the lessee contained in clause 2 of the said indenture of lease."

I read this proviso to mean that the parties are expressly excluding any question of the furniture from this deed of surrender—the furniture is certainly not included in the premises surrendered—and I think that the proviso was intended to assert the Crown's right to deal with the furniture as not being covered by the surrender and to leave the Commissioners all the rights which they then possessed in regard to the furniture and the instalments which had accrued due. Long before the deed of surrender was executed, the defendants had in fact abandoned the furniture. On February 24, 1925, new tenants of the Crown had taken possession of the Speech House, and on or about that day the defendants left the premises and left the furniture behind them. The Crown then took possession of the furniture, they assumed dominion over it, and they dealt with it, either by letting or selling it to the new tenants or by selling it by auction. It is not quite clear to me how the furniture was dealt with, but it is not disputed that after the Pritchards left it in the house, on or about

February 24, 1925, the Crown in fact did exercise dominion over it and treat it in a manner which was quite inconsistent with any proprietary rights of the Pritchards in it.

No payment was made by the defendants, or any of them, on account of the instalments unpaid in the years 1922, 1923 and 1924, and on May 13, 1927, the Attorney-General filed the information in this action, claiming £1,052 19s. 3d., alleging that £701 19s. 6d. was due from the executors of Mr. Henry Pritchard, and £350 19s. 9d. was due from Mrs. Alice Pritchard to the Crown. The answer of the executor defendants to that information is two-fold : (*a*) *Plene administravit ;* (*b*) the Crown has taken possession of the whole of the furniture comprised in the lease, and, therefore, they cannot claim. The answer of Mrs. Pritchard is confined to the second of these grounds. All the defendants have complicated their answers by alleging that the lease was not only a lease but a hire-purchase agreement, but I think the real substance of their defence is that the Crown, having taken possession of and dealt with the furniture in antagonism to any rights which they may have had in it, has precluded itself from claiming as such any portion of the agreed purchase price. The action came on to be tried with a special jury before me, on March 18 last. At the trial the defendants appeared in person, and I had not the advantage of the assistance of counsel appearing on their behalf, but Mr. Hubert Hull, who appeared for the Crown, was most helpful to me in explaining the facts and in directing my attention to the points of law to be considered and the authorities which might guide me in considering the defendant's contentions.

When Mr. Hull had opened the facts of the case it was obvious that, while questions of law had to be considered, there was only one question of fact to be determined—namely, had the executor defendants properly administered the estate which came into their hands ? Upon that issue I left the jury the questions : "Did the executors receive money available to meet the Crown debt, and, if so, how much ? " and received the answer "Yes. £800." Upon that verdict it is clear that if the Crown is right in its contention that the executors are liable to pay the two instalments payable under clause 2 (*b*) of the indenture of October 14, 1921, there were funds of the testator for which they are still answerable, and they must pay.

Now the question to be determined is, whether, on the undisputed facts of the case, they are, and Mrs. Alice Pritchard is, liable to pay the instalments claimed from them, or has the Crown, by taking possession of the furniture and exercising dominion over it contrary to the defendants' rights—even though without their opposition or by their consent—terminated the contract so that the Crown cannot sue for the instalments, although they may have other rights enforceable if properly formulated claims are brought before the Court ? That question whether the Crown can recover these instalments in the circumstances seems to me to turn entirely on the construction of clause 2 of the indenture of October 14, 1921. Is that clause a hire agreement with an option to purchase ? or a hire agreement in which a purchase will be effected when a certain number of hire payments have been made ? or is it an agreement for the sale of the furniture—payment to be made by instalments, the property not to pass until the price is fully and finally satisfied ?

I have no hesitation in coming to the conclusion that the latter is the correct view, and I am justified in this opinion by Mr. Hull who, in argument, said, "This was an agreement for the sale of property not passing to the purchaser." Although in clause 2 the words "let to hire" are used to describe the transaction, I am satisfied that they do not really and appropriately describe it. This was not a hiring agreement ; it was an agreement of sale, the property not to pass until the whole of the purchase price had been paid. The amount of the instalments, in proportion to the agreed total value of the furniture, the charging of interest on the unpaid instalments, the inability of the grantee to determine the contract, all point to this being in reality an agreement for sale and not an agreement for hire, with a right to purchase included. That being so, it seems to me that by resuming possession of the furniture when it was abandoned by the defendants, the Crown has disentitled itself to sue for a part of the purchase price. The proper course of action, I think, was for damages for breach of agreement to purchase, and in that form compensation would have been recoverable for the usage of and depreciation in the value of the furniture during the three or four years while it was in the possession of the defendants and their testator.

This is not a case, in my opinion, like *Brooks v. Beirnstein* ([1909] 1 K.B., 98) in which it was held that an owner who had let goods out on hire, did not, by retaking possession, abandon his right to recover hire instalments which had accrued due before he retook the goods. In that case a clear distinction is drawn between an agreement for the hiring of goods and an agreement for the sale of goods, and the reasoning in that case makes it quite clear, to my mind, that if it is an agreement for the sale of goods, the owner cannot retake them and at the same time sue for the price. This, I think, is clearly laid down in the case of *Hewison and Another v. Ricketts* (63 L.J.Q.B., 711). In that case the plaintiffs let to W.G. certain chattels, £125 was paid in advance, and the balance (£243) was to be paid by monthly instalments. There was a power to seize in case of default. If all the instalments were met the chattels were to belong to G. Default was made, and the plaintiffs seized. The defendant, in consideration of the return of the chattels to G., guaranteed the remaining instalments. Further default was made as to two instalments. The plaintiffs again seized, and afterwards sued the defendant for the amount of the two instalments. It was held that the plaintiffs had determined the original contract and could not recover from the surety. In that case Mr. Justice Charles said that the "words point to its being a hiring agreement, but a hiring agreement not quite in the usual form. In effect it constitutes an agreement between a vendor and a purchaser although the payment is described as hire. . . . Seizure by the plaintiffs extinguished liability, as far as Guerin (the purchaser) was concerned with regard to these two instalments, and in my opinion relieves the surety. The practical result of holding otherwise would be that vendors, or as they term themselves, owners, in cases of this kind, on default being made, might seize the property and keep it, keeping at the same time the £125 and all instalments paid and thus get paid twice. Upon the true construction of the agreement the general right to sue Guerin (the purchaser) having been put an end to by the seizure, the right to sue the defendant as surety falls to the ground." Mr. Justice Collins said : "Here the agreement, which is called a hire and purchase agreement, is primarily a sale and purchase agreement, the property in the goods meanwhile remaining in the vendor. In the first

place it is seen that a sum has to be paid down in advance, and there is a provision that this sum, together with all money paid under the agreement, shall belong to the vendors absolutely. Were this otherwise they would have to refund. This agreement, upon its true construction, provides for payment of the residue of the purchase money by instalments. It is needless to consider what would happen if a complete default were made or not, for the provision was that the owners, or rather vendors, were to have a right to seize and resume possession of the goods if default were made in the payment of one instalment. Here, after the guarantee had been given, the plaintiffs had two rights—they could, under their original agreement, resume possession, or they could sue the surety, the present defendant, on his guarantee. By resuming possession they would determine the agreement. This they did, and by doing so lost the right they had to sue Guerin; consequently, any proceedings taken by them against the defendant to enforce the guarantee against him as surety must fail. The agreement does not give the plaintiffs, who are the vendors, the right to resume possession of the goods, and at the same time recover unpaid instalments from the defendant, the surety, upon his guarantee."

I think that this case covers the one which I am now considering. In my opinion it would be inequitable that the vendor, having resumed possession of the furniture and dealt with it in such a way as to put it out of his power to return it to the purchaser, if the price were paid, should be allowed to recover a part of that price. The Crown's remedy, if any, is, I think, for damages for breach of contract, and not for the price of goods, and I therefore give judgment for the defendants, with costs.

[Solicitor—The Treasury Solicitor.]

Court of Appeal.
(Scrutton and Sankey, L.JJ., and Tomlin, J.)

1928.
Mar. 20.

STOTT AND ANOTHER v. SHAW AND LEE, LIMITED.*

Bills of Sale — Validity — Contemporaneous mortgage forming part of contract — "Defeasance or condition"—Bills of Sale Act, 1878 (41 and 42 Vict., c. 31), s. 10 (3).

By the Bills of Sale Act, 1878, s. 10 (3): "If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void."

The grantor of a bill of sale for £1,000 was being pressed by other creditors and approached the grantee for further financial assistance. It was ultimately agreed that the grantee should pay the other creditors a sum of £600, and receive a new bill of sale from the grantor for £1,600, the old bill being cancelled. Contemporaneously with the bill of sale, and as part of the same bargain, a mortgage instrument was executed by way of collateral security. The bill of sale provided for the repayment of the principal "on the 24th day of December next," and the mortgage instrument provided as follows: "The mortgagor . . . covenants with the mortgagee to pay him on the 24th day of December next the sum of £1,600 . . . and it is hereby agreed and declared that (subject to the right of the mortgagee to require repayment of the said principal sum on the 24th day of December next according to the foregoing covenant by the mortgagor or at any time thereafter) the principal money secured shall be repaid by instalments of not less than £20" on agreed dates.

Held, that the clause in the mortgage providing for the repayment of the principal by instalments was not a variation of the terms of the bill of sale so as to amount to a "defeasance or condition" within the mischief of section 10 (3) of the Bills of Sale Act, 1878.

Decision of the Divisional Court (44 *The Times* L.R., 210) affirmed.

This was an appeal from an order of the Divisional Court (Mr. Justice Shearman and Mr. Justice Finlay) (44 *The Times* L.R., 210), affirming a judgment of the Judge of the Salford County Court in favour of the claimants in an interpleader issue. The claimants, Messrs. Stott and another, were the executors of one Albert Stott, who died on December 10, 1926, and the appellants, Messrs. Shaw and Lee, Limited, were a firm of moneylenders who held a judgment against one Robert Thornley. In 1910, Thornley built a laundry at Flixton, Lancashire, and he bought some land from Stott for that purpose. As Thornley was unable at that time to find the whole of the purchase money, it was arranged that a mortgage of £150 in favour of Stott should be left on the land, and by 1912, as the result of a further series of loans, Thornley's indebtedness to Stott had been increased to £600. In 1913, Stott lent Thornley a further £400, taking as security to cover the entire sum of £1,000, a bill of sale dated May 30, 1913.

In June, 1925, Thornley was being pressed by the appellants in respect of a series of loans which they had made to him on various occasions, and he again approached Stott for further financial assistance. On June 24, 1925, Stott paid £600 to the appellants to clear Thornley's debt to them on that date. It was agreed between Thornley and Stott that the former securities should be withdrawn and that Thornley should give the deceased a new bill of sale on the machinery and chattels in the laundry to cover the entire £1,600 owed by him, and also a mortgage for the same sum on the building as a collateral security. The material portions of the bill of sale, which was dated July 1, 1925, were as follows: "In consideration of the sum of £1,600 paid to Robert Thornley by Albert Stott on the 24th day of June, 1925 (the receipt of which sum the said Robert Thornley hereby acknowledges) . . . Robert Thornley doth hereby assign unto . . . Albert Stott, his executors, administrators, and

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

assigns, all and singular the several chattels and things specifically described in the schedule . . . and the said Robert Thornley doth further agree and declare that he will duly pay to the said Albert Stott the principal sum aforesaid with the interest then due on the 24th day of December, 1925 . . ." By the mortgage instrument, which also was dated July 1, 1925, the mortgagor covenanted "in consideration of the sum of £1,600 paid by the mortgagee to the mortgagor on the security of a bill of sale dated the 1st day of July, 1925," to "pay to [the mortgagee] on the 24th day of December next the sum of £1,600 with interest thereon"; and it was further provided that "subject to the right of the mortgagee to require repayment of the said principal sum on the 24th day of December next according to the foregoing covenant by the mortgagor or at any time thereafter, the principal money hereby secured shall be repaid by instalments of not less than £20" on March 24, June 24, September 24, and December 24 every year, the first payment to be made on September 24, 1926. In January, 1927, the appellants seized Thornley's chattels to satisfy a judgment for £157 9s. 6d. which they had obtained against him. Stott's executors paid that sum into Court, and on an interpleader summons they were made claimants and the execution creditors (the present appellants) were made the respondents. It was contended on behalf of the execution creditors that the bill of sale of July 1, 1925, was invalid, first because the collateral mortgage constituted a defeasance or condition, which was not written on the same paper or parchment as the bill before registration, as required by section 10 (3) of the Bills of Sale Act, 1878; and, secondly, because the consideration for the bill of sale was not truly stated in the bill.

The County Court Judge held that the bill was not invalidated on either ground, and that therefore the claimants on the issue were entitled to judgment. This judgment was affirmed by the Divisional Court.

The execution creditors appealed.

Mr. E. W. Wingate-Saul, K.C., and Mr. J. C. Jolly appeared for the execution creditors; Mr. Cyril Atkinson, K.C., and Mr. J. Lustgarten for the claimants.

Lord Justice Scrutton, in the course of his judgment, said that before the County Court Judge two points were taken. The first point was that the consideration was not truly stated in the bill of sale. The County Court Judge decided that it was truly stated and the Divisional Court affirmed the judgment of the County Court Judge. In the Court of Appeal, counsel had abandoned that point and they were not troubled with it in that Court. The second point was that the bill of sale was subject to a defeasance or condition not contained in the body thereof, and that it was therefore void under subsection (3) of section 10 of the Bills of Sale Act, 1878. That subsection provided that: "If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void." What was said in this case was that there being a bill of sale to secure the payment of the sum of £1,600 and also a mortgage to secure the payment of the same sum there was a provision in the mortgage deed which added to and contradicted the bill of sale and that therefore the bill of sale was void under the above subsection. What he (the Lord Justice) understood to be the principle of the matter was that if there were in respect of the same debt varying provisions relating to the repayment thereof they must all be in the same document. If there are two documents containing different provisions, the provisions contained in the second document are a defeasance of the first document.

His Lordship then referred to the bill of sale dated July 1, 1925, and to the mortgage of the same date for the same amount, whereby the mortgagor covenanted in consideration of the sum of £1,600 paid by the mortgagee to the mortgagor on the security of a bill of sale dated July 1, 1925, to pay to the mortgagee on December 24 next the sum of £1,600 with interest thereon, and continued. Then came the clause which had given rise to the question in this case. It provided that "subject to the right of the mortgagee to require repayment of the said principal sum on the 24th day of December next according to the foregoing covenant by the mortgagor or at any time thereafter, the principal money hereby secured shall be repaid by instalments of not less than £20," on March 24, June 24, September 24, and December 24 every year, the first payment to be made on September 24, 1926.

It was very difficult to give any intelligible meaning to the clause about repaying the principal by instalments. But the personal covenant to repay the principal debt was expressly reserved and was not affected by the clause in the mortgage deed providing in certain events for repayment by instalments. There was no variation or alteration of the terms of the bill of sale so as to amount to a defeasance of it. The appeal must therefore be dismissed.

Lord Justice Sankey agreed. He said that it was sought to defeat the bill of sale in this case on the ground that a contemporaneous document—namely, a mortgage of the same date as the bill of sale—contained provisions relating to repayment by instalments which were not contained in the bill of sale and that therefore the bill of sale was void under section 10, subsection (3), of the Bills of Sale Act, 1878. The difficulty was to ascertain the real meaning of the instalment clause in the mortgage. It must have some meaning, although it was difficult to say what it was. Personally, he (the Lord Justice) had great doubts whether it had any meaning at all. It did not affect the mortgagee's right to sue for the principal. The clause itself was made subject to the right of the mortgagee to require payment on the fixed day or at any time thereafter. It did not affect the bill of sale and there was nothing in it which affected the rights or liabilities under the bill of sale and it did not contain any variation amounting to a defeasance of the bill of sale, and the transaction did not come within the mischief of section 10 (3) of the Act of 1878. The decision of the Judges of the Divisional Court was right and the appeal must be dismissed.

Mr. Justice Tomlin also agreed. The mortgage was obscure. It might be that the provisions with regard to repayment by instalments had no effect at all, or they might have the effect of limiting the mortgagee's rights in respect of foreclosure. In either case they did not vary the terms of the bill

of sale and there was no defeasance. He therefore agreed that the appeal should be dismissed.

[Solicitors—Mr. A. R. Lord, for Messrs. B. Kuit and Co., Manchester ; Messrs. Peacock and Goddard, for Messrs. Barlow, Garrett and Co., Manchester.]

Prob., Divorce, and Adm. Div. (Hill, J.) 1928. Mar. 27.

WOODLAND v. WOODLAND (OTHERWISE BELIN).*

Divorce — Nullity — Husband's petition—Ceremony of marriage in England—French decree dissolving wife's previous marriage — Decree not complete—Wife's order for restitution of conjugal rights — Appearance by husband —Estoppel.

If a man goes through the form of a ceremony of marriage in England with a woman who is not really free to marry owing to a foreign decree of divorce not having become effective at the time of the English ceremony, and if afterwards, with full knowledge of this fact, he does not raise the question of the validity of the English marriage when sued for restitution of conjugal rights, and thereupon a decree of restitution is granted in which the couple are declared "lawful man and wife," the man is estopped from impeaching the validity of his marriage, and a petition by him for a declaration of nullity of marriage will be dismissed.

This was a petition for nullity of marriage, filed on June 10, 1927, by Mr. Percy Maurice Woodland, a racehorse trainer, of Childerton, Wiltshire, formerly of Alfriston, Sussex. The petition stated that on December 5, 1914, at the register office, St. Martin's, London, he went through a form of ceremony of marriage with Ivy Vera Belin, who described herself as a spinster. There were no children. On March 21, 1907, at the register office, St. George's, Hanover-square, she had been married to Francis Saville Barton, and it was now alleged that this marriage had not been dissolved or annulled on December 5, 1914, and was still subsisting, Mr. Barton being still alive. In 1921 the respondent was granted a decree of restitution of conjugal rights, and on April 5, 1927, she presented a petition for periodical payments. By her answer to the petition for nullity the respondent said that the marriage of 1907 was lawfully dissolved by the Civil Tribunal of the Seine, Paris, on November 18, 1914. By his reply the petitioner denied this plea.

The Hon. Victor Russell appeared for the petitioner ; Mr. G. Tyndale and Mr. H. Rolfe for the respondent.

During the hearing it was established that the Civil Tribunal of the Seine, in an undefended divorce suit brought by Mr. Barton on May 5, 1914, against Mrs. Barton (the present respondent) on the ground of her relations with Mr. Woodland, then a jockey riding in England and France, granted a decree dissolving the marriage. Mr. Woodland joined the Royal Naval Air Service on the outbreak of war, and while on leave awaiting orders to go abroad was married to the respondent at her urgent request on December 5, 1914. At the register office the respondent described herself as a spinster. After that he lived with the respondent for about four weeks, but had not cohabited with her since. While flying over the enemy lines in Palestine he was shot down and taken prisoner by the Turks and was not released until 1919.

Expert legal evidence showed that according to French law a divorced woman could not enter into a valid remarriage until the time for appeal had expired (two months), and in any event not until the formalities of transcription had been carried out in the register of the office of civil status. In this case the transcription was not made until July 29, 1915, when the decree of dissolution became absolute. Even then a further interval might be necessary under French law before remarriage was valid, but this consideration did not arise in the present case. On July 29, 1921, the President granted the respondent a decree of restitution of conjugal rights against the petitioner (Mr. Woodland), the order reciting that they "were and are lawful husband and wife." Mr. Woodland did not defend these proceedings and did not resume cohabitation, Mrs. Woodland returning to France shortly after the decree.

Mr. Justice Hill adjourned the nullity proceedings for argument as to whether the petitioner was not estopped from putting forward his present plea by reason of the principle of *res judicata* being involved in the restitution decree. He granted the respondent leave to amend her answer, which was accordingly amended on February 22, 1928, alleging the order of restitution by way of estoppel.

Mr. Tyndale submitted that a party could not stand aloof and let his opportunity go, and at some later date raise his plea. Among other authorities he cited *Humphries v. Humphries* ([1910] 1 K.B., 796 ; [1910] 2 K.B., 531) and *Rudd v. Rudd* (40 *The Times* L.R., 197 ; [1924] P., 72), a suit for restitution of conjugal rights, in which Mr. Justice Horridge said : "This suit is brought for the avowed purpose of testing the validity of that decree" (an American decree of divorce). In *Hoystead v. Commissioner of Taxation* (42 *The Times* L.R., 207 ; [1926] A.C., 155, at p. 165) Lord Shaw said : "Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted." Counsel could not agree that the marriage here was valid, but the petitioner was estopped from raising the plea.

Mr. Justice Hill.—Your submission is summed up in Article 41 of Stephen's Digest of the Law of Evidence :

"Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case, actually decided by the Court, and appearing from the judgment itself to be the ground on which it was based ; unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which that judgment is intended to be proved."

Mr. Russell submitted that a question of status was involved which was on a different footing from other cases of estoppel. He referred to *Cowley v. Cowley* (29 *The Times* L.R., 690 ; [1913] P., 159) and *Miles v. Chilton* (1 Rob. Ecc., 684). In *Harriman v. Harriman* (25 *The Times* L.R., 291 ; [1909] P., 123, at p. 144) Lord Justice Farwell said :

* Reported by William Latey, Esq., Barrister-at-Law.

"No rule of evidence which prevents a party as against the other litigant from giving evidence of the truth can bind the Court to shut its eyes if it is not satisfied that all the truth is before it."

MR. JUSTICE HILL, in delivering judgment, said: In the course of the hearing it appeared that there had been proceedings in this Court in 1921 which had resulted in a decree of restitution of conjugal rights being pronounced on July 29, 1921, in a suit by the present respondent against the present petitioner, and, I think, the first suggestion came from me that that might create difficulties in the way of the petitioner's now setting up the case that the original marriage was void. The matter stood over for counsel to consider it and they have assisted me very much by their argument.

They also, however, asked that I should express my opinion both on the merits of the nullity question as well as upon the estoppel point, and I do so at their request, but I think that if the estoppel point is good I am in truth debarred from considering the merits. It may, however, be convenient if the case goes higher, and if I am wrong on the estoppel point, that the Court of Appeal should know what my decision would be upon the merits if the matter is open.

It is clear that the decree of the French Tribunal on November 18, 1914, did not operate to dissolve the marriage. It was a preliminary step like a decree *nisi* for the dissolution of marriage, but it was not effective to dissolve it. The necessary steps to convert it into a dissolution of marriage had not been taken by December 5, 1914, when the petitioner entered into a ceremony of marriage with the respondent. I think it is clear from the evidence of the French lawyers that the judgment of the Court did not itself make any change of status. It did not dissolve the marriage in itself. Further requirements were necessary. Certain intervals of time had to elapse and the decree had to be transcribed into the Register of Civil Status before the marriage was dissolved.

On December 5, 1914, the necessary time had not expired and the decree had not been transcribed into the register of civil status. It follows that on that date the respondent was still the wife of Mr. Barton and, therefore, incapable of marrying the present petitioner. Therefore, if the matter is open to the petitioner, he would be entitled to a decree of nullity, but I cannot see how the petitioner can be heard to say that he did not become the legal husband of the respondent by reason of the ceremony of December 5, 1914.

In 1921 the respondent brought proceedings for restitution of conjugal rights. She had to allege marriage in her petition. The Court would have no jurisdiction to grant such a decree until it found the marriage proved. The decree of the Court pronounced in terms that the petitioner "had sufficiently proved the contents of the petition," and that the respondent and the petitioner "were and are lawfully married," and ordered "that the said respondent do within 14 days from service of this order on him return home to the petitioner and render her conjugal rights" and so on.

It may be that such a decree does not directly affect the status of the parties, but it is a final decree and it can only be made upon the finding of status —namely, that the husband and wife were and are lawful husband and wife. The husband and wife were both parties to that suit. The husband appeared and he put in no answer, but he might in that suit have traversed the wife's allegation of the marriage; he might have put the marriage in issue. He did not do so. It may well be that at that time he had not ascertained that there were any grounds for disputing the validity of the marriage. He may not have ascertained his rights, but he did not file an answer, and the decree went by default upon the wife's proof of the marriage, which at that time no doubt she believed to be a valid marriage, and upon proof of the other matters entitling her to a decree.

Can it be that in such circumstances it is open to the petitioner to allege that the marriage was not a valid marriage? No doubt in some respects the questions which arise under a contract of marriage are different from questions which arise under other contracts, but I have listened to the argument and attended to the cases that have been cited and I am unable to find that there is in the law peculiar to this Division anything which renders inapplicable the general law of estoppel. [His Lordship read Article 41 of Stephen's Digest of the Law of Evidence, and continued.] The marriage was directly in issue in the proceedings for restitution. It was actually decided by the Court, and the Court could not have granted a decree without finding that it was a valid marriage. That appears from the judgment itself to be the ground upon which it was based. There was a finding that the parties were lawful husband and wife. I can see no reason for saying that, because this was a marriage contract, I am to refuse to apply the principles laid down in the cases cited to me.

In this view I am very much assisted by *Wilkins v. Wilkins* (12 *The Times* L.R., 212; [1896] P., 108), in which it is clear that Mr. Justice Gorell Barnes (as he then was) felt the same difficulty which presented itself to me when this case was opened. In that case the wife took proceedings for judicial separation on the ground of the husband's adultery, and the husband put the marriage in issue on the ground that a previous husband of the woman was alive, but the jury found otherwise and a decree of judicial separation was granted. Apparently the previous husband had not been heard of for nearly 40 years, but he appeared nine months after the finding of the jury and the respondent then petitioned for nullity. Mr. Justice Gorell Barnes had no doubt that the other man was the real first husband, but he felt a difficulty in granting a decree of nullity by reason of the verdict and decree in the former suit, and he adjourned the consideration of the case in order that the then petitioner might make an application to the Court of Appeal. He felt the same difficulty that I feel. It is quite true that there the validity of the marriage had been put in issue by the husband and the question had been fought out, but that can make no difference.

In the case of this wife's petition for restitution of conjugal rights she alleged the validity of the marriage, and the husband, if he had chosen, might have appeared to traverse it, but he did not choose to do so at that time. Therefore, in my view, I have every reason to feel the same difficulty as Mr. Justice Gorell Barnes felt. But the way in which the Court of Appeal dealt with that case (*Wilkins v. Wilkins, supra*) was to extend the time for appealing, and it was not suggested in the Court of Appeal that the decree of judicial separation was not binding as long as it stood, and, indeed, Lord Justice Kay clearly expressed his view that it was binding. He said: "As evidence is now forthcoming which could not by the exercise of reasonable diligence have been obtained at the first trial, there must be some mode of getting over an estoppel arising from a verdict which was obtained under a misapprehension of the real facts. In my opinion, we have jurisdiction to

enlarge the time for moving for a new trial of the first suit, and I am also clearly of opinion that the case is one in which the jurisdiction ought to be exercised." The estoppel was clearly there recognized, and a way of getting round it was found. I asked Mr. Russell if he would like me to do what Mr. Justice Gorell Barnes did in that case, and he said that he would prefer me to deal with the case as it stands.

No doubt he can go to the Court of Appeal. If I am wrong in finding that there is an estoppel, the matter is open to the husband. I have stated in my opinion what will be the result if I am competent to deal with the merits. If, on the other hand, the Court of Appeal think that the proper way is to extend the time for appeal, it is within their power to deal with it in that way, but for the moment I must dismiss the petition with costs.

[Solicitors—Mr. J. J. Warden Gowring; Messrs. R. C. Bartlett and Co.]

Court of Appeal. } 1928.
(Scrutton, Greer, and Sankey, L.JJ.) } Apr. 19.

IRONMONGER AND CO. v. DYNE.*

Gaming—Dealings in foreign currency—Obligation to deliver.

Observations upon what constitutes a transaction a gaming or wagering contract.

This was an application by the defendant, Mrs. Aminta Marjorie Bradley Dyne, of Earl's Court, S.W., and Tring, Hertfordshire, for judgment or a new trial on an appeal from the verdict and judgment entered at the trial before Mr. Justice Horridge and a special jury in favour of the plaintiffs, Messrs. Ironmonger and Co., foreign bankers, of 5, Angel-court, Throgmorton-street, in an action in which they claimed to recover from the defendant about £39,000. The plaintiffs said that the money was due and owing in respect of foreign currency sold by the defendant to the plaintiffs and resold by them to her.

The defendant pleaded the Gaming Act, alleging that the contracts referred to gambling transactions. She contended that she and the plaintiffs were conducting a gamble in foreign currency. She said that there were no real purchases and sales, and that it was not intended by the parties that there should be any liability either to deliver or to accept delivery. All that the parties intended, she said, was to gamble on the rise and fall of the franc and lira during the time which elapsed between the date of each contract and the date of its performance.

The plaintiffs sued the defendant in respect of her separate estate.

The jury returned a verdict for the plaintiffs, and Mr. Justice Horridge entered judgment for them for £38,938, the agreed amount.

The defendant appealed.

Mr. Jowitt, K.C., and Mr. Blanco White appeared for the appellant; Mr. Stuart Bevan, K.C., and Mr. St. John Field for the respondents.

Mr. JOWITT, in opening the appeal, complained of the summing up of the Judge, and said that some important matters had not been mentioned to the jury.

He (counsel) contended that there was conclusive evidence of gambling. The transactions began in 1923 with Mr. J. D. Gregory, who then occupied a prominent position in the Foreign Office. In January, 1924, the defendant, Mrs. Bradley Dyne, started operations, and throughout 1924, 1925, and 1926, down to the date of the writ, she operated on a very extensive scale. Counsel said that he was told that there were 280 separate transactions, and the turnover amounted to 421,000,000 francs, 17,000,000 lire, 1,000,000 pesetas, 120,000 Norwegian kroner, and 100,000 United States dollars. This case far transcended all other previous cases in the magnitude of the transactions.

The subject-matter of the action consisted of the last 12 of the transactions, which took place between December, 1926, and February, 1927. It was material to consider the nature of those transactions. In no single one was any currency ever delivered by either party. In no single case was any arrangement for delivery of currency ever made, and no delivery was ever asked for. No address was ever given at which delivery could be made.

Whenever Mrs. Bradley Dyne wanted to speculate she communicated with the plaintiffs and a contract would be arranged by them in the market in a sense directly opposite to that in which the contract was to be made with Mrs. Bradley Dyne. In that way, counsel suggested, they preferred to "lay off the bet."

As the case related to the sale of foreign currency, the obligation to deliver was an obligation to deliver currency. If the day came for delivery and the defendant—as in fact happened—could not deliver, what happened? The plaintiffs would "close" the transaction (without instructions) in the sense of entering into a new contract with the defendant, of sale by them to her, which would have the effect of undoing the former contract, subject to payment of the difference.

The evidence was that it was not expected that the defendant would have to deliver. It was understood that the transaction would be closed at the rate of the day. The Judge ought to have directed the jury that they ought to draw the inference that all the transactions between the defendant and the plaintiffs were simply and solely gaming transactions.

In reply to LORD JUSTICE SCRUTTON, counsel said that Mrs. Bradley Dyne paid back what she could. In 1924 she repaid £28,000, and in 1925, £2,000.

Mr. STUART BEVAN, for the respondents, said that she received £24,000 in 1926.

Mr. JOWITT said that whether the plaintiffs were or were not affording the defendant facilities for gambling it was clear that they were, by means of enforceable and genuine contracts, covering their obligations to the defendant.

LORD JUSTICE SCRUTTON.—That is to say, treating their obligation to the defendant as one which they might be called on to perform.

Mr. JOWITT.—Yes: but that does not affect the case. The plaintiffs had two risks: (1) the risk of the defendant's solvency. The way in which they regarded that was shown by the fact that they never asked for any cover: and (2) the risk of her repudiating her liabilities by pleading the Gaming Act. In view of the method and manner of the introduction by Mr. J. D. Gregory, that risk must have been regarded as completely negligible.

Continuing, counsel said that at one time there was a hopeless muddle between the defendant and Mr. Gregory with regard to the relative division of the "spoils."

LORD JUSTICE SCRUTTON.—None of these people had any idea of the mischief that they were doing to France.

* Reported by T. W. MORGAN and E. J. M. CHAPLIN, Esqrs., Barristers-at-Law.

Mr. JOWITT.—I agree. The view taken of gambling is a merely selfish one. The gambler never thinks of anything except the immediate prospect of winning money without working for it.

LORD JUSTICE GREER.—Was the defendant winning at that time?

Mr. JOWITT.—Yes; in 1926 I think she won £23,000.

LORD JUSTICE GREER.—That explains her plunging since.

Mr. JOWITT read a letter written by Mrs. Dyne to a member of the plaintiff firm in which she said:—

"My husband has definitely refused to recognize my gambling debts and I have to go to work to pay them off myself. . . . My dear Albert, I do not know what more to say. I fully recognize that this further blow on the top of everything is going to affect you and your firm very seriously. But at the present moment I am utterly cornered. It is not much use saying I am terribly sorry, but I do say it. I never in my darkest moments thought I should have to let you down."

Counsel said that that was not the letter of a person willingly dishonouring gambling debts, but of one who realized that it was a most humiliating thing.

LORD JUSTICE SCRUTTON.—You can say, "I can't pay" without saying, "I plead the Gaming Act."

Mr. JOWITT.—Yes; but there were the words "my husband has definitely refused to recognize my gambling debts."

Counsel submitted that on a review of all the circumstances the inference could properly be drawn that both parties intended that nothing but differences should be paid, and that was a gambling transaction.

LORD JUSTICE GREER.—You will have to satisfy me of that.

Counsel proceeded to read the evidence and the summing-up, and submitted that the question was not properly expounded to the jury. Counsel then referred to *Universal Stock Exchange, Limited v. Strachan* ([1896] A.C., 166); *In re Gieve* (15 *The Times* L.R., 251; [1899] 1 Q.B., 794); *In re Duncan and Co.* (*The Times*, March 17, 1903); *Miles v. Lowenfeld and Others* (*The Times*, December 21, 1900, May 7 and 8, 1901); and *Barnett v. Sanker* (41 *The Times* L.R., 660), and submitted that, where on the totality of the circumstances of the case the proper inference was that the transactions related to differences only, then the transactions were gaming transactions; and even though on the face of them the contracts gave an option to the buyer or seller to demand delivery or acceptance, as the case might be, the transactions were none the less gaming transactions where it was not anticipated by either party that any delivery would be made or asked for.

Mr. STUART BEVAN, in opening the case for the respondents, said that the case made before Mr. Justice Horridge was not as to the true inference to be drawn from the circumstances. Mrs. Bradley Dyne's case was that a direct agreement was entered into under which she was to pay differences only, and the question, therefore, was whether such an agreement had been entered into. The question of the intention of the parties was, therefore, not open, the only matter to be considered being the terms of the agreement. The summing-up could not be effectively criticized because it dealt with the case in all its aspects.

As to the verdict being the only possible verdict, he submitted that on the evidence the only possible verdict was one for the plaintiffs, and for this broad reason, that it took two parties to make a gamble. In this case the one element of gambling was wanting, because the plaintiffs never gambled at all.

Mr. ST. JOHN FIELD followed on the same side.

Mr. JOWITT, in reply, said that what the defendant desired to have tried again was whether, in all the circumstances, the jury ought not under a proper direction to find that what the parties were doing was not entering into genuine commercial bargains but entering into transactions which, though couched in commercial language, in reality amounted to gambling transactions.

LORD JUSTICE SCRUTTON, in giving judgment, said that the defendant appealed on two grounds: (*a*) misdirection and (*b*) that the verdict was against the weight of evidence.

The question in the case might be stated very shortly. The action was brought on 12 contracts of purchase of foreign exchange. The defence set up was that these were gaming contracts unenforceable under the Gaming Act. The transactions between the plaintiffs and the defendant extended over three years, although the particular amount sued for covered only the period of two months in 1926 and 1927.

The transactions in question were not of a pleasant nature. After the War, while Europe was recovering from the various upheavals which were the result of it, the value of currency fluctuated extremely. Contracts for the purchase or sale of currency which, before the War, had been a comparatively sober business became very speculative in their making and their result. It was possible to make very large profits and equally possible to make very great losses, and, as was to be expected when great profits might be made, the birds of prey gathered together. Reckless speculators, absolutely indifferent to the damage that they were doing to the country in the currency of which they were dealing, began operations. People bought and sold foreign currency to a very large extent, with the most disastrous results to the countries concerned. That was particularly the case with regard to sales and purchases of French currency, which went near to bringing that country to ruin. People who indulged in those speculations were beneath contempt and ought to be condemned. They were utterly selfish, and had no regard at all to the enormous injury which they were inflicting on the legitimate trade of the country in whose exchange they were speculating. The unfortunate result of such speculations was one of the reasons which made the case unpleasant.

Another reason which had made the case unpleasant and notorious was that in the particular set of speculations in which Mrs. Dyne was interested more than one prominent official of the Foreign Office was concerned. That had nothing to do with the legal merits of the case, and he proposed to say nothing more about it, except that the Government had dealt with the matter properly in so far as they had declared that such transactions were a disgrace to the Civil Service, and the proper punishment had fallen on those officials who engaged in them. The only question to be determined was whether those 12 transactions, upon which the claim was based, were gaming and wagering transactions. It must be borne in mind that the case was one tried by a jury, and the question was, therefore, not what conclusion the Court, or the Judge before whom the case was tried would have come to, but whether the Judge had properly directed the jury and whether there was evidence on which the jury could, under

that direction, properly arrive at their finding. The jury were the persons to decide.

In considering the summing-up, one must have regard to the course which the case took at the trial. He was not going to attempt exhaustively to define what was a gaming or wagering contract. Lord Justice Cotton had attempted a definition in *Thacker v. Hardy* (4 Q.B.D., 685) when he said, at page 695 :—

"The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way A will lose, but if it turns out the other way he will win."

With great respect, he thought that that definition was not exhaustive. If goods were sold to be delivered three months hence at a fixed price, and the price fell below or went above that figure, the price at the date fixed would determine whether there was a profit or a loss ; but that was not a gaming or wagering contract. Lord Justice Cotton had omitted any such consideration as that. Assume the case of the Grand National and a horse called Tipperary Tim, and A and B agreed that if Tipperary Tim did not win A would pay £1 to B, but that if it did, B would pay £100 to A ; that was a bet, because neither of them had any interest in the horse except their agreement about the money to be paid if the horse should win or lose. But if the contract was that A said that he would buy Tipperary Tim for £200, and, if he won the Grand National, he would pay another £800, a matter which depended on a future event, that was not a gaming transaction because they had a proprietary interest in the subject matter—Tipperary Tim—which passed from one to the other.

A number of similar examples might be given in commercial matters, as in the case of goods to be delivered three months hence, the price of which would depend on the market and would determine whether the seller would get out with a profit or not. That rested on matters over which he had no control, but if the contract was to result in the delivery of goods or in the passing of property it was not gaming or wagering. If it were a contract in which differences in prices were to be paid it was not a gaming contract unless it could be shown that there was an agreement between the parties that the purchaser had no right to claim delivery of the goods and the seller had no right to claim acceptance.

The question to be considered here was whether the transactions were such that nothing was to happen except payment of differences, or whether currency was to be delivered. That depended on the agreement between the parties, and it had been agreed by counsel in the Court below that the question to be left to the jury was that which had been put by Mr. Justice Cave in *Universal Stock Exchange, Limited v. Strachan* ([1896] A.C., 166, at p. 167) to the jury and was approved in the House of Lords. What Mr. Justice Cave said was this :—

"The question which you have to try is whether these transactions were real bargains for purchase of stock or whether they were simply gambilng transactions intended to end in the payment of differences. . . . A man goes to a broker and directs him to buy and sell so much stock, as the case may be. That may be, in the eye of the purchaser, a gambling transaction or it may not. If he means to invest his money in the purchase of the stock which he orders to be bought, that undoubtedly is a perfectly legitimate and real business transaction."

After referring to the "terms of business" that Judge concluded thus :—

"Notwithstanding those ostensible terms of business, was there a secret understanding that the stock should never be called for or delivered, and that differences only should be dealt with ? If there was that secret understanding, then the plaintiff is entitled to recover his securities. If there was not that secret understanding, then he is not entitled to recover them, and that is the only question with which I need trouble you."

A question based on that direction had in this case been put to the jury, and he thought that no complaint was to be made about how the question was put. In his opinion, although the summing-up might have been improved in one or more matters, there was no ground for saying that there had been a misdirection. And further, he was of opinion that there was evidence on which the jury could come to their conclusion. The plaintiffs, who were said to have been gaming, had covered themselves by genuine commercial contracts which could be enforced against them and protected them against payments to the defendant, but did not apply to payments to be made by her. The appeal therefore failed, and must be dismissed.

Lord Justice Greer and Lord Justice Sankey delivered judgments to the same effect.

[Solicitors—Messrs. Kenneth Brown, Baker, Baker; Messrs. H. S. Wright and Webb.]

Court of Appeal.
(Lord Hanworth, M.R., Lawrence and Russell, L.JJ.)
1928.
Apr. 19.

LONDON HOLEPROOF HOSIERY COMPANY, LIMITED v. PADMORE.*

Vendor and Purchaser—Lessee's option of purchase—Destruction of premises by fire—Subsequent exercise of option—Refusal of lessor to reinstate premises—Repudiation of contract by lessees—Claim to specific performance.

The defendant demised to the plaintiffs for three years a piece of land with a factory on it, and the plaintiffs were to keep the inside of the factory in repair. The agreement said nothing as to the repair of the outside and as to insurance, but gave the plaintiffs an option of purchase during the term. The defendant insured the factory against fire, and, on the occurrence of a fire which almost completely destroyed it, he received compensation from the insurance company. The plaintiffs then gave notice of the exercise of their option of purchase and paid a deposit, but the defendant declined to reinstate the walls and roof and alleged that in exercising the option the plaintiffs had to take the property as it was. In an action for a declaration that in these circumstances the plaintiffs were not bound to proceed with the purchase the defendant counterclaimed for specific performance.

Held, that since at the date of the exercise

* Reported by H. C. Garsia, Esq., Barrister-at-Law.

of the option the plaintiffs, to the knowledge of the defendant, thought that he was going to re-erect the factory, the parties were never *ad idem* and the plaintiffs were entitled to a return of their deposit and the counterclaim for specific performance failed.

Decision of Tomlin, J., (44 *The Times* L.R., 161) reversed.

This was an appeal by the plaintiffs from an order of Mr. Justice Tomlin (44 *The Times* L.R., 161).

In the action the plaintiffs claimed from the defendant (1) damages for breach of contract (if any); and (2) in the alternative, a declaration that the plaintiffs were not bound to proceed with the purchase of a factory, and an order for return of £160 paid as a deposit. The defendant counterclaimed for specific performance of the contract to purchase the factory.

By an agreement, dated August 20, 1925, the defendant demised to the plaintiffs a piece of land at Woodgate Rothby, Leicestershire, with a factory fitted with machinery thereon, for the term of three years from August 1, 1925, at a rent of £60 a year. The agreement contained a provision that the plaintiffs should keep in good repair and condition at all times during the term the inside of the factory and premises. The agreement was silent as to keeping in repair the outside of the factory and as to keeping it insured. It contained an option for the plaintiffs to purchase the factory premises on or before June 24, 1927, at the price of £1,600 on giving to the defendant six months' notice in writing and paying a deposit of £160 and all arrears of rent up to the date fixed for completion.

In November, 1926, the factory was almost completely destroyed by fire. The factory had been insured by the defendant against fire and he received the sum of £625 from the insurance company.

Correspondence ensued between the parties and on December 8, 1926, the defendant's solicitors wrote to the plaintiffs saying:—

"According to the agreement you are responsible for payment of rent of the factory until August 1, 1928, notwithstanding the fact of the fire which has occurred, and you are similarly liable to repair the interior of the premises. . . . Our client is obtaining an estimate for the necessary repair of the exterior roof and exterior walls and will be glad to know that you appreciate the responsibility for the repair and replacement of the interior and will be glad to know when this work will be put in hand."

To that the plaintiffs' solicitor replied on December 13, 1926:—

"My clients in no way suggest that they do not intend to carry out their obligations under the agreement for tenancy and they are quite willing to proceed with the repairs as soon as your client has put the building in such a condition that it can be repaired. I understand it is quite obvious that there is nothing in the nature of internal repairs which can be carried out until after your client has replaced the building. It has occurred to me that as your client is dealing with the roof and walls, &c., it might be advisable if you put me into touch with the builder who is doing your client's work."

In answer to that the defendant's solicitors wrote on December 14 stating that they were obtaining an estimate of the work required for external repairs.

On December 20, 1926, the plaintiffs' solicitor gave the defendant a notice in writing exercising the option to purchase and paid a deposit of £160. That notice was accompanied by a covering letter in which the plaintiffs' solicitor said that it was, of course, necessary for the building to be placed in proper repair by the defendant at the earliest possible moment, and pointing out that the plaintiffs were acquiring the freehold of the property when reinstated by the defendant. The defendant's solicitors replied on December 22:—

"In reference to your suggestion that the building should be placed in proper repair by our client we can only say this is a misconception of the position. Your clients in exercising the option take the property in its present state subject to and with the benefit of the tenancy agreement, which contains no covenant on our client's part to repair."

The plaintiffs' solicitor replied saying that he could not agree that there was any misconception of the position on the plaintiffs' part. Further correspondence ensued in which each side maintained the same position. Requisitions were delivered and answers made maintaining the same opposed views.

The plaintiffs brought the action on March 2, 1927.

Mr. Justice Tomlin dismissed the action and made an order for specific performance on the counterclaim, holding that the plaintiffs were too late in seeking in this action to repudiate the contract and that the contract was to take the premises in the condition in which they were when the option was exercised.

The plaintiffs appealed.

Mr. C. A. Bennett, K.C., and Sir Arthur Underhill appeared for the appellants; and Mr. Archer, K.C., and Mr. H. A. H. Christie for the respondent.

The Master of the Rolls (Lord Hanworth), in giving judgment, said that what the plaintiffs were now claiming was (1) that they were not bound to proceed with the purchase of the property and (2) an order for the repayment to them of the deposit of £160. The option contained in the tenancy agreement was only exercisable if the plaintiffs had committed no breach of their obligations under the tenancy agreement. That option was to be regarded as an offer made independently of and collateral to the contract of tenancy.

It was essential in the first instance to consider the precise terms of the option. It was not an unqualified option, and only came into existence if there were no existing breach by the plaintiffs of their obligations. If there were such a breach in existence, there was no option to exercise. One of the covenants by the plaintiffs was to maintain and keep in repair the inside of the factory premises, and a covenant to keep in repair involved, as had long ago been decided, an obligation to put in repair. It followed that before there was an option which the plaintiffs could exercise they had to put in repair the interior of the premises which had been burnt down. It seemed to follow that there must be premises in existence to enable the plaintiffs to carry out their agreement to repair the interior.

The option in his view involved a condition that the plaintiffs should have had an opportunity of fulfilling their duty by the defendant's reinstating the skeleton walls of the premises. There was a duty cast on the vendor (the defendant) to put the premises in such a condition that the tenants would have an opportunity of remedying their breach. On the attitude taken up by the defendant, there was no option in existence which could be exercised, because the option could only be exercised if and when the factory premises were in existence. As there was no option which could be exercised on December 20, 1926, it followed that there was no

contract between the parties and the defendant's claim to enforce it must fail and the plaintiffs be entitled to a return of the deposit.

There was another ground on which the defendant's claim also failed. The whole correspondence showed that, in purporting to exercise the option, the plaintiffs were relying on the defendant's previous statements that he was going to reinstate the building. But the defendant's solicitors in their letter of December 22 repudiated any liability to undertake its reinstatement. The position, therefore, was that the plaintiffs thought that they were being promised a reinstated building and that, as he held, the defendant knew that the plaintiffs so understood. If, then, the building was not to be reinstated the very basis of the exercise of the option was gone and the case came within *Smith v. Hughes* (L.R., 6 Q.B., 597).

The facts were plain from the correspondence and showed that the plaintiffs had definitely dealt with the defendant to his knowledge on the presumption that they were contracting for the purchase of a reinstated building and, if so, there was no good contract because the parties were not *ad idem*. On that ground, also, the defendant's claim to hold the plaintiffs to their exercise of the option failed.

It had been suggested that after the defendant's solicitors wrote the letter of December 22 the plaintiffs were entitled to elect whether they should go on with the contract. But as there was no contract there could be no question of any subsequent election.

The appeal must be allowed with costs and the counterclaim dismissed, and there must be an order for payment to the plaintiffs of the deposit of £160.

Lord Justice Lawrence said that the question which arose here was by no means free from difficulty. The correspondence showed that at the date of the exercise of the option the plaintiffs thought, and the defendant knew that they thought, that the defendant was going to re-erect the factory. But immediately after it was exercised the defendant told the plaintiffs that he was not going to do so. It was in these circumstances that the plaintiffs commenced this action and claimed damages for breach of contract or alternatively a return of the deposit on the ground that the contract was void. He (his Lordship) thought that logically the first point to be considered was whether there was no contract because the parties were never *ad idem*. A decision on this point was on the view which he took decisive of the issue. As he had already pointed out, it was quite plain that the plaintiffs in exercising the option counted on the defendant's re-erecting the building, and that it was only on that footing that they exercised it, and it was also plain that the defendant knew this. It followed that the case fell within the principle of *Smith v. Hughes* (L.R., 6 Q.B., 597, at p. 607). There Mr. Justice Blackburn said: "I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not *ad idem*, there is no contract."

If that was the true view of the position here, it seemed to be wholly irrelevant to consider the subsequent conduct of the parties; for if one thing was more clear than another it was that no fresh bargain was ever come to by the parties. Both parties insisted on their views of the contract of December 20, 1926; but if in fact there was no such contract, there could be no ratification or affirmation. This was not the case of a voidable contract, but one where no contract in fact came into existence. He proposed to found his judgment on that fact and not to deal with any of the difficult questions which might arise on the alternative argument on behalf of the plaintiffs that a contract to sell a factory could not be satisfied by selling its burnt remains, so that the plaintiffs were entitled to damages for breach of contract.

Lord Justice Russell said that he agreed that the appeal must be allowed. The correspondence between the parties satisfied him that the plaintiffs in accepting the defendant's continuing offer of sale thought that they would receive a conveyance of the reinstated premises, and, further, that the defendant knew that this was the plaintiffs' expectation. If that was so, the principle of *Smith v. Hughes* (L.R., 6 Q.B., 597) applied and the parties not being *ad idem* there was no contract. That was sufficient to dispose of the appeal.

As regards the first point taken on behalf of the plaintiffs, he inclined to the view that at the date of the exercise of the option the defendant must be taken to have been offering to sell the land with the factory buildings upon it and that the notice exercising the option was an acceptance of this offer and constituted a contract to convey the land with the factory buildings on it. That contract the defendant owing to the fire was unable or unwilling to perform; and, if so, the defendant was not carrying out his contract and was not entitled to retain the deposit of £160. Therefore, on this point also, the plaintiffs would, he thought, have been equally entitled to succeed. The plaintiffs were, however, only claiming now to be free of the contract and to have their deposit returned. He agreed that appeal should be allowed and the defendant's counterclaim dismissed and that there should be an order for repayment of the deposit.

[Solicitors—Mr. W. G. A. Edwards; Messrs. Peter Thomas and Clark for Messrs. Ironside and New, Leicester.]

K.B. Div. (Salter and Talbot, JJ.) 1928. Apr. 2.

SOWERBY AND ANOTHER v. LINDSAY (WHITELOCK AND ANOTHER, 3RD PARTIES).*

Landlord and Tenant—Lease—Construction—Rates paid in excess of fixed sum in any year of tenancy—Covenant by landlords to refund—Covenant by tenant duly and punctually to pay rates—Three half-years' rates paid in single year of tenancy—Construction of landlords' covenant to refund.

The lease of a flat commencing at midsummer at a rent of £400 per annum, payable in advance at the rate of £100 on each quarter day, contained a covenant by the lessors that in case the total sum paid by the tenant in any one year of the term in respect of rates and taxes should exceed £125, the lessors would, on production of the relative receipts, refund to the tenant the difference between the total sum paid by him as aforesaid and £125. If this difference were not refunded by the lessors

* Reported by C. G. Moran, Esq., Barrister-at-Law.

within 14 days of demand the tenant was to be at liberty to deduct such difference from the next instalment of rent. The lease contained a covenant by the tenant that he would duly and punctually pay and discharge all rates, taxes, duties, charges, assessments, and outgoings payable in respect of the demised premises. The tenant's right to quiet enjoyment was only made expressly conditional on the tenant's performance of his covenants.

The tenant in a year of the tenancy between midsummer and midsummer paid three half-years' rates, amounting in all to over £125, and having demanded the refund of the excess from the landlords and having failed to get payment of the same within 14 days of the demand, deducted it from his next instalment of rent.

Held, that even on the assumption that he had not duly and punctually paid these rates, the tenant, by the express terms of the lessors' covenant, was entitled to make this deduction. The tenant's covenant as to due and punctual payment of the rates was not a condition of the lessors' covenant to refund the excess paid over £125, and it did not qualify or modify that covenant.

Quaere : What is the precise meaning of a covenant in a lease "duly and punctually" to pay all rates payable in respect of the demised premises ?

This was an appeal from a decision of the Recorder of the City of London, sitting at the Mayor's and City of London Court, by which he gave judgment for the plaintiffs, Messrs. Sowerby and Another, against the defendant, Mr. John Lindsay, for £66 9s. 2d., being a quarter's rent of £100 for a flat on the fourth floor at No. 24, Park-lane, London, less certain credits to the plaintiffs amounting to £33 10s. 10d., and judgment for the defendant against the third parties for the amount payable by the defendant to the plaintiffs in respect of the claim and costs.

By a lease dated June 26, 1925, the Park-lane Flats, Ltd., demised to Captain Beaumont the said flat at a rent of £400 per annum, payable in advance at the rate of £100 on each quarter day. Clause 2 (2) of the lease was in these terms :—

"That the tenant will duly and punctually pay and discharge all rates, taxes, duties, charges, assessments, and outgoings whatsoever, whether Parliamentary, parochial, local, or of any other description, and including in particular water rate, which are now or may at any time hereafter be assessed, charged or imposed upon or payable in respect of the demised premises or the owner or occupier in respect thereof (landlords' property tax in respect of the rent first hereinbefore reserved only excepted) and will also duly and punctually pay all sums payable in respect of gas, electric light, and other luminant, if any, used on the flat as shown by the separate meter or meters belonging thereto."

By clause 4 (6) : "In case the total sum paid by the tenant in any one year of the term hereby granted in respect of rates and taxes shall exceed £125, that the lessor will on production of the relative receipts refund to the tenant the difference between the total sum paid by him as aforesaid and the said sum of £125. And that if such difference be not refunded by the lessor within 14 days of demand, then the tenant shall be at liberty to deduct such difference from the next instalment of rent payable by him hereunder."

By clause 4 (1) of the lease the right to quiet enjoyment was made conditional on the tenant's performance of his covenants.

By a deed of assignment dated December 4, 1925, the Park-lane Flats, Ltd., assigned their interest in the lease to the plaintiffs. By a deed of assignment dated May 26, 1927, Captain Beaumont assigned his tenancy under the lease to the defendant. In the year of the tenancy from June 24, 1926, to June 24, 1927, Captain Beaumont had paid three half-years' general rates and two water rates, making in all £213 11s. 8d. On completion of the assignment of the tenancy Mr. Lindsay paid over to Captain Beaumont £88 11s. 8d., the amount by which £213 11s. 8d. exceeded £125, and Messrs. Whitelock and Storr, Captain Beaumont's solicitors, gave Mr. Lindsay an undertaking by way of indemnity in respect of the said sum. The sum of £88 11s. 8d. then duly demanded from the plaintiffs having been and remaining unpaid for 14 days, Mr. Lindsay claimed to deduct the said sum from the next instalment of the rent, due on June 24, 1927. The plaintiffs thereupon sued for £100, this instalment of the rent, less certain credits of £33 10s. 10d., making £66 9s. 2d., under Order XIV. in the High Court. The defendant obtained leave to defend, claiming the right to deduct £88 11s. 8d. under clause 4 (6) of the lease, and the action was transferred to the Mayor's and City of London Court, Messrs. Whitelock and Storr being added as third parties. The learned Recorder gave judgment for the plaintiffs for £66 9s. 2d., with costs, and judgment for the defendant against the third parties for the amount payable by the defendant to the plaintiffs in respect of the claim and costs. The defendant and the third parties appealed.

Mr. C. A. Bennett, K.C., and Mr. Sandlands appeared for the appellants ; Mr. Grant, K.C., and Mr. Lavington for the respondents.

Mr. Justice Salter said that this was an appeal from a judgment of the learned Recorder for the City of London. He agreed with him that the point raised was of interest and capable of argument ; but he was unable to agree with the conclusion of the learned Recorder as to the construction of this lease. The action was brought by landlords against a tenant for the quarter's rent of a flat in Park-lane, the quarter ending at midsummer, 1927. The flat was let at £400 a year ; £100 being payable on each of the usual quarter days. The question for decision was what right, if any, the tenant had in the circumstances to make a deduction from this quarter's rent in respect of rates paid by him. The lease contained only two clauses which required to be cited. The first was sub-clause 2 of clause 2, which contained the tenant's covenants ; sub-clause 1 contained the covenant to pay the rent, and the second was in these terms. [His Lordship read the sub-clause.]

It was to be observed that those words "duly and punctually," upon which so much insistence had been made, qualified the covenant to pay rates and also the covenant to pay for gas and electric light and matters of that kind. The other relevant clause was sub-clause 6 of clause 4, which contained the landlord's covenant and was in these terms. [His Lordship read the sub-clause.]

It had not been argued that a year of tenancy did not mean a year from midsummer to midsummer; and in the year in question, from midsummer, 1926, to midsummer, 1927, the tenant had in fact made three payments in respect of rates and taxes. On July 24, 1926, he had paid £65 6s. 3d. for general rate, in respect of the period from April 1 to September 30, a period of which the first half was in the previous year of the tenancy; the second half was in the year in question. Then the tenant had made a second payment for rates on October 28, 1926, £65 6s. 3d., for the winter half of the rates from Michaelmas to Easter. Lastly, near the end of the tenancy year, on May 25, 1927, he had paid £66 9s. 2d. for the April to September half of the rates. He also paid two sums of £8 5s. each for water rate, as to which no question arose. He therefore had paid during that year of the tenancy for rates £213 11s. 8d., and the difference between that sum and the £125 mentioned in clause 4 (6) of the lease was £88 11s. 8d. The question was whether the tenant was entitled to deduct that sum from the quarter's rent sued for. The landlords had admitted the right of the tenant to deduct a smaller sum, but the only question that arose was whether the tenant was or was not entitled to deduct this sum of £88 11s. 8d. from the quarter's rent. That amount had been demanded and had not been paid within fourteen days; the tenant then claimed to make that deduction.

To make the matter clear, it was advisable to state the payments which had been made by the tenant in the previous year. The tenancy had commenced on June 24, 1925—midway in the summer half of the rates. On September 29, 1925, the tenant had paid £36 17s. 6d., being half the rates for that half-year, which had been demanded from him from June 24 to September 30. Then, for the winter quarters of 1925-26, from September 30, 1925, to March 31, 1926, he had paid on February 16, 1926, £72 10s. Then the next quarter would be from April 1 to September 30, 1926, and he made no payment in respect of that half-year, before the year of tenancy with which they were concerned began on June 24. It appeared, then, that in the first year of the tenancy the tenant paid nine months' rates only, and three months' rates were owing and unpaid at the time when the year of tenancy with which they were concerned had begun on June 24, 1926. The tenant had paid these six months' rates, as he (his Lordship) had stated, on July 24, 1926. The result of paying the summer rates after midsummer quarter day was that the tenant made three half-yearly payments of rates in the tenancy year from June, 1926, to June, 1927, instead of two. Substantially, the question that arose was whether it was a term or condition of the agreement between the parties that the tenant should pay the summer half-year's rates before the midsummer quarter day. If he was at liberty to pay the summer rates either before or after the midsummer quarter day, it was plain that he would sometimes pay one half-year's rates in his year of tenancy and sometimes he would pay three. It was said, and truly, that if this course was systematically carried out, the tenant would obtain an advantage from the landlord which he would not obtain if he always paid the summer half-year's rates within the first half of the period, that was to say, before the midsummer quarter day. On that result was based the argument that if clause 2 (2) were read with clause 4 (6) of the lease, it would appear that the parties intended to provide against this contingency. The lease had to be read as a whole. First it was said that clause 2 (2) was a condition of clause 4 (6), that was to say, that unless the rates were punctually paid—it was said that "duly" was the same as "punctually"—there was no right to make this deduction at all. With that view he did not agree. He did not think that clause 2 (2) was meant to be a condition of clause 4 (6). He (his Lordship) observed that in clause 4 (1) the right of quiet enjoyment was made conditional on the tenant's performance of his covenants, but the other clauses were not. Then it was said that clause 2 (2) must be read as explaining and qualifying clause 4 (6), and that that sub-clause must be read somewhat in this way: "In case the total sum punctually paid in respect of rates and taxes shall exceed £125," or perhaps, "In case the total sum paid in any one year of the term hereby granted in respect of the rates and taxes for that year shall exceed £125." There was no doubt what was the plain meaning of clause 4 (6), if it were read alone. In that case the tenant was entitled to make this deduction from his quarter's rent. In his Lordship's opinion, clause 2 (2) was not meant to qualify or modify the plain words of clause 4 (6). The words of that sub-clause must be read according to their plain meaning. If the payment were manipulated by the tenant and arranged so that he could obtain an advantage over the landlords of making a greater deduction than he could had he paid punctually, the landlords would have their remedy in damages for breach of clause 2 (2). Should the local authority be so inconceivably negligent as to allow the arrears of rates to mount up to such an extent that there was more than £100 to be deducted, the landlord would have, or might have, the further protection that, as the deduction must be made from the next quarter's rent, it could not exceed £100.

Upon the whole, he (his Lordship) had come to the conclusion that the Court must read the words of clause 4 (6) in their plain meaning and that therefore the tenant was entitled to make this deduction. He had assumed that as a matter of fact these payments of rates had not been punctually made. He was not at all satisfied of that. All the payments were made well within the six months' period for which they were to provide. He was not affected by the decision of *Leeds and Hanley Theatre of Varieties, Limited v. Broadbent* (14 *The Times* L.R., 157; [1898] 1 Ch., 343), which was approved by the House of Lords in *Maclaine and Others v. Gatty and Another* (37 *The Times* L.R., 139; [1921] 1 A.C., 376), where, in the circumstances of that case, punctual payment was held to be payment on the first day on which the sum was legally due. He did not think that a covenant to pay rates punctually meant anything of that kind. But even if it should appear that some of these payments of rates were not punctually made within the meaning of clause 2 (2) of this lease, he thought that by the plain words of clause 4 (6) the tenant was entitled to make the deduction that he claimed. For these reasons the appeal must be allowed and judgment entered for the defendant, with costs, and the order against the third parties in favour of the defendant would be set aside.

Mr. Justice Talbot said that he was of the same opinion. The question was how much a tenant of premises let by a lease dated June 26, 1925, was entitled to deduct from a payment of a quarter's

rent under clause 4 (6) of the lease. The intention, he should imagine, of that clause, was to apportion the rates as between landlords and tenant in this way : up to £125 per annum it was intended that the rates should be borne and paid by the tenant, and that any excess over that should be borne by the landlords. That, he had very little doubt, was the intention with which that sub-clause was framed. If one knew all the facts connected with this lease and with the building of which obviously these premises formed a part, one would find that these very same words were applied to terms beginning at different times of the year, and probably it was because the clause had to be adapted to a tenancy dating from midsummer that this point, which likely was never thought of at all by the parties when they executed this lease, had arisen. Shortly, the point was this : the lease provided that if the total sum paid by the tenant in any one year of the term thereby granted in respect of rates and taxes should exceed £125, then the lessors were to refund the difference, the excess over £125, and that if that amount was not refunded the tenant might deduct it from the next instalment of rent payable. The question really was whether the sub-clause was to be read according to what it undoubtedly said, that the amount, of which the excess over £125 was recoverable, depended on the time of payment, or whether it depended on the time at which the rates in respect of which the payment was made accrued due. According to the literal meaning of the words, it unquestionably related to the former. "The total sum paid by the tenant in any one year of the term hereby granted" were words that were unambiguous, and they were not made ambiguous by the words that followed : "in respect of rates and taxes." Read literally, these words meant, and could only mean, that the payment must be made in one year of the term, that was to say, in the period between one midsummer and the next, and that that payment should be in respect of rates and taxes. The first observation to be made with regard to the suggestion that one had, by some mode of construction, to limit the sum to the amount of rates and taxes which had accrued due in one year was that, if that were so, there was no reason that he could see for confining the payment to one year at all. It would have been quite easy, and would have carried out what was intended, according to that argument, to have omitted those words confining the payment to a year altogether. It had been sought to construe these words in a sense different from the literal construction, on two grounds. The first was by reference to the lessee's covenant, clause 2 (2) of the lease, one of the sub-clauses containing the lessee's covenants, by which the lessee undertook that he would duly and punctually pay and discharge all rates and other outgoings, including water rate. It was said that the due and punctual—punctual was the word on which stress was laid—payment of the rates was a condition of the right to have a refund, and the right to deduct under clause 4 (6) the payments in respect of which the refund or deduction was claimed. He agreed entirely with the judgment that had just been delivered, that the Court would require more consideration as to what was meant by the punctual payment of rates and what was meant by an undertaking to pay rates punctually in the covenant of a lease, before deciding that these rates were not paid punctually. Taking the case put before them by counsel for the landlords, where there was a clause restraining the calling in of a mortgage, and that restraint was made in terms conditional on the punctual payment of the interest, it had been decided that in such a case "punctual" meant "punctual." (See *Leeds and Hanley Theatre of Varieties, Limited v. Broadbent* (14 *The Times* L.R., 157 ; [1898] 1 Ch., 343.) Again, as appeared from the case of *Maclaine and Others v. Gatty and Another* (37 *The Times* L.R., 139 ; [1921] 1 A.C., 376), when it was once admitted that a contract to pay on a particular day meant that you were to pay on that particular day and not otherwise, it was absurd to suppose that if the word "punctually" were added that could diminish the precision of the obligation to pay on that particular day.

These cases were quoted, as he understood, in order that they might be applied to this case, and the only way in which they could be applied to this case on the argument for the landlords was that this right conferred upon the tenant, of deduction or refund in respect of rates, was conditional in the strict sense upon the punctual payment of the rates. No doubt that would have the result that was sought, namely, that if all the rates were paid punctually—if that meant on the date of demand—the position could not arise of more than one year's rates being paid in one year of the term. In his opinion, it was quite against sound construction to import here any condition of the kind. There was no trace in this lease that these two covenants were interdependent, and in his opinion it would be altogether contrary to sound construction to import so drastic a condition as that without any indication that it was imported into the clause relating to the lessors' covenants. Further, he thought that it was an exceedingly strong argument against that suggested construction, that one found in its appropriate place, in accordance with almost universal practice, that the covenant for quiet enjoyment which occurred in the same clause was expressly made conditional on the payment of the rents reserved and the performance and observance of the covenant, and so forth. There was no such condition applied to any of the other lessors' covenants, and he could not conceive why the condition should be applied without the appropriate language. Speaking for himself, in his opinion, there was no ground at all for qualifying the word "paid" in this paragraph by the words "duly and punctually" which occurred in the earlier part of the deed. He thought that it was a much more attractive contention that one must look at what he had described as probably the broad intention of the parties, and that one must qualify the words "in respect of rates and taxes" by the addition of some such words as "accruing due in any one year of the term hereby granted." The first comment on this was the one which he had made already—that, if so, there was no reason for confining the right to sums paid in any one year, and secondly, what was perhaps even more satisfactory, that if that had been the intention or were the intention—and it might have been—it should have been expressed. Nothing in the world would have been easier than to add to the words "rates and taxes," "accruing due in any one year of the term," or "accruing due in such year," or something of that kind.

When once one began to speculate on what parties might have had in their minds apart from what they had said, one got, as had been pointed out over and over again, on to very dangerous ground, and unless it could be shown that there was some absurdity, something which no reasonable parties in that position could really have agreed to, in the words as literally construed, it was far the

safest and most correct course to adhere to the actual words. As to those actual words, there appeared to him to be no ambiguity about that clause. It was quite true that the consequences could be suggested, and indeed it was not only that they could be suggested, but they would very easily result, if this right were used in a particular way ; but restricting oneself within any reasonable bounds of probability, the consequences were not very serious —he meant the advantages to the tenant ; still, they were substantial, and he entirely agreed with what had been said, that he saw no reason at all for thinking that that, if it should be a danger, would not be met by the right of the landlords to recover damages for breach of the covenant punctually to pay these rates. It might be also that they had the other remedy of forfeiture, which was specified in the lease, but as to that he would not say anything. There were also other questions which might in certain events arise, and upon which he certainly would not be prepared to express any opinion without much further consideration—namely, for example, whether the right to refund was independent of and was limited to the right to deduct, and also whether, if the sum to be deducted should, though it was very unlikely that it should, be in excess of the whole instalment from which the deduction was to be made, it would be possible to carry on, as it were, the deduction to a future instalment. Those were matters which, although he did not think they were likely to arise, might conceivably arise, but it was not necessary or desirable to express any opinion whatever upon them. In his opinion, no ground had been shown for departing from the plain meaning of the covenant, and he agreed, therefore, that the judgment of the Mayor's and City of London Court could not be supported.

Leave to appeal was given.

[Solicitors—Messrs. Whitelock and Storr ; Messrs. Richardson Sowerby, Holden and Co.]

Prob., Divorce, and Adm. Div. (Bateson, J.) } 1928. Apr. 4.

THE CHANNEL QUEEN.*

Ship—Practice—Collision—Taxation of costs —R.S.C., Order LXV., r. 27 (29).

A collision between the plaintiffs' barge and the defendants' steamship resulted in damage to the barge and the death of one of her crew. At the inquest on the deceased bargeman the owners of both vessels were represented. Subsequently the plaintiffs issued a writ claiming the damage occasioned by the collision, but after a final order had been made against them to file their preliminary act they discontinued their action. Liability for the collision mainly turned on the question whether the barge was exhibiting a proper light. Therefore, before the discontinuance of the plaintiffs' action the defendants' solicitors had incurred costs in taking statements from independent witnesses, in paying those witnesses for their time and trouble in coming to give their statements, and in attending before the coroner. On taxation the Assistant Registrar disallowed these items of the defendants' costs, on the ground that it was a well-settled principle of taxation that a party was only entitled as against his opponent to incur such costs or expenses as would enable him to conduct his case at the stage which the proceedings had reached, and not to incur expenses in anticipation of matters which, as events turned out, never arose. On appeal to the Judge in Chambers,

Held, that a solicitor, in incurring costs, had to have regard not only to the ultimate trial of the action but to the necessity of being in a position to give proper advice to his clients and to place adequate instructions before counsel to settle the preliminary act, by which, in an Admiralty action, a party was bound ; that the costs and expenses in question had been reasonably incurred within the meaning of Order LXV., r. 27 (29), of the Rules of the Supreme Court, and the matter must go back to the Registry.

This was a summons to review taxation.

No counsel appeared on either side.

MR. JUSTICE BATESON :—This is a summons to review taxation. I have already intimated to the parties that I would review it, and at their desire said I would give my reasons in Court.

It arises out of a collision action. The collision was between a coaster and a barge in the Thames, which took place on December 30, 1927, near Horseferry Wharf. The coaster is a regular trader, and her owners are in London. One of the two men on the barge lost his life in consequence of the collision.

On January 4, 1928, an inquest was held upon his body, at which the owners of the coaster and of the barge were represented. The main question on the collision between the parties was as to there being a proper light showing on the barge. On January 7, three days after the inquest, the owners of the barge issued their writ against the defendants. On January 16 the defendants appeared, and on January 24 the defendants filed their preliminary act. The plaintiffs ought to have filed their preliminary act seven days after the writ, but did not do so. On February 10 a final order to do so was made against the plaintiffs, and on February 11 they discontinued their action.

In the meantime, the defendants, on being sued, had naturally sought for evidence outside their own crew, so as to test whether they had a good or bad case, and be prepared to meet the plaintiffs' case.

The defendants' solicitors found that two tugs had been in the vicinity and that their masters, and the mate of one of them, could give valuable evidence. They took statements, paid the witnesses for their time and trouble in coming to give statements a not unreasonable sum, according to my experience of days before the War, and copied out the statements for counsel to settle their preliminary act. They took the statements while the facts were fresh in the minds of the witnesses. In addition they also got copies of the depositions before the coroner, and of a police report.

The learned Assistant Registrar has disallowed all

* Reported by A. W. GRANT, Esq., Barrister-at-Law.

those items on the principle he states at the beginning of his Answers to Objections. He says :—

"It is a well-settled principle of taxation that a party is only entitled *as against his opponent* to incur such costs or expenses as will enable him to conduct his case at the stage which the proceedings have reached, and not to incur expenses in anticipation of matters which, as events turn out, never arise."

I do not know where that principle comes from, and if it is limited in the way in which he has limited it in this case I think it is wrong. Order LXV., Rule 27 (29), lays down what is to be allowed, and Lord Justice Atkin in the case of *Société Anonyme Pêcheries Ostendaises v. Merchants Marine Insurance Company, Ltd.* (44 *The Times* L.R., 270, at p. 273), dealing with this rule, says : "It was intended to sum up generally the principles upon which costs are awarded, and I cannot help thinking that if that rule were really rigorously applied by everybody—and by 'rigorously applied' I mean applied in all cases, giving full effect to the width of its language—there would be far fewer complaints brought by successful litigants than are brought at the present moment, because it is a rule which is intended to give to the successful litigant a full indemnity for all costs reasonably incurred by him in relation to the action. I think it says so in terms, that it is to allow 'all such costs as shall appear to him to have been necessary or proper for the attainment of justice.' That is the whole principle on which the Taxing Master has to determine."

In my view these costs were reasonably incurred in relation to the action. Farther on, when dealing with the facts of that case, and Mr. Simey's argument, Lord Justice Atkin says : "There was one other point which was raised by Mr. Simey, and it was this, that no costs can be incurred (that is to say properly incurred at all, as I understand him, in the action) until the issues have been determined (that is to say, have been defined) ; and he says that these costs were incurred before the defendants had delivered their defence or indicated what their defence would be. All that I can say is that that goes very much too far. That would mean this, that the litigant would never be entitled to recover any costs, save the actual costs of proceedings, until the defendant had delivered his defence, because until then the issues are not defined. That again does not seem to be the right view. The question is, in every case, what is the reasonable thing to do ? —and the Taxing Master is not bound by any such limit of time as is mentioned." Mr. Roscoe, at page 429 of his book, *Roscoe's Admiralty Practice,* says much to the same effect. My view is that the learned Assistant Registrar has felt himself bound in this case by a limit of time. What the learned Assistant Registrar says in effect, in his reasons, is that these costs were incurred in premature preparation for the trial, and were not necessary at that stage of the proceedings. In my view the trial is not the only thing to be looked at. The solicitors, in dealing with the matter, must be in a position to give proper advice, and if they can kill an action—as they did in this case—by collecting all the evidence that is necessary, I think it is quite proper that they should do so. The plaintiffs themselves saw one of the witnesses that the defendants saw (I think they saw him before the defendants had seen him) and they paid that witness the same sum as the defendants are charging in their bill. That was, of course, before they discontinued their action. Then the learned Assistant Registrar quotes the case of *The Neck,* which is not reported, and the facts as to which I am told cannot now be ascertained. It was a salvage action in which the plaintiffs apparently had taken a good deal of evidence which might well not have been taken, and Lord Gorell—or Mr. Justice Barnes, as I think he was then—disallowed the costs of that evidence, saying, according to the Assistant Registrar, that they were entitled, as against the defendants, to the costs of taking such evidence only as was required for the framing of the statement of claim. That case only refers to plaintiffs, and not to defendants. It may very well be that in that case it was proper to disallow the costs.

The learned Assistant Registrar goes on to say that all that the defendants required was sufficient evidence to enable counsel to settle their preliminary act. That, again, I do not think is right. In the first place, I think this evidence was necessary to settle the preliminary act. The preliminary act in an Admiralty case embodies the party's case. He cannot change it. If it is drawn on half the evidence it very likely will land the party in difficulties. It is essential to get up a case in Admiralty at the beginning. It is of no use to get independent witnesses, as they are called, after the other party has defined his issues. He may delay that for months. I do not think that any self-respecting junior would settle a preliminary act unless he had all the evidence before him that could be obtained, if he could avoid it.

I gather that the learned Assistant Registrar thinks that that is necessary for the solicitor against his own client, and for the life of me I cannot see why it is not equally necessary against the other party. I do not consider that it is over-caution or unnecessary, and I think it is everyday practice for solicitors to get this evidence, and it agrees with such little knowledge as I have, which dates back to work in a solicitor's office some 37 odd years ago.

He has allowed in this taxation a fee to a surveyor who was called in merely to attack the bill of the plaintiffs for their damage, if that ever came to be considered. Of course, in the early stages of this particular case that would never arise. Then he goes on to discuss the payment to these witnesses, and describes it as blackmail. But in my view witnesses of the class of those from whom statements were taken in this case were not unduly paid at the figures which were put in the bill of costs. If exorbitant fees are asked for it would not be proper to pay them. In some cases payments of this sort are included in instructions for brief—whether it is done in one way or another does not seem to matter—or they are allowed as sums paid, which I think would be the better way to do it, but they are the sort of payments that are generally made. Of course, they may be included in instructions for brief. What I have said covers the question of taking the statements and copying them for counsel, and payments to the witnesses for their time, but one of the other matters that was dealt with was the report of the police officer, which I think ought to be allowed—it is a very small sum—and also the copy of the depositions before the coroner. The last was a matter which I should have thought might well have been delayed, until it was known whether or not the case was going on. The parties had attended the inquest, and, of course, a proper fee should be allowed for that, but when they had attended the inquest, and had heard all the evidence, I doubt myself whether it

would be necessary (I do not think it would) to get the details in full before the case was really coming on, or reasonably known to be coming on.

I think that deals with all the questions that were raised. For these reasons I think the matter must go back to the learned Assistant Registrar to tax on the lines that I have indicated. I think that covers all the points.

Leave to appeal was granted.

[Solicitors—Messrs. J. A. and H. E. Farnfield, for plaintiffs; Messrs. Thomas Cooper and Co., for defendants.]

K.B. Div.
(Lord Hewart, C.J., Avory and Acton, JJ.)
1928. Apr. 3.

ROBINSONS, LIMITED v. RICHARDS.*

Motor-cars—Tractor and trailer—No person on trailer—Brakes—Trailer brake independent of tractor brakes—Brakes operated by driver of tractor—Locomotives on Highways Act, 1896 (59 and 60 Vict., c. 36), s. 7—Motor Cars (Use and Construction) Order, 1904, Art. III. (3).

By Article III. (2) of the Motor Cars (Use and Construction) Order, 1904, every vehicle exceeding 2cwt. in weight unladen drawn by a motor-car is required to have an efficient brake, and by paragraph (3) of the same Article is required to "carry upon the vehicle a person competent to apply efficiently the brake. Provided that it shall not be necessary to comply with this condition if the brakes upon the motor-car by which the vehicle is drawn are so constructed and arranged that neither of such brakes can be used without bringing into action simultaneously the brake attached to the vehicle drawn; or if the brake of the vehicle drawn can be applied from the motor-car by a person upon the motor-car independently of the brakes of the latter."

The appellants appealed against a conviction by the Stipendiary Magistrate of the Staffordshire Potteries District for an offence under this Article. They had a motor-tractor and trailer in charge of one man. The trailer had an independent brake operated by hand by the driver of the tractor, which had also a foot brake and a hand brake, neither of which was connected with the trailer brake. The lever controlling the trailer brake was on the opposite side of the driver from the lever controlling the hand brake of the tractor. The driver could apply simultaneously the foot brake of the tractor and the trailer brake, or the two brakes of the tractor. He could not apply simultaneously the hand brake of the tractor and the trailer brake without abandoning the steering-wheel.

Held (without deciding whether the "person" on the motor-car to control the trailer brake under the second proviso to Art. III. (3) must always be a person other than the driver of the motor-car) that the Stipendiary Magistrate had not misdirected himself in holding that the driver in this case was not able "to apply efficiently" the brake of the trailer.

This was a case stated by the Stipendiary Magistrate for the District of the Staffordshire Potteries.

An information was preferred on October 26, 1927, by Alfred James Richards, Chief Superintendent of Police, of Newcastle-under-Lyme (hereinafter called the respondent), under section 7 of the Locomotives on Highways Act, 1896, against Robinsons, Limited, of Knolls House, Bury New-road, Salford (hereinafter called the appellants) for that they, on September 22, 1927, unlawfully caused to be used upon a highway a certain heavy motor-lorry, which was then drawing another vehicle, to wit a trailer, in contravention of the provisions of Article III. of the "Motor Cars (Use and Construction) Order, 1904," and Article XVI. of the "Heavy Motor Car Order, 1904," in that, although the brake required by the first-named Order to be fitted to the said trailer could be applied from the motor-lorry drawing the same (independently of the brakes of the latter) no person competent efficiently to apply such trailer brake was upon either the said motor-lorry or the trailer.

The said information was heard and determined on November 4, 1927, and the magistrate convicted the appellants and fined them £1 and ordered them to pay £3 3s. special costs.

Upon the hearing of the said information the following facts were admitted or proved:—

(*a*) On September 22, 1927, a police officer stopped a heavy motor-car or tractor (hereinafter referred to as the tractor) upon a highway at Chesterton, in the said county, for the purpose of examining its brakes. The tractor was drawing another vehicle (hereinafter referred to as the trailer) consisting of a furniture removal van exceeding 2cwt. in weight unladen. Both tractor and trailer were the property of the appellants and were being driven by a man in their employ, who, in accordance with their usual practice, was not accompanied by any other person.

(*b*) The trailer was fitted with the brakes required by Article III. (2) of the Motor Cars (Use and Construction) Order, 1904 (set out below), but carried on it no person competent to apply the same, as required under paragraph (3) of the said Article.

(*c*) The tractor was fitted with the two independent brakes required under Article II. (4) of the said Order, but these two brakes were not so constructed or arranged that neither could be used without bringing into action simultaneously the brake attached to the trailer. The tractor brake system was not in any way connected with that of the trailer brake.

(*d*) The trailer brake was so arranged that it could be operated by a person occupying the driving seat of the tractor, independently of the brakes of the latter (proviso 2, Article III. (3)), by the use of a special handle or wheel placed near to that side of the steering-wheel which was opposite to the side from which the lever of the tractor hand brake was operated. There was thus a hand-operated brake lever on either side of the steering-wheel—one for the tractor brake and the other for the trailer brake. But no person (other than the driver of the tractor) was employed anywhere upon either vehicle to operate the hand lever which controlled the trailer

* Reported by J. W. Hall, Esq., Barrister-at-Law.

brake. The driver of the tractor, whilst keeping hold of the steering wheel with one hand, could, by using his other hand to apply the tractor hand brake, at the same time using his foot to apply the foot brake lever, simultaneously and efficiently apply the two independent brakes of the tractor. Also, whilst keeping one hand on the steering-wheel, he could simultaneously apply the trailer brake by its special handle and the foot brake of the tractor. But it was not possible for the tractor driver efficiently to apply the trailer brake simultaneously with the tractor hand brake without taking both hands off the steering-wheel.

(*e*) As a result of this arrangement the trailer brake had to be applied or released as a separate operation either before or after the hand brake of the tractor was applied, if the driver retained control of the steering-wheel.

The following enactments and regulations were referred to during the hearing of the said information :—

(*a*) The Locomotives on Highways Act, 1896, section 6 (power of Ministry to make regulations as to use and construction of motor vehicles) ; section 7 (penalty for breach of any regulation so made).

(*b*) The Motor Cars (Use and Construction) Order, 1904 : Article III.—" No person shall cause or permit a motor-car to be used on any highway for the purpose of drawing any vehicle or shall drive or have charge of a motor-car when used for such purpose unless the conditions hereinafter set forth are satisfied—namely, (1) Conditions (2), (3), (5), and (6) of Article II. of this Order shall apply as if the vehicle drawn by the motor-car was therein referred to instead of the motor-car itself.

" (2) Every vehicle exceeding 2cwt. in weight unladen, drawn by a motor-car, shall have a brake in good working order of such efficiency that its application to the vehicle shall cause two of the wheels of the vehicle on the same axle to be so held that the wheels shall be effectually prevented from revolving, or shall have the same effect in stopping the vehicle as if such wheels were so held.

" (3) The vehicle drawn by a motor-car shall, when in pursuance of the condition lastly hereinbefore set forth a brake is required to be attached thereto, carry upon the vehicle a person competent to apply efficiently the brake.

" Provided that it shall not be necessary to comply with this condition if the brakes upon the motor-car by which the vehicle is drawn are so constructed and arranged that neither of such brakes can be used without bringing into action simultaneously the brake attached to the vehicle drawn ;

" Or if the brake of the vehicle drawn can be applied from the motor-car by a person upon the motor-car independently of the brakes of the latter ;

" Or (added by Motor Cars (Use and Construction) Amendment Order, 1925), where the vehicle drawn is by reason of construction, use or otherwise such that it is impracticable for a person to be carried thereon in accordance with this condition, if such vehicle is accompanied by a person walking alongside for the sole purpose of applying the brake when necessary, and if the speed of the motor-car drawing such vehicle does not exceed three miles per hour."

" Article IV. (2). He (the driver) shall not when on the motor-car be in such a position that he cannot have control over the same. . . ."

For the respondent it was contended :—

(*a*) The driver of the tractor was not the " person upon the motor-car " by whom the brake of the vehicle drawn could be applied from the motor-car, independently of the brakes of the latter.

(*b*) The regulation in the first instance required a special person to travel on the trailer for the purpose of applying its brake (Article III. (3) (*supra*)). If this was impracticable, the second part of the proviso to Article III. (3) allowed the position of the lever or handle controlling the trailer brake to be shifted from the trailer to the tractor as an alternative place for the person to apply it, but it did not contemplate that person being dispensed with and the tractor driver taking his place, merely by reason of this change of position of the operating handle of the trailer brake.

(*c*) If the driver, as well as operating his own tractor brakes and controlling the steering wheel, was to take the place of the " person " controlling the trailer brake, the conditions of this case were specially provided for in the first part of the proviso—that is to say, the brakes of both vehicles must be so mechanically interconnected as to secure that neither of the tractor brakes can be used without bringing into action simultaneously the brake acting on the trailer. In such circumstances the trailer brake was simultaneously applied, whether the driver used either his hand brake or his foot brake.

(*d*) The use of the word " simultaneously " indicated an essential condition when the driver alone was permitted to control the brakes of both vehicles. This condition could not be complied with in the case of the appellants' vehicle, where the application of the respective brakes could only be successive, unless the driver abandoned control of his steering wheel, in which case, particularly in an emergency, he might be held to commit an offence under Article IV. (2) of the Order.

For the appellant it was contended :—

(*a*) There was nothing in the wording of the last part of the proviso to exclude the driver from being the " person " to operate the trailer brake. " A person " meant any person and not the special person required—initially—to travel on the trailer under Article III. (3), who was dispensed with when the alternative condition contained in the second part of the proviso was complied with.

(*b*) In the case of the appellants' vehicle all the conditions prescribed in the second part of the proviso were fully complied with, and the trailer brake could be applied by a " person " upon the tractor independently of the brakes of the tractor. The proviso must be read in its literal sense and not as importing that the special person required under Article III. (3) to travel on the trailer (or by the side of it, as permitted by the Amending Order of 1925) must be present on the tractor to control the trailer brake lever in its alternative position on that vehicle.

(*c*) Except in the conditions necessary to satisfy the first part of the proviso, the Article nowhere stipulated that both tractor and trailer brake should be applied simultaneously. Except by chance, this could not be the case under the initial condition of paragraph (3) when each brake was in charge of a separate person, and there was no reason why such a requirement should be imported into the second part of the proviso. The expression " simultaneously " in the first part of the proviso only referred to the required effect of the interconnected brake mechanism.

The magistrate was of opinion that Article III (3) of the Motor Cars (Use and Construction) Order, 1904, was not complied with in the circumstances under which the appellants' tractor and trailer were being used upon the highway in this case—that is to say, where there was thrown upon the driver of the tractor vehicle, in addition to the duties of apply-

ing or releasing the two independent brakes of the tractor itself and also maintaining uninterrupted control over its steering wheel, the further duty of efficiently applying or releasing the brake of the trailer vehicle by means of a separate hand brake quite independent of and not mechanically interconnected with the brake system of the tractor, so that if and when an emergency required the simultaneous application of both hand brakes the steering wheel of the tractor must necessarily be released and left without control, with possible disastrous consequences. He was further of the opinion that Article III. (3) contemplated the operation of both trailer and tractor brakes by one and the same person only when the said brakes were mechanically interconnected in the manner provided by the first part of the said proviso. He therefore convicted the appellants of a breach of Article III. (3) of the Order, and imposed the penalty above mentioned.

The question for the opinion of the Court was whether upon the above statement of facts he came to a correct determination in point of law, and if not, what should be done in the premises.

Mr. Lionel Jellinek appeared for the appellants; Mr. W. T. Monckton for the respondent.

The Lord Chief Justice.—This is a case stated by the Stipendiary Magistrate for the district of the Staffordshire Potteries. It arises in the following way. An information was preferred by the present respondent against the present appellants under section 7 of the Locomotives on Highways Act, 1896, for unlawfully causing to be used upon a highway a certain motor-lorry drawing a trailer in contravention of the provisions of Article III. of the Motor Cars (Use and Construction Order), 1904, and Article XVI. of the Heavy Motor Car Order, 1904. The information contained particulars as follows: "In that, although the brake required by the first-named Order to be fitted to the said trailer could be applied from the motor-lorry drawing the same (independently of the brakes of the latter) no person competent efficiently to apply such trailer brake was upon either the said motor-lorry or the trailer." The learned magistrate having heard the case convicted the appellants and fined them, and the question for us is whether he came to a correct determination in point of law.

Now the material facts are that the trailer was fitted with the required sort of brake, but carried on it no person competent to apply it. The tractor in its turn was fitted with two independent brakes, but they were not so constructed or arranged that neither could be used without bringing into action simultaneously the brake attached to the trailer. The tractor brake system was not in any way connected with that of the trailer brake. More than that, "the trailer brake was so arranged that it could be operated by a person occupying the driving seat of the tractor, independently of the brakes of the latter (proviso 2, Article III. (3)) by the use of a special handle or wheel placed near to that side of the steering wheel which was opposite to the side from which the lever of the tractor hand-brake was operated. There was thus a hand operated brake lever on either side of the steering wheel—one for the tractor brake and the other for the trailer brake. But no person (other than the driver of the tractor) was employed anywhere upon either vehicle to operate the hand lever which controlled the trailer brake. The driver of the tractor, whilst keeping hold of the steering wheel with one hand, could, by using his other hand to apply the tractor hand-brake, at the same time using his foot to apply the foot-brake lever, simultaneously and efficiently apply the two independent brakes of the tractor. Also, whilst keeping one hand on the steering wheel, he could simultaneously apply the trailer brake by its special handle and the foot-brake of the tractor. But it was not possible for the tractor driver efficiently to apply the trailer brake simultaneously with the tractor hand-brake without taking both hands off the steering wheel," and to sum up those facts it is found as a fact that "the trailer brake had to be applied or released as a separate operation either before or after the hand-brake of the tractor was applied, if the driver retained control of the steering wheel." In other words, as the driver sat upon the tractor he had three brakes which he might deal with: a hand-brake for the tractor and a foot-brake for the tractor and a hand-brake for the trailer. If he wished to apply simultaneously the hand-brake for the tractor and the hand-brake for the trailer it followed that he must abandon for the time being the steering wheel. The Article provides, among other things, that "the vehicle drawn by a motor-car shall . . . carry upon the vehicle a person competent to apply efficiently the brake," but that condition is subject to certain alternative exceptions stated in the proviso, and in particular there need not be a person upon the trailer if the brake of the trailer can be applied from the motor-car by a person upon the motor-car independently of the brakes of the motor-car. When one sees what it is to which this proviso relates—namely, that a person is to be on the trailer competent to apply efficiently the brake, it is clear that the words "if the brake of the vehicle drawn can be applied from the motor-car" mean, can reasonably be applied, can be applied independently from the brake system of the motor-tractor itself. The learned magistrate, having examined the provisions of the Article, came to the conclusion that it was not complied with in the circumstances because "there was thrown upon the driver of the tractor vehicle, in addition to the duties of applying or releasing the two independent brakes of the tractor itself and also maintaining uninterrupted control over its steering wheel, the further duty of efficiently applying or releasing the brake of the trailer vehicle by means of a separate hand-brake quite independent of and not mechanically interconnected with the brake system of the tractor, so that if and when an emergency required the simultaneous application of both hand-brakes, the steering wheel of the tractor must necessarily be released and left without control, with possible disastrous consequences," and he was further of the opinion that the third paragraph of Article III "contemplated the operation of both trailer and tractor brakes by one and the same person only when the said brakes were mechanically inter-connected in the manner provided by the first part of the said proviso." With regard to that second expression of opinion it is not necessary for the decision of this case, and it may well be, at any rate it is conceded, that the person referred to in the proviso as a person upon the motor-car who may operate the brake of the trailer may also be the person who drives the motor-car. That question may have to be determined hereafter; it need not be determined in the present case.

With regard to the first part of the opinion expressed by the learned stipendiary it seems to me that he has made no error in point of law. He has correctly construed these rather difficult articles and the provisions in them, and he has applied his mind with a true view of the law to the facts of the particular design, construction and method of control of these two vehicles. In these circumstances, while

not assenting to the suggested view that the driver of the tractor must not be the same person upon the tractor as the person who is regarded as a possible operator of the brake of the trailer, I think that the learned magistrate was right and that this appeal fails.

MR. JUSTICE AVORY.—I agree entirely, and have nothing to add.

MR. JUSTICE ACTON.—I agree.

[Solicitors—Messrs. Amery Parkes and Co.; Messrs. Few and Co., for Mr. R. E. Joy, Stafford.]

K.B. Div.
(Lord Hewart, C.J., Avory and Acton, JJ.)
1928. Apr. 3.

PIPER AND OTHERS v. MARYLEBONE LICENSING JUSTICES.*

Intoxicating Liquor—Licence—Special removal—Refusal—Appeal to quarter sessions—Finality of decision—No power to state a case—Licensing (Consolidation) Act, 1910 (10 Edw. VII. and 1 Geo. V., c. 24), s. 29 (5).

The licensee and owners of refreshment rooms applied to the licensing justices under the Licensing (Consolidation) Act, 1910, for a special removal of the licence. The justices refused the application, and the applicants appealed to quarter sessions, the justices being the respondents. Quarter sessions allowed the appeal, but stated a case. The applicants took a preliminary objection that by reason of s. 29 (5) of the Act quarter sessions had no power to state a case. That subsection provides that on an appeal against the refusal of a special removal "the judgment of the Court of Quarter Sessions shall be final and conclusive for all intents and purposes."

Held, that the justices had no power to state a case.

The COURT upheld a preliminary objection taken by the respondents to this appeal, Mr. Piper and the Metropolitan Railway Company, and decided that quarter sessions had no jurisdiction to state a case on a matter arising out of section 29 of the Licensing (Consolidation) Act, 1910. It was said that the practice of stating a case had continued for many years.

Amos Piper, the licensee, and the Metropolitan Railway Company, the owners, applied to the Marylebone licensing justices for a special removal of the licence of the refreshment rooms at Edgware-road Station. The application was refused, and the applicants appealed to the quarter sessions of the County of London, which allowed the appeals. The justices applied for a special case and when the case came on for hearing the present respondents took the preliminary objection that quarter sessions had no jurisdiction to state a case.

Mr. du Parcq, K.C., and Mr. Christmas Humphreys appeared for Mr. Piper; Mr. du Parcq, K.C., and Mr. Sidney Lamb for the Metropolitan Railway Company; Mr. Mitchell Banks, K.C., and Mr. Harold Murphy for the justices.

The LORD CHIEF JUSTICE.—This is a case stated by the Court of General Quarter Sessions for the County of London, and, as appears by paragraph 19 of the case, it was contended, *inter alia,* in the Court below by the then appellants that there was no power in the Court of Quarter Sessions to state a case. The subject-matter of the appeal was the refusal of licensing justices to grant a special removal of the licence of the refreshment rooms at Edgware-road Station. The matter, therefore, was one of those referred to in section 29 of the Licensing (Consolidation) Act, 1910. That section provides, by subsection (1), that:—

"Any person who thinks himself aggrieved by the refusal of the licensing justices of any licensing district to grant a renewal, transfer or special removal of a justices' licence . . . may appeal against the refusal to the Court of Quarter Sessions for the county in which the premises in respect of which the appeal is made are locally situated. . . .

By subsection (5) of that section:—

"The judgment of the Court of Quarter Sessions shall be final and conclusive for all intents and purposes."

Those words are reproduced from section 27 of the Alehouse Act, 1828. The question, then, is whether the Act providing that the judgment of quarter sessions shall be conclusive extends to prevent the statement of a case for the opinion of this Court. In my opinion, that question is concluded by the judgment of the House of Lords in *Kydd v. Liverpool Watch Committee* (24 *The Times* L.R., 772; [1908] A.C., 327). That case in the Court below (23 *The Times* L.R., 624; [1907] 2 K.B., 591) turned on the construction of section 11 of the Police Act, 1890. That section, providing, as it did, for an appeal to the next practicable Court of Quarter Sessions, provides also that that Court may make such order in the matter as appears to the Court just, "which order shall be final." The question was whether that finality prevented the statement of a special case. The House of Lords unanimously decided that it did. Lord Loreburn, at page 331, speaks of the language of the section:—

"Where it says, speaking of such an order, that it is to be final, I think it means there is to be an end of the business at quarter sessions, and I am fortified in the view I take by knowing that the same view commended itself to the majority of the Court of Appeal, had they felt themselves free from precedents."

An examination of the judgments in the Court of Appeal shows that three at least of the Lords Justices expressed the view to which Lord Loreburn there refers.

The phrase there was "shall be final"; the phrase here is "shall be final and conclusive for all intents and purposes."

For these reasons, whatever the practice in some cases may have been, I think that a Court of Quarter Sessions has no jurisdiction in these circumstances to state a case. That such a case is an appeal is made clear by section 25 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925.

For these reasons I think that the contention of the present respondents is right.

MR. JUSTICE AVORY and MR. JUSTICE ACTON concurred.

[Solicitors—Messrs. White and Leonard; Mr. I. Buchanan Pritchard; Messrs. Greenwell and Co.]

* Reported by J. W. HALL, Esq., Barrister-at-Law.

K.B. Div.
(Lord Hewart, C.J., Avory and Acton, JJ.)
1928.
Apr. 3.

WILLIAMS v. JONES.*

Aliens—Hotel—Registration—British subject—Statement of nationality — Duty of hotel-keeper—Aliens Order, 1920 (S.R. and O., 1920, No. 448), Art. 7 (3).

It is the duty of the keeper of a hotel, under Art. 7 (3) of the Aliens Order, 1920, to require every person staying at his hotel, whether known to him to be a British subject or not, to sign a statement of nationality. If that statement shows the guest to be an alien the keeper must then require the particulars which aliens have to furnish under the Order.

This was a case stated by justices for the County of Brecon.

At a court of summary jurisdiction at Llanwrtyd Wells on September 8, 1927, an information was preferred by William Williams (hereinafter called the appellant) under the Aliens Order, 1920, against Thomas Sidney Jones (hereinafter called the respondent), of the Belle Vue Hotel, Llanwrtyd Wells, for that he on August 14, 1927, at the parish of Llanwrtyd in the said county, then being the keeper of certain premises to which the Aliens Order, 1920, applied, to wit, the Belle Vue Hotel, did unlawfully fail to require persons staying at the said hotel to sign a statement and furnish the particulars required from them under Article 7 of the said Order, which information was dismissed.

Upon the hearing of the said information the following facts were admitted or proved :—

(1) On August 14, 1927, there were persons staying at the said hotel.

(2) Such persons were not aliens but British subjects.

(3) The respondent had not required such persons to sign a statement and furnish the particulars referred to in the said information.

(4) The appellant had been furnished with the names and addresses of the British subjects, together with the numbers of the bedrooms which they occupied in the said hotel.

On the part of the respondent it was contended :—

(1) That the Aliens Order, 1920, and in particular Article 7 thereof in its entirety, must be considered in order to arrive at the legal construction of paragraph (3) (*a*) and paragraph (3) (*b*).

(2) That the respondent was not under any legal obligation to require persons staying at his hotel who were known to be British subjects to sign the statement and furnish the particulars referred to in Article 7 of the said Order.

The justices were of opinion that the said Order was part of the emergency legislation and that the respondent's contention was correct and that the respondent was not under any legal obligation to require British subjects staying at his hotel who were known to him as British subjects to sign the statement and furnish the particulars referred to in Article 7 of the said Order.

The question upon which the opinion of the Court was desired was whether the justices, upon the above statement of facts, came to a correct determination and decision in point of law, and, if not, what should be done in the premises.

Mr. Richard O'Sullivan appeared for the appellant; Mr. J. W. J. Cremlyn for the respondent.

THE LORD CHIEF JUSTICE.—This is a case stated by justices, and the question which is raised is connected with an information preferred by the present appellant under the Aliens Order, 1920, against the present respondent for that, being the keeper of certain premises to which the Aliens Order, 1920, applies, he unlawfully failed to require persons staying at the hotel to do what that Order says they must be required to do. The justices, having heard the information, dismissed it, and the question for this Court is whether in so doing they came to a correct determination in point of law.

The facts are in a very short compass. There were on August 14, 1927, certain persons staying at the respondent's hotel ; in fact those persons were not aliens but were British subjects, and in fact the respondent had not required those persons to sign the statement or furnish the particulars referred to in the information. It is quite clear from the statement of the contentions and the opinion of the justices that the case made for the defence was, and was only, that the respondent (I quote the very words of the contention) "was not under any legal obligation to require persons staying at his hotel who were known to be British subjects to sign the statement and furnish the particulars referred to in Article 7." So the present respondent contended and so the justices held. They say : "We were of opinion that the respondent's contention was correct and that the respondent was not under any legal obligation to require British subjects staying at his hotel who were known to him as British subjects to sign the statement and furnish the particulars referred to in Article 7." At some date perhaps the point will be taken that the police have struck too soon and that the keeper of the hotel has not had a reasonable opportunity of requiring the signatures referred to in the article. No such case was made here, and any allegation of that kind is utterly and completely inconsistent with the case which was made—namely, that the respondent was not under any legal obligation to require his guests to sign the register.

The question, therefore, turns on the construction of this Order. I do not think that we are concerned with the merits of the Order or the merits of continuing the Order or the merits of the drafting of the Order. It may well be, especially when one comes to paragraph 3 of Article 7, that a slight additional clearness would have been given if the two matters dealt with had been dealt with the other way round. Paragraph 3 of the article provides as follows : "It shall be the duty—(*a*) of every person (whether an alien or not) staying at any premises to which this article applies to sign, when so required, a statement as to his nationality, and, if an alien, to furnish and sign a statement of the particulars required under this article." There are two quite separate things contemplated : (1) (which is universal in its application) that every person, whether an alien or not, staying at any premises of the kind referred to must when required sign a statement as to his nationality, and (2) having so signed, if he is an alien, he must, when so required, furnish and sign a statement of the particulars which are described in the article. The meaning, one would have thought, is sufficiently clear. Every person, whether an alien or not, must sign a statement as to his nationality ; when that statement is signed the information, true or false, is given, and if it appears from that information that

* Reported by J. W. HALL, Esq., Barrister-at-Law.

he is an alien then the keeper of the house is in a position to proceed to the second duty, which is to require the particulars that an alien has to furnish. As rendering those steps and each of them possible, the article goes on to provide in clause (*b*) that it shall be the duty "of the keeper of any premises to which this article applies to require any person who stays at the premises to sign the statement and furnish the particulars required from him under this article," and also to preserve such statements for two years. It seems to me that those words are to be read *singula singulis reddendo* with what is contained in clause (*a*). The statement is a statement as to the guest's nationality, the particulars are the particulars required of him if it appears that he is an alien, and it is the duty of the keeper of any premises of the kind in question to require any person who stays at his premises to sign the statement. When he has signed the statement, if it appears that he is not of British nationality, then it is the duty of the keeper of the premises to require him to furnish the particulars.

Now the argument which was made in the Court below, an argument contained among the arguments made in this Court on the part of the respondent, was that "the respondent was not under any legal obligation to require persons staying at his hotel who were known to be British subjects to sign the statement." How can the keeper of premises know whether the persons staying in the hotel are British subjects? The article does not repose upon his knowledge or supposed knowledge; it requires a document, and if that document is falsely filled up by the person filling it up certain unpleasant consequences follow. But in order that the machinery of the article may work it is necessary that every person should sign that statement as to nationality. To exempt persons who are known to the landlord to be British subjects, that is to say, to exempt persons who, as the landlord thinks, are British subjects, might, of course, reduce the whole machinery of the article to nothing. At any rate, if that is what the article meant, it is not what the article has expressed. Mr. Cremlyn has been driven to say that the words "it shall be the duty of the keeper of any premises . . . to require any person who stays at the premises to sign the statement" really mean that it shall be the duty of the keeper of the premises to require some persons who stay at the premises to sign the statement, each person being a person as to whose nationality he has a doubt. That is not what the article provides.

I think, therefore, that this appeal succeeds, and that the case ought to go back to the justices with this expression of opinion as to the true construction of the article.

MR. JUSTICE AVORY.—I have entertained some doubt about this case in consequence of the form in which this information was laid against the appellant here. It charged that "he did unlawfully fail to require persons staying at the said hotel to sign a statement and furnish the particulars required from them under Article 7 of the said Order," and the contention which was put before the justices was that the respondent was not under any legal obligation to require the persons staying at his hotel, who were known to be British subjects, to sign the statement and furnish the particulars referred to in Article 7. I think the justices in this case have probably been misled by the combination in the information and in the arguments of the two matters—namely, the statement of nationality and the particulars which have to be furnished by an alien, for it is to be observed that a British subject is under no obligation to furnish the particulars which are there mentioned, and it may very well be that the justices in looking at the combination of these two matters in the information were misled into thinking that there was no obligation on the keeper of the house to require a British subject to make a statement of his nationality. I find myself unable to differ from the judgment of my Lord as to the strict reading of paragraph 3 of Article 7 of the Aliens Order, 1920, which in terms makes it the duty of the keeper of an hotel to require any person—and I cannot doubt that that includes a British subject—to make a statement of his nationality, and if the information had stopped there, charging that the respondent had failed to require persons staying at his hotel to make a statement of their nationality, I am not satisfied that the justices would have fallen into the error into which they did fall.

I desire to reserve the question whether it is the duty of the keeper of an hotel, in a case where persons arriving are known to him to be British subjects, to make his requisition upon them on their arrival or whether he may not do it at some time subsequent to their arrival. I agree, therefore, that the case should be remitted.

MR. JUSTICE ACTON.—I agree, without any doubt or qualification whatever, with the judgment that has been delivered by my Lord.

[Solicitors—Messrs. Field, Roscoe and Co., for Mr. A. Jolly, Brecon; Messrs. Samuel Griffith and Son, Llanwrtyd Wells.]

Court of Appeal. (Scrutton, Greer, and Sankey, L.JJ.) 1928. Apr. 23.

MERCHANTS' MARINE INSURANCE COMPANY, LIMITED v. LIVERPOOL MARINE AND GENERAL INSURANCE COMPANY, LIMITED.*

Insurance (Marine)—Total loss—"Immediate consequence"—Chain of causation.

The plaintiffs, having undertaken the reinsurance of a risk under a marine policy, reinsured their own risk with the defendants, the policies being subject to the following conditions: "In the event of the vessel not being at the place of destination on the date of the expiration of the policy the insurance shall continue in force till the end of the day when the vessel arrives at her first place of destination. If the insured object is in a damaged condition at the time when the insurance expires . . . the risk shall continue for the immediate consequence of such damage until the object without unnecessary delay has been repaired or sold." On the date of the expiration of the original policy the vessel was on a voyage and had not reached her first place of destination, and after that date and before reaching such place she grounded on a reef, but got off and proceeded. When she reached her first place of destination, it was found that she was

* Reported by E. J. M. CHAPLIN and T. W. MORGAN, Esqrs., Barristers-at-Law.

badly damaged. There were no local facilities for repair, but temporary repairs were effected to enable her to proceed on her voyage to a place where she could be repaired. She then proceeded, but began to leak badly and had to be run ashore to prevent sinking, and was subsequently sold as a wreck. The original insurers paid as for a total loss, and the plaintiffs, having paid them, claimed against the defendants.

Held, that the loss was an "immediate consequence" of the damage caused by the original stranding and as the risk continued until the vessel was repaired with no unnecessary delay the plaintiffs were entitled to recover.

Decision of Rowlatt, J. (44 *The Times* L.R., 312), reversed.

This was an appeal by the plaintiffs, the Merchants' Marine Insurance Company, Limited, from a judgment of Mr. Justice Rowlatt (44 *The Times* L.R., 312) in an action in which they claimed against the defendants, the Liverpool Marine and General Insurance Company, Limited, under a policy of reinsurance dated March 9, 1925, effected on the Norwegian steamer Maradal.

The steamer Maradal was insured against marine perils for the period from January 1 to December 31, 1925. The insurers reinsured their risk with the plaintiffs and the plaintiffs reinsured their risk with the defendants. The policies were subject to conditions of which the two following were material:—

"In the event of the vessel not being at the place of destination on the date of the expiration of the policy the insurance shall continue in force till the end of the day when the vessel arrives at her first place of destination.

"If the insured object is in a damaged condition at the time when the insurance expires . . . the risk shall continue for the immediate consequences of such damage until the object without unnecessary delay has been repaired or sold."

On December 31, 1925, the Maradal was on a voyage from the Baltic to South Africa with a cargo of timber. Her first destination was Lüderitz. On the evening of January 9, 1926, before she reached her destination, she grounded on the Angra Reef during a fog. After a short time she was refloated and went into Lüderitz, her first place of destination. It was then found that she was badly damaged. There were no facilities for repair at Lüderitz, and a diver was sent from Cape Town, and temporary repairs were effected to enable the vessel to proceed to Cape Town. She started, but, though the weather was good, she began to leak badly again, and to prevent sinking she was run ashore on Possession Island. Subsequently she was sold as a wreck for £500. The original insurers paid as for a total loss, and the plaintiffs, as reinsurers, paid the original insurers and claimed over against their reinsurers, the defendants, who refused to pay. The plaintiffs accordingly brought their action.

Mr. Justice Rowlatt held that the loss was not an "immediate consequence" of the damage caused by the original stranding, because the chain of causation was broken when the steamer reached her first place of destination, which was a place of safety, and that, therefore, the action failed.

The plaintiffs appealed.

Mr. Raeburn, K.C., and Mr. Simey appeared for the appellants; Mr. A. T. Miller, K.C., and Mr. H. Atkins for the respondents.

Lord Justice Scrutton.—This case raises a comparatively short point and one that is unusual in an English Court in this sense, that it does not turn on the ordinary rules applied by English law as to the consequence of perils which can be recovered under a policy, but turns on the application to the facts of this case of a particular clause in Norwegian insurance, which does not exist in English law. It is a fight between two English reinsurers, the subject of insurance being a Norwegian ship which was reinsured with the plaintiffs who reinsured their risk with the defendants. The original insurance was a time policy for a year, but there was incorporated in all the policies a continuation clause in case the ship should be at sea at the expiration of the policy, so that it would not be known what had happened to her. The continuation clause in this particular case is, "In the event of the vessel not being at the place of destination on the date of the expiration of the policy"—she was not; she was on a voyage from Europe to various ports on the South African coast beginning with Lüderitz Bay and ending with Beira—"the insurance shall continue in force till the end of the day when the vessel arrives at her first place of destination." The first place of destination was Lüderitz Bay, which is on the west coast of Africa, some 500 miles north of Cape Town. Then there was a further continuation clause, which is incorporated in the policy and in the reinsurance policies, and which is expressed in section 27 of what is called the Norwegian plan, which is something like the Institute clauses in English insurance policies, a set of clauses which may be included by referring to them as the Norwegian plan; and that clause, on the applicability of which to the facts in this case the whole question in this case arises, is this: "If the insured object is in a damaged condition at the time when the insurance expires and the damage comes within the underwriters' responsibility, the risk shall continue for the immediate consequences of such damage until the object without unnecessary delay has been repaired or sold." Now that clause assumes that damage had resulted before the insurance expired from a risk insured by the policy. So far, of course, the damage would be recoverable, or the costs of repairing it. But something is added. It is assumed that there may be further damage directly resulting from the damage which has already been caused after the date when the insurance expires, *i.e.*, after the date of arrival at the first point of destination. The further damage resulting from the original damage is to be covered by the policy until the object without unnecessary delay has been repaired. So unless you can find that the vessel has been repaired or that there has been unnecessary delay in repairing her, further damage directly caused by the original damage which results from the original perils in the policy is covered. Now that, of course, is quite a different question from considering the applicability of the maxim *Causa proxima non spectatur* to the damage caused by the insured peril. You begin here with damage caused by a peril; you assume that that damage may cause further damage before the vessel is repaired, and for that further damage directly caused by the original damage before the damage has been repaired the underwriters undertake to pay. Now apply that to the facts in this case. Approaching Lüderitz Bay this particular vessel, the Maradal, grounded on the Angra Reef, and, grounding, was

bumped for some considerable time on a rocky reef, with the result that her No. 5 after-tank was holed very considerably; there were large holes, and I should have thought that it was almost inevitable that a heavy vessel laden with timber bumping on a reef so as to make large holes in the bottom of her double tank would have strained herself and that it was extremely probable that her structure was weakened as well in addition to the damage caused by the specific holes which were made in the double bottom. She gets off and reaches Lüderitz Bay and lies in a place where she lies safely to this extent, that the pumps can keep down the water which is leaking through various places, not clearly ascertained, between her double-bottom tank and the holds of the ship. But there she is, and what is she to do? She is on a voyage; she is insured on a voyage which the time covers, a voyage she is making to Beira. She has a lot of cargo in her for other ports. Lüderitz Bay, I am quite clear, has no facilities for the repair of a vessel damaged in this way. Is it to be said "She is now in a place of safety. If she goes on pumping she will keep safe. Let her stay there; she is in a place of safety"? A place of safety for a ship does not mean a place where she will be shut out for all time from any commercial operations, and, because she can lie safely there, that she shall lie safely there without endeavouring to proceed. Obviously the thing every one has to consider is, how she can be efficiently repaired in order that she may continue her operations as a freight-earning ship; and everybody concerned in the case, though this did not include any efficient surveyors at Lüderitz Bay, because there were not any—every one concerned in the case at Lüderitz Bay and the underwriters' representatives at Cape Town who had been in communication with the original underwriters in Norway thought that the proper thing to do after the diver had patched her holes as best he could was to take the chance of her getting through to Cape Town, which is about 500 miles off. This Court has not the advantage of being able to look at the log and see in what weather she started, but she was tried outside Lüderitz Bay under steam, and everybody took the view that she could get through to Cape Town. The diver backed his opinion by proceeding to travel with her instead of travelling in a roundabout way by road. Again, not having the log, we do not know whether the weather got worse, and there was a controversy whether the wind she met with was force 8 by the Beaufort scale or force 4 by the Beaufort scale, because it is "4" in the log, and it is not known whether that refers to the Norwegian scale or the English Beaufort scale. She gets part of the way down and then she begins to leak badly. It seems to me quite clear that the reason why she begins to leak badly is that she has been damaged by the original grounding, with her strength weakened, and that in that weakened condition she was not able to stand the strains of a sea voyage. In consequence she has to be beached at a very desolate island a little to the west of Lüderitz Bay, and there is no doubt that, being beached there, she was a constructive total loss. How does that fit in with the terms of section 27? When the insurance expired the ship was in a damaged condition. That damage came within the underwriters' responsibility because it was occasioned by perils of the sea. The risk is therefore to continue until the object without unnecessary delay has been repaired. She has not been repaired and there has been no unnecessary delay. What is the risk which is to continue? The risk which is to continue is for the immediate consequences of such damage. Was it an immediate consequence of the damage done by the stranding which was continuing and had not been repaired that she was unable to stand weather which any ordinary seaworthy ship undamaged would have stood, and had to be grounded? In my opinion it was. Now, the learned Judge has come to an opposite conclusion for this reason, that he has imported into the clause a provision which is not there. He has said the clause is to be read "till the object is in a place of safety." But that is just what the clause does not say. The clause says that the risk shall continue for the immediate consequences of such damage until the object without unnecessary delay has been repaired, and it assumes that, after the damage has been caused and before the ship has been repaired, further damage may be caused by the original damage. That seems to me just to be intended to meet the case where a ship, having been damaged, has to be brought to another port to be repaired. That provision does not cease to apply because, on the way to be repaired efficiently, the vessel is in a place where she can lie in safety so long as she is not repaired, and at a place where there are no facilities for repairing her. For these reasons I think the learned Judge came to a wrong conclusion when he thought that the place of safety before the vessel was repaired was a matter to be considered under this clause. This view of the question which we have to determine, which seems to me to be the obvious and only question, having regard to section 27, turns on considering whether or not the English decisions of *Reischer v. Borwick* (10 *The Times* L.R., 568; [1894] 2 Q.B., 548) and *Leyland Shipping Company, Limited v. Norwich Union Fire Insurance Society, Limited* (34 *The Times* L.R., 221; [1918] A.C., 350), which do not deal with the same question at all but deal with the question whether damage is a proximate result of an insured peril, which is quite a different question, apply to the facts of this present case or not. But I only say this, that whatever one may have thought, if one were brought up in the old school of considering proximate cause, was the conclusion which should have been arrived at in the case of *Reischer v. Borwick* (*supra*) and the *Norwich Union* case (*supra*), since the House of Lords has given its decision, those older views must be taken as erroneous, and the result of both cases, and particularly of the case of *Reischer v. Borwick* (*supra*), seems to me to support the view I have arrived at as to the meaning of clause 27, although I think they are not decisions on the same question.

For these reasons I think the learned Judge's view that the vessel had got to a place of safety, and therefore that liability had ceased under section 27, is erroneous. This view relieves one from expressing any final opinion about the other point argued from the point of view of the appellants, which was this. The policies contain a prövision to pay as may be paid thereon, and that the settlement of the original company shall be followed. The original company has paid and has settled, and the appellants desire to argue, as I understand, by their leader, one point, which is: here is a settlement of the original underwriters; by their junior, two points: that there is also a provision under the clause to pay as may be paid thereon. Now, on the second point, 35 years ago Mr. Justice Mathew in *Chippendale v. Holt* (12 *The Times* L.R., 50; 1 Com. Cas., 197) decided, with the assistance of the argument of Mr. Simey, who now says he was wrong, that to pay as may be paid thereon did not cover a case

where the original person paying was not under any liability to pay. I think myself it would be difficult to disturb that 35 years' old decision which has been acted on repeatedly ever since, but I mention that the point has been taken in order that the House of Lords, if it ever gets there, shall have the opportunity of saying whether it will treat *Chippendale v. Holt* (*supra*) as standing in its venerable antiquity or whether it should be reversed. It is not necessary for us, in the view we take as to the main liability, to express any opinion upon it.

For these reasons I think the appeal should be allowed with costs.

LORD JUSTICE GREER.—I agree. The appellants were the plaintiffs in an action on a marine policy of reinsurance, and they claimed against the defendants under the circumstances that the other reinsurers had paid and the original insurers had paid. Mr. Justice Rowlatt, in the Court below, dismissed the action with costs, holding that they had not brought the case within the words of the policy.

The material facts may be quite shortly stated. The vessel (during the continuance of the policy by reason of the clause therein) stranded near the entrance to Lüderitz Bay. Lüderitz Bay was one of her ports of discharge. Under the terms of the policy the risk continued till she arrived at a port of discharge. There was an additional clause to the effect that "if the insured object is in a damaged condition at the time when the insurance expires and the damage comes within the underwriters' responsibility, the risk shall continue for the immediate consequence of such damage until the object without unnecessary delay has been repaired or sold." Now it is clear, as applying to this case, that the words are not "the immediate consequence of the stranding," but "the immediate consequence of such damage." The further facts that seem to me to be material for this case are these, that there is no finding by the learned Judge that the shipowners, by her master, failed to take reasonable steps at Lüderitz to do such temporary repairs as might reasonably be supposed to be sufficient to enable the vessel to get to the nearest place, that is to say, Cape Town, where she could be efficiently repaired. I do not understand it to be seriously suggested that they did in fact fail to take reasonable steps, though it was hinted at once or twice in Mr. Miller's argument. It seems to me impossible, having regard to the facts proved in this case, to find that they failed to take reasonable steps to do such temporary repairs as would enable them to continue what is for this purpose an insured voyage by going to a place where the vessel could be properly repaired. Now, the clause says that until she is repaired—that means at such a reasonable place as she ought to be repaired at—the responsibility for the immediate consequence of the damage caused by the stranding is to be covered, and she is to go there without unnecessary delay. One wonders whether, if they had waited and had brought up surveyors and more workmen and more divers from Cape Town and had done some more repairs, and then immediately the vessel had stranded at Lüderitz Bay, what the respondents would have said. I can imagine they would have said: "This was unnecessary delay on your part; you ought to have patched her up sufficiently to enable a reasonable navigator to take her to Cape Town, and as you have not done that you have been guilty of unnecessary delay. Therefore you are not covered by the policy." I think the vessel when she met with this accident was still suffering from the damage caused by the stranding, and the water coming into her, and her consequent loss was the immediate consequence of the still existing damage caused by the stranding.

I only wish to refer to one authority, and that is the case of *Reischer v. Borwick* (10 *The Times* L.R., 568; [1894] 2 Q.B., 548) which, though not a direct authority on this question, is an authority which affords some guidance how we should determine the question we have to decide in this case. Lord Justice Lopes, in giving his judgment, says this, at page 553: "It was contended that the towing the tug through the water after the collision was the proximate cause of the loss now sought to be recovered. It was, however, admitted that this was a reasonable and proper act in the circumstances." It is said that the cause of the damage in the present case was the decision to take the vessel with such repairs as she had had to Cape Town. It appears to me, and it is now admitted to be the fact, that this was a reasonable and proper act in the circumstances. I also refer to the words in Lord Justice Davey's judgment at page 553: "The failure of the attempt to mitigate or stop the damage arising from the breach in the condenser cannot in my opinion be justly described as the cause of the ultimate damage." It seems to me that, applying these words to this case, it cannot be said that the failure of the attempt to mitigate the damage when the vessel was in Lüderitz Bay can justly be described as the cause of the loss of this vessel.

I think it unnecessary to say anything about the other part of the case that may possibly be argued elsewhere. It does not arise on the view to which I have come. I agree that the appeal must be allowed with costs.

LORD JUSTICE SANKEY.—I agree.

The only question which falls for determination in this appeal is whether the plaintiffs, on the facts of the case, have brought themselves within section 27 of the Norwegian plan of insurance, which reads: "If the insured object"—a ship in this case—"is in a damaged condition at the time when the insurance expires, and the damage comes within the underwriters' responsibility, the risk shall continue for the immediate consequence of such damage until the object, without unnecessary delay, has been repaired or sold." Now, no question arises, as there might arise under a clause of this character in certain circumstances, as to whether there has been any unnecessary delay in repairing her. The vessel was injured by taking the ground somewhat severely, if you look at the general average statement, at Angra Reef when she was making for Lüderitz Bay. Everything was done that could be done to get her to Lüderitz Bay, and when she got there the master immediately communicated with Cape Town, which was about 500 miles distant, and a diver and some four or five men with their equipment arrived and patched the vessel up. Personally, I do not think the question whether the vessel had arrived at a place of safety has very much to do with the case. Personally, I also doubt whether under the circumstances it could be said that the vessel had arrived at a place of safety. The real point for determination is whether the damage which was sustained by the vessel when she took the ground at Angra Reef was the immediate cause of her loss on Possession Island. I think that it was. Fortunately, we have not got to speculate here upon the meaning of the words "proximate cause" or to add anything to the

numerous words which have been used to elucidate the meaning of it, such as "efficient" or "effective cause," "real cause," "proximate cause," "direct cause," "decisive cause," "immediate cause," "*causa causans*," all of which have been used in one or other of the cases to which our attention has been directed. All we have to decide is whether it was the immediate consequence of the damage. I am clearly of opinion that it was.

I also should like to refer, not because I think the construction of the words is important, but because of the facts, to the case of *Reischer v. Borwick* (10 *The Times* L.R., 568 ; [1894] 2 Q.B., 548), where Lord Justice Lindley, as he then was, says at page 551 : "It appears to me, however, that an injury to a ship may fairly be said to cause its loss if, before that injury is or can be repaired, the ship is lost by reason of the existence of that injury, *i.e.*, under circumstances which, but for that injury, would not have affected her safety." Again Lord Justice Davey says in his judgment on page 553 : "The collision"—in that case the ship came into collision with a snag—"made the hole in the condenser, and the broken condenser was a continuing source of risk and danger." Here, too, I think the damage that was sustained by the tank and in the various parts on the port side to which our attention was directed was a continuous source of danger, and so the damage which she sustained was in fact the immediate cause of the eventual beaching of the vessel.

[Solicitors—Messrs. Waltons and Co. ; Messrs. William A. Crump and Son.]

Chan. Div. (Clauson, J.) } 1928. May 2.

TILLING-STEVENS MOTORS, LIMITED v. KENT COUNTY COUNCIL AND ANOTHER.*

Revenue — Mechanically propelled vehicles — Duty—Petrol-electric vehicle—Electrical propulsion—Generation of electricity by internal combustion engine on vehicle—Rate of duty —Finance Act, 1926 (16 and 17 Geo. V., c. 22), Sched. I. (5).

A vehicle propelled by electricity generated by an internal combustion engine on the vehicle is an electrically-propelled vehicle within clause 5 of the First Schedule to the Finance Act, 1926, and is therefore subject to a lower duty than a vehicle mechanically propelled otherwise than by electricity.

The plaintiffs, Tilling-Stevens Motors, Limited, engineers and motor-chassis manufacturers, with a registered office and works at Maidstone, Kent, claimed (1) that the petrol-electric vehicle chassis, No. TS. 13 2426, Registered Mark No. K.O. 1404, and similar vehicles were electrically-propelled vehicles within the meaning of clause 5 of the First Schedule to the Finance Act, 1926, and were chargeable with licence duty under section 13 of the Act as such and not as vehicles other than electrically-propelled vehicles ; and (2) that they were entitled to repayment of all licence duties paid by them in respect of such vehicles over and above the amounts properly chargeable under section 13 of the Act on electrically-propelled vehicles.

The defendants, the Kent County Council, were the licensing authority for the County of Kent under the Roads Act, 1920, and were empowered to levy and collect duties on licences for mechanically-propelled vehicles.

The defendant, the Minister of Transport, was interested under the Roads Act, 1920, because the amounts for licences collected by the Kent County Council were payable to the Exchequer and the Minister of Transport became entitled to a certain proportion of the sums so received by the Exchequer.

On April 9, 1927, the plaintiffs applied to the defendants, the Kent County Council, for a licence in respect of a petrol-electric goods vehicle as an electrically-propelled vehicle and paid to the defendants £21 5s. 3d. in respect of the licence duty, which sum was the proper amount chargeable for an electrically-propelled goods vehicle of the weight of that vehicle.

The Kent County Council refused to license the vehicle as an electrically-propelled vehicle, and the plaintiffs, under protest, applied for and obtained a licence for it as a vehicle other than an electrically-propelled vehicle. They paid the defendants, the Kent County Council, a further £21 5s. 3d. in respect thereof.

Clause 5 of the First Schedule to the Finance Act, 1926, sets out the amount payable for licences made chargeable with duty by section 13, and divides the vehicles chargeable into electrically-propelled and other than electrically-propelled vehicles, the latter being thereby made subject to a licence for which the sum payable is considerably more than that payable for a licence for electrically-propelled vehicles.

The defendants, the Kent County Council and the Minister of Transport, denied that the vehicle was an electrically-propelled vehicle within the meaning of clause 5 of the First Schedule to the Finance Act, 1926.

One of the main manufactures of the plaintiffs was a petrol-electric vehicle in which a petrol engine and electric generator generated electricity, which was used in an electric motor to propel the vehicle.

Sir Arthur Colefax, K.C., and Mr. W. Trevor Watson appeared for the plaintiffs ; the Attorney-General (Sir Thomas Inskip, K.C.) and Mr. C. Stafford Crossman, for the Minister of Transport ; and Mr. K. E. Shelley, for the Kent County Council.

Sir Arthur Colefax, in opening, said that the electricity was generated in the vehicle by a chemical re-action. Whether the electricity was generated in the vehicle or not, however, was not the criterion whether it was an electrically-propelled vehicle. There was no mechanical connexion between the internal combustion engine and the back axle, and the vehicle owed its motive power to the electric motor. If a vehicle derived its motive power from an electric motor it was an electrically-driven vehicle.

Mr. H. A. Gill, M.A. (Cantab.), and patent agent, was called by the plaintiffs and gave evidence that the petrol-electric commercial vehicles manufactured and used by the plaintiffs were electrically-propelled vehicles for the purposes of the First Schedule to the Finance Act, 1926.

The Attorney-General said that the question was what was the meaning of "electrically-propelled." The expression was used in a popular sense, as the Schedules to the Act of 1926 were not based on scientific examination. To be electrically-propelled the primary source of energy in the vehicle must be electrical, and one could not say that because the back axle was turned by an electric

* Reported by G. P. Langworthy, Esq., Barrister-at-Law.

motor therefore the vehicle was electrically-propelled. The source of the energy here was petrol, which was the primary motive power, through the internal combustion engine.

Mr. SHELLEY for the Kent County Council adopted the argument of the Attorney-General and added a few words.

SIR A. COLEFAX replied.

MR. JUSTICE CLAUSON, in giving judgment, said that in popular language there was in these vehicles an ordinary internal combustion engine which produced the electricity which, in the electric motor, drove the rear wheels. The wheels went round because the electric motor made them revolve. That being so, the vehicles, in the popular sense, came within the category of electrically-propelled vehicles as it was impossible to say that they were not electrically-propelled, though it was true that petrol had some work to do. The plaintiffs had established that these particular vehicles were electrically-propelled vehicles within the meaning of clause 5 of the First Schedule to the Finance Act, 1926.

[Solicitors—Messrs. Godden, Holme, and Ward ; Messrs. G. B. Hemming and Son, for Messrs. Bracher, Son, and Miskin, Maidstone ; the Treasury Solicitor.]

K.B. Div. } 1928.
(Wright, J.) } May 1.

PEARMAN v. CHARLTON.*

Savings Banks — Nomination — Invalidity of form — Receipt of payment by nominee — Right of administrator of nominator to recover amount—Post Office Savings Bank Regulations, 1921, regs. 65, 66, 87.

One P., who had money to his credit in the Post Office Savings Bank, signed a nomination form by which he left the money to the defendant. The name of a witness appeared on the form, but P. had not signed the form in his presence as required by reg. 66 (1) of the Post Office Savings Bank Regulations, 1921. After P.'s death, as the form appeared on the face of it to be valid, the Postmaster-General paid the money to the defendant. The plaintiff, having taken out letters of administration of P.'s estate, claimed the money from the defendant, as money received by him to the use of the plaintiff.

Held, that the form was invalid, and the position of the defendant was the same as if he had received payment under a will afterwards held invalid, and the plaintiff was entitled to recover.

His LORDSHIP gave judgment for £676 11s. in favour of the plaintiff, Mr. William Pearman, who claimed that sum as money had and received by the defendant, Mr. Frank Charlton, to the use of the plaintiff as administrator of the estate of Mr. Percy Pearman, who had been a bar steward on the P. and O. liner Bonella.

The defendant pleaded that subsequently to the death of Mr. Percy Pearman he had received from his Majesty's Postmaster-General the sum claimed, being the amount standing to the credit of Mr. Percy Pearman at the Post Office Savings Bank account, in pursuance of a nomination form in his favour signed by Mr. Percy Pearman. The defendant claimed that the nomination was good and valid. Alternatively, he claimed that the nomination constituted a good and valid *donatio mortis causa.*

From the evidence, it appeared that on March 28, 1925, Mr. Percy Pearman had registered with the Post Office what purported to be a nomination form by which he left the money to his credit in the Post Savings Bank to the defendant. Mr. Kelly, whose name appeared on the form as a witness, said that the form had not been signed by Mr. Percy Pearman in his presence. Mr. Percy Pearman died at sea on April 15, 1925, and letters of administration of his estate were taken out by the plaintiff on September 1, 1926. After the death of Mr. Percy Pearman the Postmaster-General, in pursuance of the terms of the nomination form, which appeared valid on the face of it, paid out to the defendant the sum claimed.

No. 65 of the Post Office Savings Bank Regulations, 1921, dated September 30, 1921, states :—

"Subject to the provisions of these Regulations, a depositor of the age of 16 years or upwards may (on and after the date upon which these Regulations come into operation) nominate any person to receive any sum due to such depositor at his decease, but a nominator may not have more than one nomination in force at any time, Provided nevertheless that the Postmaster-General may in his absolute discretion refuse to accept or register any nomination."

By No. 66 of those Regulations :—

"(1) Every such nomination shall be in writing and shall be signed by the nominator in the presence of a witness, and shall be sent by post or otherwise to the Controller of the Post Office Savings Bank during the lifetime of the nominator.

"(2) Every such nomination shall be in the prescribed form which may be obtained from the Controller of the Post Office Savings Bank."

By No. 87 :—

"When any payment is made, or act done by the Postmaster-General or any person acting under his authority in accordance with the Savings Banks Acts and the Regulations for the time being made thereunder, the Postmaster-General and such person shall not be liable in respect of any claims on the part of any person in connexion with such payment or act, but any person may nevertheless recover any sum lawfully due to him from the person to whom the Postmaster-General has paid the same."

Mr. Bensley Wells and Mr. Theodore Turner appeared for the plaintiff ; the defendant appeared in person.

MR. JUSTICE WRIGHT, in a considered judgment, having stated the facts, said that he could come to no other conclusion than that it was a necessary condition of the validity of this nomination that it should be signed by the nominator in the presence of a witness. It was a testamentary document, and he thought it was as necessary that it should be signed by the nominator in the presence of a witness as that the provisions for the due execution of a will should be observed. As to that, he need only cite the case of *In re Gunstan—Blake v. Blake* (7 P.D., 102), where it was held that to constitute a sufficient acknowledgment, within section 9 of the Wills Act, 1837, the witnesses must at the time of the acknowledgment see, or have the opportunity of seeing, the signature of the testator, and if such were

* Reported by C. G. MORAN, Esq., Barrister-at-Law.

not the case it was immaterial whether the signature was in fact there at the time of the attestation, or whether the testator said that the paper to be attested was his will, or that his signature was inside the paper. So in this case he must hold that this nomination was not a valid nomination under the Post Office Savings Bank Regulations, as the signature of the nominator had not been made in the presence of a witness. And that was so although the nomination form when it reached the Post Office appeared to be valid and the Postmaster-General appeared to be justified in paying the money in Mr. Percy Pearman's account to the defendant. But such payment was made under the mistaken impression that the nomination form was valid and binding.

There remained the question whether the defendant was entitled to hold the money or whether the administrator of the deceased's estate was entitled to say that it was due to him in his capacity as administrator. He had considered the cases relating to wills and the administration of estates to see what was the position of a person who had received payments under a will which was afterwards pronounced to be invalid. He had considered more especially the reasoning in *Fitzpatrick v. M'Glone* ([1897] 2 I.R., 542). In view of the decisions and of the words in No. 87 of the Post Office Savings Bank Regulations, 1921, "but any person may nevertheless recover any sum lawfully due to him from the person to whom the Postmaster-General has paid the same," he thought that the plaintiff was entitled to succeed. There was no ground for the defendant's alternative contention that there was here a *donatio mortis causa*. The defendant's costs as between solicitor and client would come out of the estate.

[Solicitors—Messrs. Raymond Oliver and Co.]

K.B. Div.
(Salter and Talbot, JJ.) } 1928. Apr. 19.

MANSFIELD v. ROBINSON AND OTHERS.*

Agricultural Holdings — Arbitration — Costs — Preliminary agreement between parties — Agreement not mentioned at hearing — Discretion of arbitrator—Validity of agreement —Agricultural Holdings Act, 1923 (13 and 14 Geo. V., c. 9), s. 16, Schedule II., paragraph 15.

An agreement in regard to costs between parties to a dispute under the Agricultural Holdings Act, 1923, made before an arbitration thereunder, is valid and enforceable, despite the fact that no reference to such agreement is made at the hearing.

Prince v. Haworth (21 *The Times* L.R., 402 ; [1905] 2 K.B., 768) applied.

This was an appeal from a decision of his Honour Judge Chapman, sitting at the Great Grimsby County Court, who had held that an agreement made between the parties to a dispute under the Agricultural Holdings Act, 1923, in regard to costs, before an arbitration thereunder, was void.

The plaintiff, the Rev. Alexander Mansfield, was the landlord of an agricultural holding, and in April, 1925, he gave certain of his tenants, the defendants Messrs. Eddie, Hill, Charles and Edward Robinson, notice to quit in April, 1926. Disputes arose in regard to the compensation payable to the defendants under section 12 (3) of the Act. The dispute was referred to arbitration under the Act, and in default of agreement between the parties a Mr. Gorbett was appointed arbitrator by the Minister of Agriculture. The hearing of the arbitration was fixed for April 25, 1927, and before the hearing the solicitors representing the parties, as the result of correspondence, agreed (as the County Court Judge found) that the successful party should be entitled to costs as between party and party on the High Court scale, and that taxation should be made by the District Registrar. No reference to this agreement was made at the hearing, and the arbitrator, after giving his award in favour of the landlord, added : "I award and direct that each party shall bear their own costs of and incidental to the arbitration and shall pay one moiety of my costs of this award."

On demand being made for the costs payable under the above agreement, the defendants' solicitors contended that no such agreement as alleged by the plaintiff had been concluded, and that the agreement alleged was void. An action for the recovery of £94 2s. 10d., the estimated amount of the taxed costs of the arbitration, was brought by the plaintiff. The County Court Judge found that the agreement existed as alleged by the plaintiff, but that it was void and unenforceable in law, on the ground that section 16 and paragraph 15 of Schedule II. of the Agricultural Holdings Act, 1923, placed costs within the discretion of the arbitrator. He gave judgment for the defendants.

The plaintiff appealed.

By the Agricultural Holdings Act, 1923, section 16 (1): "Any question or difference arising out of any claim by the tenant of a holding against the landlord for compensation payable under this Act . . . and any other question which under this Act is referred to arbitration shall be determined, notwithstanding any agreement under the contract of tenancy or otherwise providing for a different method of arbitration, by a single arbitrator in accordance with the provisions set out in the second schedule to this Act."

By Schedule II., paragraph 15 : "The costs of and incidental to the arbitration and award shall be in the discretion of the arbitrator, who may direct to and by whom and in what manner these costs or any part thereof are to be paid. . . ."

Mr. P. E. Sandlands appeared for the appellant ; Mr. M. F. Healy for the respondents.

Mr. SANDLANDS submitted that section 16 of the Act was a procedure section and nothing more (*Lowther v. Clifford* (42 *The Times* L.R., 432 ; [1927] 1 K.B., 130)). Costs could not be called "a method of procedure." By Order LXV., rule 1, of the Rules of the Supreme Court, the costs of proceedings in the High Court were placed within the discretion of the trial Judge ; yet *Prince v. Haworth* (21 *The Times* L.R., 402 ; [1905] 2 K.B., 768) was a strong authority for the proposition that the Judge's discretion did not interfere with the right of the parties to make their own agreement. The same analogy applied to these arbitration proceedings under the Agricultural Holdings Act, 1923. Paragraph 15 of the second schedule to the Act, which gave the arbitrator discretion over costs, did not contain any negative words, such as "notwithstanding any agreement to the contrary."

Mr. HEALY contended that, though the question of costs might have been withdrawn from the arbitrator,

* Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.

that course was not taken here. A party who took up an award to act upon it could not be heard to say that that award was valueless. A contract to take away the right of an arbitrator to award costs could not be valid, though a contract to supplement the award by saying that the costs should be on the High Court scale might be.

He referred to *Walter v. Bewicke, Moreing and Co.* (90 L.T., 409) and *Farquharson v. Morgan* (10 *The Times* L.R., 240 ; [1894] 1 Q.B., 552).

Mr. Justice Salter.—This is an appeal from a judgment of the learned County Court Judge at Great Grimsby, who found for the defendants in an action to recover money alleged to be due under an agreement. The question is whether the agreement is valid and enforceable in law. The learned Judge held that it was not.

The appeal raises a question of some general importance—namely, whether the parties to an arbitration under the Agricultural Holdings Act, 1923, can make a valid agreement between themselves governing the costs of such proposed pending arbitration notwithstanding that the statute provides that the costs of such an arbitration shall be in the discretion of the arbitrator.

The plaintiff was the landlord and the defendants were the tenants of an agricultural holding, and certain differences arose between them. The only one with which we are concerned arose under section 12 of the Act. The parties proceeded to arbitration under the Act ; in default of their agreement the Minister appointed an arbitrator and he made an award. Before the hearing the parties made an agreement which the learned Judge found to be contained in three letters which he construed. It was contended that he had misread the letters. In my view he was entitled to find, as he did find, that the whole contract was contained in the three letters and I agree with his finding as to their meaning. [His Lordship read the letters and continued.] The learned Judge found as follows : "Having considered these letters I have come to the conclusion that they constitute an agreement between the parties as follows : (i.) That the successful party to the arbitration shall be entitled to the costs of the arbitration as between party and party ; (ii.) that in any event the costs shall be taxed on the High Court scale ; (iii.) that party and party costs shall run as from April 6, 1926 ; (iv.) that the costs shall be taxed by the District Registrar. Further, I find that the plaintiff is the 'successful party' within the meaning of the agreement and is entitled to have the agreement carried out unless the defendants are correct in their contention that the agreement is null and void and of no effect in view of section 16 of the Act and paragraph 15 of the second schedule thereto." I agree with the learned Judge's reading of those letters.

The arbitrator determined the dispute between the parties, which related to a question whether the tenants had been guilty of bad farming. The landlord was the successful party. With regard to costs the arbitrator said : "I award and direct that each party shall bear their own costs of and incidental to the arbitration and shall pay one moiety of my costs of this award which are as follows." Each party did pay one moiety. This action is now brought by the plaintiff upon the agreement contained in those letters to recover, subject to taxation, the costs which, in the event which has happened, were agreed to be paid by the defendants to the plaintiff, and the only question that arises is, as stated by the learned County Court Judge, whether that is an enforceable agreement.

One asks : Why is it not an enforceable agreement ? In my view it is not contrary to public policy ; there is nothing, as I think, illegal or immoral about it. It is said that it is rendered unenforceable by virtue of the provisions of section 16 of the Act, and of paragraphs 15 and 16 of the second schedule thereto.

Before I come to those points I may say in passing it might perhaps have been argued that this was not an arbitration under the Agricultural Holdings Act, 1923, at all.

In the case of *Lowther v. Clifford* (42 *The Times* L.R., 432; [1927] 1 K.B., 130) section 16 was considered in the Court of Appeal and Lord Justice Scrutton expressed the view that that section was only a procedure section which provided that those matters of dispute for which arbitration had been provided earlier in the Act should be dealt with by arbitration according to the procedure laid down in section 16. It appears that the actual dispute now in question between the parties was not a dispute for which arbitration had been provided in the earlier sections, and it might therefore be questionable whether this was in truth an arbitration under the Act at all, but it was dealt with as such an arbitration and I do not base my decision on that ground.

The question is whether it is allowable for parties to an arbitration of this kind to make their own agreement in regard to costs. The arbitrator under the Act is not in the strict sense of the term an arbitrator, that is to say, he is not a person to whom the parties voluntarily refer a dispute and who derives his authority from their consent. They can select him but he is imposed upon them by the law and not by their own wishes. In the case of an arbitration in the proper sense of the word there could be, I imagine, no question that the parties in submitting their dispute to an agreed arbitrator, notwithstanding the terms of the Arbitration Act, 1889, which gives him a discretion in regard to costs, could make such agreement as they pleased about costs, but it is said that they cannot do so in this case where the arbitrator is imposed upon them.

I am unable to distinguish the position of such a so-called arbitrator from that of a Judge in this respect. It is true that this statute says, in prescribing the procedure for arbitrations, that the costs shall be in the discretion of the arbitrator, who may, if he thinks fit, give directions about costs, but I imagine that he is not bound to give any directions about costs. Mr. Healy admitted that if the arbitrator had given no directions about costs this would have been a valid and enforceable agreement, but he says that as the arbitrator has given a direction the agreement cannot be enforced. In fact the agreement was never mentioned to the arbitrator at the hearing.

As to the discretion of a Judge in regard to costs, which is given by Order LXV., rule 1, of the Rules of the Supreme Court, it is, I think, common practice that parties constantly make their own agreements in regard to the costs of proceedings in the High Court and County Courts and such agreements are perfectly valid and enforceable. I am not able to see why the same principle should not apply to an agreement of this kind.

The authorities seem to me to support the view which I am expressing. The learned Judge seems to have been impressed by the case of *Gray v. Lord Ashburton* ([1917] A.C., 26), but in that case all that the House of Lords decided was that the dis-

cretion of an arbitrator under the Agricultural Holdings Act, 1908, was not fettered or limited in the same way as the discretion of a Judge is in some cases, but was entirely unlimited. I am not able to see anything in that case which is inconsistent with the view that I am expressing. The case of *Prince v. Haworth* (21 *The Times* L.R., 402 ; [1905] 2 K.B., 768) is, as it seems to me, a very strong authority in favour of the appellant. In that case the plaintiff had propounded a will in a probate action and Haworth had propounded an earlier will. Haworth represented the interests of an infant. During the course of the proceedings a contract was made between the plaintiff, and Haworth, and the infant. It was agreed that, whichever of the two wills was upheld, the costs of the plaintiff and of the defendant and of the infant should be paid out of the estate, whether the Court so ordered or not. The Court pronounced in favour of the earlier will, that is, the will propounded by Haworth, and, on application made, refused to sanction the contract on behalf of the infant, and directed that the plaintiff should pay the costs of Haworth and the infant in the probate action. Notwithstanding that order the plaintiff sued to recover his costs against Haworth, and it was held that the contract was not illegal and the defendant was personally liable upon it.

Mr. Justice Lawrance said : "If all the parties to this agreement had been *sui juris,* can anybody doubt that they might have made it ? Either party might then have charged or mortgaged his interest, such as it was, in the fund ; he might even have conveyed it absolutely either to the party on the other side or to anybody else. There is a broad distinction between an agreement which tends to divert the course of justice and prevent it reaching its proper goal, and an agreement which merely regulates the rights of the parties after the course of justice has reached its proper goal. It is clear that an agreement of the latter kind is not, merely as such, void ; if it were, every judgment of a Court of justice would operate as a restraint on alienation of the property recovered. Then is there any special prohibition against a successful claimant to a fund or estate agreeing to pay out of the fund or estate, if and when recovered by him, the costs of the unsuccessful claimant ? It is said that Order LXV., rule 14*a*, makes such an agreement invalid. That rule provides that the costs occasioned by any unsuccessful claim or unsuccessful resistance to any claim to any property shall not be paid out of an estate unless the Judge otherwise orders. But that is merely a rule of practice, indicating what order shall, under ordinary circumstances, be made in proceedings before the Court ; it does not in any way affect the conduct of the parties after the order of the Court has been made. In other words, it is quite consistent with the Judge's order directing the costs to be paid by the parties that one party shall agree to pay the other party his costs, and pay them out of what fund he pleases. I come, therefore, to the conclusion that if the parties to this agreement were all of age there would be nothing to prevent them from making this agreement."

Mr. Healy relied in the course of his argument on the case of *Walter v. Bewicke, Moreing and Co.* (90 L.T., 409). That was a case in which there had been certain interlocutory proceedings and orders made therein in regard to costs, that they should be paid by one party to the other in any event and so forth. The action was subsequently settled upon the terms endorsed on counsel's briefs, "Record withdrawn. No costs on either side." It was held (dismissing the appeal), that after the settlement of the action the defendants were entitled to taxation and payment of their costs of the interlocutory proceedings which the plaintiff had been ordered to pay. The Court in that case merely had to construe the agreement which the parties had made and to decide what costs it covered and what costs it did not, but, in the course of giving judgment, Lord Collins, Master of the Rolls, said : "It appears to me that there is no ground whatever for this appeal. During the progress of the action orders were made that the plaintiff should pay costs to the defendants, in some cases 'in any event.' Those orders cannot be got rid of unless the parties have clearly agreed that those costs shall not be paid." It is therefore quite clear that the learned Master of the Rolls was of opinion that notwithstanding the orders which had been made the parties could, if they liked, by agreement have overridden those orders.

With regard to *Farquharson v. Morgan* (10 *The Times* L.R., 240 ; [1894] 1 Q.B., 552), to which we were referred, it appears to me there is nothing to assist us in that case. That was a case of prohibition. There was an error in law on the face of the award, and the Court of Appeal decided that they had no power to refuse prohibition.

As the matter that is relied upon here is the provision in section 16 of the Act giving discretion to the arbitrator in the matter of costs, I think it well to refer again and more fully to the observations of Lord Justice Scrutton in *Lowther v. Clifford* (*supra,* at p. 143). In the course of a review of the statute the learned Lord Justice says : "So far, the Act has been establishing a series of rights to compensation which did not exist at common law, and the amount of which, with matters incidental thereto, has already been expressly directed to be referred to arbitration. One does not see, therefore, why it was necessary to refer them again to arbitration by section 16 ; but one can see why, if it was not intended to proceed under the Arbitration Act, section 16 was wanted to provide the method of arbitration, and of appeal, if any, therefrom. Section 16 does refer the matters it deals with to the arbitration of a single arbitrator according to the provisions of the second schedule, and does exclude the operation of the Arbitration Act, 1889, and does provide an appeal by way of special case to the County Court, and thence to the Court of Appeal. This forces on one's attention the possible construction that the questions and differences dealt with are only those on rights created by the Act and already by the Act referred to arbitration, and that the section is a procedure section providing how questions by other sections of the Act referred to arbitration are to be decided—namely, by a single arbitrator according to the second schedule. The framework of the section would then be 'Any question or difference (as described in detail) which under this Act is referred to arbitration shall be determined by a single arbitrator,' and so on."

The result in my view is that the learned Judge was in error in holding that this was a void and unenforceable agreement. I can see no reason on principle and I can see nothing in authority to guide one to that conclusion. I think that these parties were quite entitled to make this agreement, and it is an enforceable agreement. The appeal must be allowed, and judgment entered accordingly.

Mr. Justice Talbot.—I am of the same opinion, and I have very little to add.

The parties to this proceeding being in difference whether any compensation was payable by the

plaintiff to the defendants in respect of one of the matters dealt with by the Agricultural Holdings Act, 1923, came, before the arbitration was heard, in pursuance of the statute, to an agreement. The question has been raised here and was raised in the County Court what that agreement meant, but, looking, as we are bound to look, at the three letters in which the learned Judge found as a fact the agreement was contained, I confess I can see no ambiguity or obscurity in the agreement at all. I find it very difficult to believe that both the professional gentlemen, the solicitors for the parties, who made this agreement in writing, were not fully aware of what was being agreed.

The agreement, putting it very shortly, was that whatever the issue of the arbitration was, that is to say, whichever party won, and whether or not the arbitrator made any order in regard to costs, or whatever order he did make, the unsuccessful party should pay the costs of the successful party on the High Court scale as between party and party, to be taxed on that footing by the District Registrar. If I had any doubt at all what that agreement means, I think my mind would be completely set at rest by knowing that the fact was that, in pursuance of it, and in reliance on it, both parties when they came before the arbitrator addressed no argument whatever to him on the subject of costs. Now that is a rational and businesslike agreement; the parties, in regard to costs, know exactly where they are and the position as between them is settled upon what in 19 cases out of 20 is a fair and reasonable basis—namely, that the party who succeeds on the issue between them should have his costs paid by the party who fails.

Those who made this agreement knew, no doubt, perfectly well that agreements with regard to costs are constantly made in all forms of proceedings before the hearing takes place, and they knew also what the statute said with regard to costs and they contracted undoubtedly having both those matters in view.

It appears to me to require something very definite indeed in the Act of Parliament to lead us to the conclusion to which the learned County Court Judge, in his very clear judgment, came, that this agreement is unenforceable in law. The argument is, and the ground upon which he decided is, that under the Act and in the schedule to the Act which deals with this matter the costs of and incidental to the arbitration and award are placed in the discretion of the arbitrator and he is given power, in what I may almost call common form, to direct, if he thinks fit, by whom and in what manner the costs are to be paid. There are provisions for taxation and there are provisions relating to what he is to take into consideration in awarding costs, and as has been decided in the House of Lords his discretion is, in point of fact, practically unlimited.

It appears to me, in the absence of any words even tending to suggest that that is the result of it, it is impossible to say that because of the discretion conferred upon the arbitrator and the incidental powers given to him for the exercise of that discretion it is beyond the powers of the parties to come to such an agreement as this. It is true, no doubt, that in the great majority of cases where parties have made an agreement in regard to costs they inform the tribunal of it so as to save the tribunal the trouble of going into the question, but assuming that it is within the competence of the parties to make an agreement I cannot conceive how they can be under any legal obligation to communicate their agreement to the arbitrator. I cannot help thinking, having read the evidence, which appears to have been uncontradicted, before the learned County Court Judge, that it is tolerably clear why both parties, while the event was yet uncertain, thought it far more satisfactory to make this agreement, which could not do substantial injustice, instead of leaving the matter to the uncontrolled discretion of the arbitrator. It was tolerably evident that the arbitrator, no doubt from motives which are perfectly intelligible, and perfectly proper in one sense, might make an order which the successful party might consider very unfair to him, and make such order not because of anything special in the circumstances of this particular case but because of some general practice which is not uncommon amongst lay arbitrators.

I think that the defendants have altogether failed to show there is anything illegal in this agreement or anything which violates the terms of the statute.

I have nothing to add to what has already been said in the judgment which has been delivered with regard to the case generally or with regard to the authorities which have been cited. I entirely agree with all that has been said. I agree, therefore, with the conclusion that the judgment of the learned Judge in the County Court cannot stand, and this appeal must be allowed.

[Solicitors—Messrs. G. Warr, Clarkson and Co., for Mr. John Barker, Great Grimsby; Messrs. Mott and Parkes, for Messrs. H. K. and H. S. Bloomer, Great Grimsby.]

Court of Appeal.
(Lord Hanworth, M.R., Lawrence and Russell, L.JJ.)
1928. Apr. 20.

IN RE BLACKWELL—BLACKWELL v. BLACKWELL.*

Will—Legacy—Secret trust—Parol evidence—Admissibility—Acceptance of trust—Validity.

A testator made a codicil bequeathing £12,000 to five of his friends upon trust "for the purposes indicated" by him to them. One of the five friends prepared the codicil, upon the testator's oral instructions, and on the same day made a note of the terms of the trust in a written memorandum; those terms were communicated to all the other trustees and they accepted the trust. The testator's residuary legatees contended that parol evidence could not be given to explain the trust, as this was in fact an infringement of the provisions of the Wills Act, 1837, by which all testamentary documents must be in writing. Eve, J., held that by the decision in *In re Fleetwood—Sidgreaves v. Brewer* (15 Ch.D., 594) such evidence was admissible, and that the trust was valid.

Held, on appeal, that the decision upon that particular point in *In re Fleetwood* (*supra*) had been affirmed by the Court of Appeal in *In re Huxtable—Huxtable v. Crawfurd* ([1902] 2 Ch., 793). The evidence was therefore admissible and the appeal failed.

This was an appeal from a decision of Mr. Justice Eve. The late J. D. Blackwell, by his will dated January 1, 1925, gave his residue in trust for his

* Reported by G. T. Whitfield-Hayes, Esq., Barrister-at-Law.

widow and son. There were four codicils to his will, and by the fourth he bequeathed the sum of £12,000 to five friends upon trust "for the purposes indicated" by the testator to them, and, being physically, though not mentally, unfit at the time he executed the codicil by making his mark. The codicil had been prepared upon the testator's oral instructions by one of the five trustees, Mr. W. P. Cowley, and the same day Mr. Cowley wrote out and signed a memorandum of the details of the trust as follows: "Income of £12,000 to be given to" (then followed a lady's name and full address) "or applied at discretion of trustees for the benefit of herself and her son" (his full name followed). "At any time trustees may pay over £8,000 capital either to her or her son or both of them. In such event £4,000 is to go back to the testator's trustees on same trusts as his residuary estate." Notice of the effect of the trusts was given by the testator to the other four trustees, and they declared their willingness to act. The testator died on June 3, 1925.

His widow and son brought this action. By their statement of claim it was alleged that no trusts of the legacy of £12,000 were ever indicated to the five trustees or any of them in writing or orally before the death of the testator. The plaintiffs had received in 1926 a copy of the memorandum, but asserted that they could not get any further information as to any directions given by the testator, and submitted that if any such had been given they were void for uncertainty or inconsistency. The plaintiffs accordingly claimed a declaration that the trusts of the £12,000 were invalid. The defendants, the five trustees and the persons entitled to benefit under the trusts of £12,000, contended that the trusts were declared in detail to one trustee and in outline to all the others, and should be carried out. Witnesses gave evidence on either side. The plaintiffs submitted that parol evidence was not admissible to vary the terms of a written will. Mr. Justice Eve held that the codicil, the memorandum, and the evidence of the five trustees established a valid trust, the only question being as to whether such evidence were admissible. He thought that its admissibility was established by *In re Fleetwood—Sidgreaves v. Brewer* (15 Ch.D., 594) and dismissed the action. The plaintiffs appealed.

Sir Thomas Hughes, K.C., and Mr. J. M. Easton, for the plaintiffs, contended that if parol evidence of the terms of a will and codicil were admitted it would be going behind the express provisions of the Wills Act, 1837, by which every testamentary disposition must be in writing. *In re Fleetwood* (*supra*) was not binding upon the present Court. Even if the principle of that case were right, the evidence must be clear and unambiguous, but the evidence in the present case was not. *In re Gardner—Huey v. Cunnington* (36 *The Times* L.R., 784; [1920] 2 Ch., 523) was a case of clear evidence to vary the terms of a will. Counsel referred to *In re Huxtable—Huxtable v. Crawfurd* ([1902] 2 Ch., 793), *In re Hetley—Hetley v. Hetley* ([1902] 2 Ch., 866), and *McCormick v. Grogan* (L.R., 4 H.L., 82).

Mr. Gavin Simonds, K.C., and Mr. John Bennett, for the five trustees, and Mr. C. A. Bennett, K.C., and Mr. Raymond Jennings, for the beneficiaries under the trusts of £12,000, were not called upon to argue.

The Master of the Rolls, after stating the facts, said that by the terms of section 9 of the Wills Act, 1837, "No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned." The Court must therefore consider carefully whether if it were necessary to supplement the codicil it would be possible to look at the memorandum made by Mr. Cowley. The codicil itself did not identify the two beneficiaries, and if the Court looked at the parol evidence of what was contained in the memorandum it was in effect supplementing the codicil, and that in spite of the terms of section 9. In support of that view it was argued that in the case of *McCormick v. Grogan* (L.R., 4 H.L., 82) it had been said that when secret instructions had been given to a legatee, and those instructions had been communicated to him by the testator, the Court, in order to avoid fraud, would enforce those instructions; but that that only applied in very exceptional cases, and in cases where a fraud was to be avoided. In *McCormick's* case (*supra*) Lord Hatherley said, at page 89: "But this doctrine evidently requires to be carefully restricted within proper limits. It is in itself a doctrine which involves a wide departure from the policy which induced the Legislature to pass the Statute of Frauds, and it is only in clear cases of fraud that this doctrine has been applied—cases in which the Court has been persuaded that there has been a fraudulent inducement held out on the part of the apparent beneficiary in order to lead the testator to confide to him the duty which he so undertook to perform." Lord Westbury also said that it was in cases of fraud that the Court would allow parol evidence to be given. The appellants in the present case contended that if the Court were to look at the memorandum, or, to put it in another way, were to allow the parol evidence of Mr. Cowley to be received, it would be enlarging the principle so laid down by the House of Lords, particularly as in the present case no fraud was alleged.

There was, however, a case in which parol evidence had been admitted, and that was *In re Fleetwood—Sidgreaves v. Brewer* (15 Ch. D., 594). That decision, given in 1880, had stood for 48 years. It was said that it had been criticized, but Mr. Justice Eve had followed it in the present case, and the effect of this appeal was really to bring the question of the validity of the decision in *In re Fleetwood* (*supra*) before the Court of Appeal. In his (Lord Hanworth's) opinion, however, the Court was concluded in its decision by what was said by the Court of Appeal in *In re Huxtable—Huxtable v. Crawfurd* ([1902] 2 Ch., 793). There parol evidence was tendered which left a legacy restricted in its purpose and scope. Mr. Justice Farwell thought that he was bound to follow *In re Fleetwood* (*supra*), and accepted the evidence. *In re Huxtable* (*supra*) went to the Court of Appeal, and Lord Justice Vaughan Williams said ([1902] 2 Ch. at p. 795): "I cannot doubt that the affidavit of Mr. Crawfurd is admissible in evidence, but it is admissible only for the purpose of proving matters which are not defined by the will." Lord Justice Stirling said (at p. 797): "In my opinion, that affidavit is admissible only for the purpose of ascertaining what are the charitable purposes which are referred to in the will, and no further." Lord Justice Cozens-Hardy also said that the affidavit might be referred to for that purpose. It seemed clear from the report of the case that the Court had before it the decision of Mr. Justice Farwell, who would not have admitted the evidence except for the authority of *In re Fleetwood* (*supra*), and it appeared to him (the Master of the Rolls) that the Court of Appeal must also have determined to follow the authority of *In re Fleetwood* (*supra*) in admitting the evidence

which restricted the legacy given to charitable purposes.

To him (Lord Hanworth) it appeared, therefore, impossible for the present Court not to hold that it was bound by *In re Huxtable* (*supra*), which had in effect upheld *In re Fleetwood* (*supra*). A strong case might be put before the House of Lords on the basis of the Wills Act, 1837, and what was said in *McCormick v. Grogan* (*supra*); but inasmuch as the decision in *In re Fleetwood* (*supra*) had stood for 48 years, it would appear to be a serious inroad upon practice and existing law if the case were upset and rejected. This appeal must therefore be dismissed with costs.

LORD JUSTICE LAWRENCE said that, in his judgment, the decision of the Court of Appeal in *In re Huxtable* ([1902] 2 Ch., 793) was a direct affirmation of the principle laid down in *In re Fleetwood* (15 Ch. D., 594), and none the less so because that case was not in terms mentioned in the judgments of the members of the Court. The judgment of Mr. Justice Farwell, founded on the admissibility of the evidence because of the decision in *In re Fleetwood* (*supra*), was before the Court of Appeal, and that Court in express terms decided that so much of the evidence as did not contradict the terms of the will was admissible, and made a declaration based on such evidence.

Cases had been referred to in which the soundness of the decision in *In re Fleetwood* (*supra*) was said to have been criticized, but those cases, in his (Lord Justice Lawrence's) view, did not afford any ground for holding that the principle of *In re Fleetwood* (*supra*) was not binding upon the present Court after the decision in *In re Huxtable* (*supra*). He agreed that the appeal failed.

LORD JUSTICE RUSSELL agreed, and said that he was quite satisfied that in *In re Huxtable* ([1902] 2 Ch., 793) the Court of Appeal had deliberately adopted the principle which appeared in *In re Fleetwood* (15 Ch. D., 594).

[Solicitors—Messrs. Rooke and Sons, for Messrs. T. and G. S. Brownson, Manchester; Messrs. Simmons and Simmons, for Messrs. March, Pearson, Yates and Green, Manchester, and for Messrs. Graham-Hooper and Betteridge, Brighton.]

K.B. Div. (Salter and Talbot, JJ.) 1928. Apr. 25.

GRINHAM AND ANOTHER v. DAVIES.*

Negligence—Practice—Personal injuries—Defendant insured—Statement of that fact to the jury—Discharge of jury—Discretion of Judge.

On the trial by a Judge and jury of an action for personal injuries alleged to have been caused by negligence the jury should not be informed by or on behalf of the plaintiff that the defendant is insured. If this rule is violated, the Judge has a discretion to order the jury to be discharged.

This was an appeal by the plaintiffs from an order of his Honour Judge Cluer, who had directed a jury summoned to the Shoreditch County Court for the trial of a street accident case to be discharged and the case to be tried by a fresh jury on the ground that it had been intimated to the jury by counsel for the plaintiffs that the defendant was insured.

Mr. J. Watson Moyses appeared for the appellants; Serjeant Sullivan, K.C., and Mr. B. D. A. Leverson for the respondent.

MR. MOYSES stated that the Judge had discharged the jury because the first few words of a letter, which referred to a company, had been read by him (Mr. Moyses), and because the jury could thereby easily draw the inference that the defendant was insured. In his recollection, however, he had not read the letter in question. He did not deny that, if the fact that the defendant was insured had been mentioned to the jury, it was within the discretion of the Judge to discharge them. He submitted, however, that in this case nothing had occurred which justified the Judge in adopting that course.

MR. LEVERSON stated that he was in the Court below, and that, to the best of his recollection, some portion of the letter in question had been read by Mr. Moyses, but he did not believe that there had been any specific reference to an insurance company.

MR. JUSTICE SALTER asked Serjeant Sullivan if there was any reported case where a Judge had discharged a jury on the ground in question.

SERJEANT SULLIVAN referred to *Gowar v. Hales* ([1928] 1 K.B., 191), in which it was stated that in an unreported case, tried before the Lord Chief Justice and a jury, that course had been taken. That was a case of *Ellis v. Mayhew, Limited,* tried on March 24, 1926.

MR. JUSTICE SALTER stated that he had seen the Associate's note of *Ellis v. Mayhew, Limited,* which was begun with a special jury. In a letter read by counsel for the plaintiff in the course of the opening of that case the word "assured" occurred. The Lord Chief Justice pointed out that the letter should not be read because the jury would infer that the parties were insured. Counsel for the defendants then applied that the case should be withdrawn from the jury and tried before another jury. In the absence of authority the application was refused by the Lord Chief Justice, who suggested that the jury might be discharged from the case and that he might try the case alone. Both counsel consented to that course, and the case proceeded as a "non-jury by consent."

In giving judgment MR. JUSTICE SALTER said: This is an appeal from the Shoreditch County Court which raises a question of some practical importance in these days, when the Courts are full of cases of claims for damages for personal injuries in connexion with driving. Indeed, it may be said that cases of this sort are the staple litigation of to-day. The present case is one of that kind, and arises from a street accident. The defendant was in fact insured, and in the course of opening the case counsel for the plaintiffs either did or did not convey to the jury the information that the defendant was insured; but the learned Judge understood him to convey that information, and ordered that the jury should be discharged, and that the matter should be tried before a fresh jury, the costs thrown away at that hearing to be the defendant's. From that order the plaintiffs appeal, and the questions are whether this information was in fact conveyed to the jury, and if it was, whether this Court ought to set aside the order of the county court Judge.

It is convenient to consider the latter question first. It is, in my opinion, a settled rule of practice in cases of this kind that the jury shall not be

* Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.

informed by or on behalf of the plaintiff that the defendant is insured. The rule is, of course, not universal, but it is well established in cases of this kind, and is obviously fair, inasmuch as one knows that in such cases the jury are, naturally enough, much more prone to find for the plaintiff if they know that the amount of their award will be paid by an insurance company and not by a private person. The rule is often difficult to carry out, for it is often difficult for counsel for the plaintiff to avoid letting the jury know this fact; and if he does so the circumstances will no doubt be considered by the Judge in deciding what course he should adopt. But there is no doubt whatever of the existence of the rule, and it is an important one. If the rule is violated, it is no doubt a matter of discretion for the Judge what course he will take. The result of the violation of the rule is that the jury, unintentionally it may be, but in fact none the less, are prejudiced, and the Judge must take such course as he thinks proper. There can be no doubt at all that the Judge has a discretion to order the jury to be discharged, if he thinks that the circumstances of the case render that course the proper one. A Judge has that power, not only by virtue of the rules of practice, but also in virtue of the much wider rule that it is the duty of a Judge to see fair play between the parties and to prevent any unfair appeal to the prejudices of the jury.

There are four authorities to which reference ought to be made. The first is *Wright v. Hearson* ([1916] W.N., 216). That was a case in which the defendant, who was being sued for damages for personal injuries caused by his motor-car, was asked in cross-examination, "Are you insured?" The defendant did not answer the question. The jury having found a verdict for the plaintiff, the defendant appealed. Mr. Justice Avory said: "It is admitted that the counsel who represented the plaintiff in the county court asked the defendant in cross-examination if he was insured. I wish to say emphatically that that was a most improper and most irregular question to put. It appears, however, that the question was not answered. The Judge seems to have said that it had nothing to do with the case, and to have added that every prudent and sensible man was insured. But although the putting of the question might create prejudice in the minds of the jury, yet, having regard to the fact that it was not answered, and that, as we must assume, the county court Judge said something to remove, as far as he could, its effect upon the minds of the jury, I do not think we can say that the jury was in fact prejudiced." Mr. Justice Rowlatt, after stating the facts, said: "That was an irregular question to put, and its effect was not removed by the fact that it was not answered. It was irregular and was calculated to prejudice the defendant with the jury. It should be stated emphatically that counsel are not entitled to do such a thing in order to prejudice the minds of the jury. It is the duty of counsel to know and observe the rules governing what they may and what they may not do in the conduct of cases; they may not disregard these rules and trust to not being checked in time. In proportion as counsel voluntarily observe these rules so will their standing and reputation grow. When this question was put to the jury the Judge might justifiably have discharged the jury and made the plaintiff pay the costs. The Judge did not take that course in this case, but those who make suggestions such as that now complained of must face the possibility of such an order being made."

The next case is *Askew v. Grimmer* (43 *The Times* L.R., 354). In that case the fact that the defendant was insured had been disclosed, and Mr. Justice Branson said that "he thought that it was the practice not to tell juries that an insurance company was involved, and that it was, perhaps, an error of judgment to have done so now. But, in view of the discussion, he felt sure that the jury would realize that it would be most unfair to the defendant to treat him as being insured, because if he had said what was alleged it might turn out that he was not insured at all. The most convenient course would be that the trial should proceed, and if he (his Lordship) were wrong, the Court of Appeal could then correct the matter."

The third case is *Ellis v. Mayhew, Limited* (unreported), tried on March 24, 1926, before the Lord Chief Justice and a special jury. The Associate's note is as follows: "In the course of the opening counsel for the plaintiff read the correspondence. In one letter read to the Court and jury the word 'assured' occurred. The Lord Chief Justice pointed out that this should not be read, as the jury would now infer that the parties were insured. Counsel for the defendants then made application to withdraw the case from the jury sworn and to allow the case to go before another jury. In the absence of authority, this application was refused by the Lord Chief Justice, who made the suggestion that the jury might be discharged from the case, and that he might try the case alone. Both counsel consented to this course, and the jury were discharged from the case and paid their fees, and the case proceeded as a 'non-jury by consent.'"

Lastly, there is the case of *Gowar v. Hales* ([1928] 1 K.B., 191). There the question was whether the insurance company which had issued a motorist's insurance policy should be brought in as a third party at the hearing of an action for damages by the injured party against the motorist, and the Court of Appeal was of opinion that no such order should be made. The appellant had relied on the three cases to which I have referred, and it was held that, as the fact of the insurance ought not to be made known to the jury, it must be wrong to join the insurance company as a third party. Lord Justice Scrutton there says: "But if it was not a question of an action against a motorist but a question whether an insurance company should pay a person who was damaged by a motor, it was found extremely difficult to get fair hearings from juries, with the result that it has been established as a rule of practice at the Bar which the Judges enforce, that in an action against a motorist the jury ought not to be told that the defendant is insured. Whether the way of enforcing it is, as has been done in one case cited to us [*Ellis v. Mayhew, Limited*—but *vide supra*], to discharge the jury when the fact has been told them, or whether it is, as in the case before Mr. Justice Branson [*Askew v. Grimmer* (*supra*)], to say it is an error of judgment on the part of the counsel who has mentioned it, but that the Judge should endeavour to put it right by his summing-up, it is not necessary to decide here. There was this undoubted rule of practice on which the Judges acted; and to have a rule of practice that a jury should not be informed that the defendant is insured, and for the Judge at the same time to bring in the insurance company to take part in the trial of the action as the Judge shall direct and be bound by the result of the trial, seems to me to be entirely inconsistent." The result is that, so far as we are aware, there is no case in which a Judge has taken the course which the county court Judge has taken

here, but, speaking for myself, I have no doubt that it was within his discretion to take that course, and that discretion is not subject to appeal.

That still leaves for consideration the question whether in this case anything was said to the jury which would lead them to know that the defendant was insured. We have a report from the county court Judge in the following terms: "In opening the case, after referring to the accident, plaintiffs' counsel stated to the jury that the defendant had made an offer to settle the matter, and proceeded to read a letter, dated February 21, 1927. The reading of the first few words of the letter disclosed that it referred to a company, and it was obvious that this could only be an insurance company. By this the jury could easily draw the inference that the defendant was insured, and having regard to the regular practice and to *Gowar v. Hales* (*supra*), which I had just read, I discharged the jury and adjourned the case to be tried by a fresh jury. Costs of the day to the defendant." [His Lordship read the letter, and continued.] It would not be necessary for that purpose to read much of the letter. Mr. Moyses' recollection is that no part of the letter was read, and that in fact nothing was said by him from which the jury could infer that the defendant was insured. We have been shown a short report of the case in the *Morning Post* of the following day. Upon that material we have to say whether we are satisfied that the county court Judge was in error on a matter of fact before him. The recollection of Mr. Leverson is that Mr. Moyses did commence to read the letter. On the whole, we are clearly of opinion that, the onus being on the appellant, we cannot say that it has been satisfactorily shown that the report of the county court Judge is mistaken in fact. We think that the jury, no doubt unintentionally, were informed that the defendant was insured.

For these reasons I think that this appeal fails.

Mr. Justice Talbot.—I am of the same opinion. It is no doubt an established rule of practice in cases of this kind that the fact that a defendant is insured must not be disclosed to the jury. The rule is one which is generally observed by the Bar, and one which it is the duty of the Courts to enforce. Whether it is an expedient rule appears to me to be a very doubtful matter. I doubt very much whether it works for justice. In the first place, no jury in these days can avoid knowing that in the very great majority of such cases the defendant is insured, and no one can say whether or not they give effect to their suspicion in any particular case. It is, in my opinion, better that the jury should have the advantage of the addresses of counsel on the point, and of the express direction of the Court that the matter is one to which they should pay no attention.

Secondly, I think it causes injustice in quite a different direction. In cases of this kind the damages are more often inadequate than excessive, and quite frequently where a defendant does not appear to be very affluent, and where a heavy award of damages is justified on the facts, a jury do not award the proper sum which they would award if they knew that the defendant was insured. If the whole matter were disclosed it would be much better, because then the attention of the jury would be explicitly directed to the fact that in considering damages the one matter which they ought to take into account is what the injury to the plaintiff has been.

These considerations are, however, quite irrelevant to this case, because the rule does exist, and as long as it exists must be enforced. We have no right to inquire whether the county court Judge acted judiciously in the circumstances. It is clear that one way of enforcing the rule is to discharge the jury at the expense of the party whose advocate has violated it. That is sufficiently established by authority, for example, by the judgment of Mr. Justice Rowlatt in *Wright v. Hearson* ([1916] W.N., 216). Counsel for the appellants here admits that if he had read the letter as it stands and disclosed the existence of the insurance company, the county court Judge would have been justified in discharging the jury. The whole question is whether the Judge is correct in saying that what was read by counsel had in fact the effect of disclosing to the jury what would have been disclosed if the letter had been read in its entirety, and whether what the Judge tells us is accurate. I have no doubt that, if a portion of the letter was read as alleged, it would not fail to convey to the jury the information of which complaint is made. The matter is one on which it is impossible for us to say that the county court Judge formed a wrong opinion, and, if what he says is correct, he had obviously the same power to discharge the jury as if the letter had been read *in extenso*. In the circumstances it is impossible for us to interfere, and I agree that the appeal must be dismissed.

[Solicitors—Messrs. Berry Tompkins and Co.; Messrs. White and Co.]

House of Lords.
(Viscount Dunedin, Lord Shaw of Dunfermline, Lord Phillimore, Lord Carson, and Lord Blanesburgh.)
1928. May 1.

OTTOMAN BANK v. JEBARA.*

Sale of Goods—War—Goods sold to Turkish customers—Delivery of goods to customers after outbreak of war—Payment received in piastres by seller's agents—Claim by seller against his agents for sterling—Treaty of Lausanne, 1923, Art. 84—Treaty of Peace (Turkey) Order, 1924.

The defendant bank, a Turkish subject, was at the outbreak of war between this country and Turkey holder of sight bills drawn in sterling for the purchase price of goods consigned by the plaintiff from Manchester for his customers in Beirut which had arrived in Beirut before the outbreak of war and were subsequently delivered by the bank to the purchasers against payment to the bank in piastres. At the conclusion of the war the defendant bank claimed to be entitled to pay to the plaintiff an amount in sterling which represented the then depreciated value of the piastres which they had received in exchange for the goods. The plaintiff, on the other hand, claimed to be entitled to be paid the sterling amounts of the bills at sight.

Held, that since the completion of the execution of the contracts, as between the plaintiff and his customers, required no intercourse between a British subject and the

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

enemy, the contracts were not abrogated by the outbreak of war, and the plaintiff was entitled to recover from the defendant bank the amount of the bills in sterling.

Appeal from decision of the Court of Appeal (43 *The Times* L.R., 369 ; [1927] 2 K.B., 254) allowed.

This was an appeal by the Ottoman Bank from a decision of the Court of Appeal (43 *The Times* L.R., 369 ; [1927] 2 K.B., 254) varying a decision of Mr. Justice Rowlatt.

The respondent purchased goods in Manchester for export to customers in Beirut and other places in the East and entrusted to the appellants, the Ottoman Bank, in respect of each consignment, the bills of lading and invoices for such goods, together with bills of exchange in sterling for the price thereof. The appellants had no authority to part with the respondent's goods unless the appellants were in a position to pay him the sterling value of the relevant bills of exchange. In practice the appellants frequently received from the drawees Turkish currency as the price of providing for them the necessary sterling to discharge the bills.

During the War with Turkey the Beirut branch of the appellant bank collected from the drawees sums in piastres equivalent at the dates of payment to the sums in sterling mentioned in the drafts, releasing the goods against such payments, but owing to the War it was impossible to remit money to England. After the War the Turkish currency had enormously depreciated, and consequently the sum in sterling which the piastres collected in Beirut would produce was much less than the sums represented by the drafts.

The respondent demanded the total sterling sum as shown on the drafts, and by this action he claimed the sterling value of the bills of exchange collected by the appellants as moneys received by the appellants to the respondent's use. Alternatively, he alleged that, if the War rendered the agreement between the appellants and the respondent impossible of performance, the appellants had wrongly parted with the respondent's goods, and he claimed damages for their conversion.

Mr. Justice Rowlatt decided in favour of the respondent on the first claim, and the Court of Appeal (Lord Justice Bankes, Lord Justice Scrutton, and Lord Justice Atkin) on the alternative claim.

After the judgment of the Court of Appeal had been delivered the respondent intimated to the appellants that all that he wanted was to be paid in sterling, as Mr. Justice Rowlatt had decided, but the appellants declined that offer and insisted on appealing to the House of Lords.

The facts are fully stated in the judgment of Lord Dunedin.

The Hon. Geoffrey Lawrence, K.C., Mr. D. B. Somervell, and Mr. I. W. G. Barry appeared for the appellants ; Mr. Cyril Atkinson, K.C., and Sir Cassie Holden for the respondent.

VISCOUNT DUNEDIN.—My Lords : This is an action brought at the instance of a Manchester merchant against the Ottoman Bank for the proceeds of certain bills of exchange collected by the bank. The course of dealing out of which the question arose was as follows :—The respondent, who is a domiciled Englishman residing in Manchester, was in use to buy Manchester goods for despatch to correspondents in Syria. He drew bills on these correspondents and handed the bills to the appellants' branch in Manchester along with the bills of lading of the goods which had been shipped. Upon this the bank made an advance of 80 per cent. on the amount of the bill. The bills and the bills of lading were then sent to Beirut. On the arrival of the goods at Beirut the Syrian correspondent on whom the bill was drawn paid the bill and received the bill of lading or, if the goods had already been removed from the ship, then the goods themselves, and the Manchester branch then, on advice of the Beirut branch, credited the respondent with the amount of the bill. War was declared between England and Turkey on November 5, 1914. At that date several consignments of goods had arrived, but the documents of title and the bills were still in the hands of the bank at Beirut. The persons for whom the goods were destined came forward and paid the bills and got the goods. The payments were actually made in Turkish currency, but the calculation of the amount of that currency needful for the sum expressed on the face of the bills was made on the rate of exchange with London. A remittance from Beirut to London direct was impossible, and no sum has as yet been credited to the respondent in respect of the bills. The respondent raised an action for the amount on the face of the bills. The appellants refused to pay, but offered the amount represented by the number of Turkish piastres actually received calculated on the exchange of the day. The action depended before Mr. Justice Rowlatt, who gave judgment for the respondent. He held that in the circumstances above mentioned the appellants had in law been paid in sterling and must repay in sterling. On appeal the Court of Appeal recalled that judgment. They held that the true view of the case was that the effect of the war was to preclude the appellants at the Beirut branch from dealing with the goods at all ; that in handing the goods to the Syrian merchant they acted without authority and not as agents of necessity ; and that consequently they were liable as for conversion ; and the Court of Appeal directed an inquiry as to what the damages for that conversion would be. An appeal from that judgment has been taken to your Lordships' House.

All the bills were in the same form ; so one may be taken as a specimen. It is in this form. It is dated Manchester. "Please pay to our order value cheque on London the sum of one hundred and sixty-three pounds eleven shillings sterling. Value received. Shipping documents attached to be given up upon payment." It is addressed to Messrs. Gandour Frères, Beirut. It is signed Jebara and is endorsed "Pay to the order of the Imperial Ottoman Bank."

The first question to be considered is what is the proper meaning of this document. The bill is expressed for a sum in English currency, or, in other words, in sterling, and the ordinary result is that only payment in sterling will be a proper payment in respect of the bill. But the appellants argue that the words "Value cheque on London" alter what would otherwise be the effect of the bill. They say that these words mean that proper payment of the bill could only be made by tendering a cheque on London ; that this was admittedly not done and that consequently their only liability arose not from the terms of the bill but from the fact that they had got Turkish piastres for the goods. These Turkish piastres they say they are willing to return just as if they had put them in a box and kept them there. As a matter of fact they did not keep them in a box, they traded with them ; but in the view which I

take of the bill I need not explore this subject further.

My Lords, I do not agree with this view of what the words "Value cheque on London" meant. I think they meant no more than this, that it must be quite understood that the payment which obviously would not be made in Beirut in actual English currency must be so calculated as to represent what a cheque on London for the amount on the bill would cost. That the words are pleonastic may be admitted, but what an absurd result is reached by the interpretation the other way. The Syrian merchant comes forward to take up the bill and get the goods. The bank itself would sell a cheque on London, the price of such a cheque for the sum in the bill would be calculated on the exchange of the day, and just because the merchant pays in piastres the same sum, instead of asking for a cheque and then handing back the cheque as soon as received, it is to be held that he has not properly taken up the bill. My view is this, that as the bank in Beirut accepted the payment in lawful money from the Syrian merchant and handed over the goods it constituted itself, as in a question with the drawer, debtor for the sterling amount on the face of the bill.

This is really the view of Mr. Justice Rowlatt though expressed in somewhat different words.

My Lords, I am not able to take the view which commended itself to the Court of Appeal. Their judgment is rested on this, that the bank in Beirut had no right to deal with the goods, the right to deal with them depending on the mandate which the respondent had given to the bank in Manchester to collect the proceeds of the bill, and that mandate having been as a contract abrogated by the War. But it is not every contract that is abrogated by the War, it is only a contract which is still executory and which for its execution requires intercourse between the British subject and the enemy. Now this contract had been partially carried out, the bills had been endorsed and the bank had received them and the endorsed bills of lading. From that a subsidiary contract arose, *i.e.*, the contract that on payment of the bills the shipping documents should be handed over. Now to execute that no intercourse between an English subject and the enemy was necessary. The bank was a Turkish subject and the Syrian merchant was a Turkish subject. The bank therefore was, in my view, perfectly entitled to do what it did ; nay more, it might have been forced to do it by the Syrian merchant on his producing proof that he was the real consignee of the goods and proffering payment of the bill. That, in my view, shuts out any idea of conversion.

It is true that the part of the original contract which provided for a remittance of the proceeds could not be carried out. But that fact did not abrogate what had already been done, *i.e.*, the endorsations and what followed thereon. The liability of the bank, in my view, rests not on the original mandate but on the fact that being entrusted with the goods it parted with them on payment of the bill, and thus we come come back again to the original question what acceptance of the payment really meant, with that I have already dealt. The bank constituted itself a debtor in sterling and therefore in sterling it must pay.

Another point was raised by the appellants which did not commend itself to either Court but which as it was strenuously argued before your Lordships must be mentioned. Article 84 of the Treaty of Lausanne between Great Britain and Turkey which by the Order in Council of August 12, 1924, has the force of law is as follows :—

"The High Contracting Parties are in agreement in recognizing that debts which were payable before the War or which became payable during the War under contracts entered into before the War, and which remained unpaid owing to the War, must be settled and paid, in accordance with the provisions of the contracts, in the currency agreed upon, at the rate current in its country of origin.

"Without prejudice to the provisions of the Annex to Section II. of this part, it is agreed that where payments to be made under a pre-War contract are represented by sums collected during the War in whole or in part in a currency other than that mentioned in the said contract, such payments can be made by handing over the sums actually collected, in the currency in which they were collected. This provision shall not affect settlements inconsistent with the foregoing provisions arrived at by voluntary agreement between the parties before the coming into force of the present Treaty."

I am of opinion for the reasons already stated that the sum now due was not collected in piastres. The bank at Beirut was not the agent of the respondent to collect piastres but for the reasons already given became a debtor by its own act in a sterling sum. Here again I take the same view as Mr. Justice Rowlatt.

On the whole matter I am of opinion that the judgment of the Court of Appeal should be recalled and the judgment of Mr. Justice Rowlatt be restored, the respondent to have his costs before this House and in the Courts below. I move accordingly.

Lord Shaw of Dunfermline.—My Lords : I am so thoroughly satisfied with the judgment pronounced by Mr. Justice Rowlatt that I should have been well content humbly to adopt it as my own on the appeal in this case.

But the able and sustained arguments on both sides and the judgments in the Court of Appeal make it suitable that I should state in a few words how the case strikes me.

The transaction, to begin with, was entirely English ; it was between the respondent, as an Englishman, and a branch of the appellant bank in Manchester. The bill in question is a sample of several of the same character, which were granted in the course of similar business.

The respondent bought Manchester goods for Beirut, where he had correspondents to whom he despatched those goods. He drew a bill of exchange upon them in the terms to be noted and handed to the bank this bill for collection in Beirut. He also handed to the bank the bills of lading for the goods which had been shipped. The situation accordingly was plain to the effect that upon the bill being paid the corresponding bills of lading for the goods would be handed over by the bank as the counterpart. The transaction was unquestionably an English transaction for payment in England in English sterling money and delivery of the bills of lading for goods shipped in England.

War broke out between Turkey and England on November 5, 1914. Subsequently to the War, however, the business was continued by the appellant bank at its branch at Beirut. The goods had gone to Beirut ; the bills of lading had gone to the Ottoman Bank at Beirut ; the person to make the payment under the bill was the Beirut merchant. In short, the scene of the completion of the transaction was in Turkey. The duties to be performed were that, upon payment of what in the bill of exchange is

called "Value cheque on London," he was entitled to the delivery to him of the bills of lading and, of course, of the goods. The transaction was interpreted in this sense in Beirut. The merchant presented himself at the bank, paid the equivalent of the sterling price in the official number of piastres, which had been regularly fixed and was known to the commercial public. This amount was accepted in piastres and the bank thereupon proceeded not only to enter the sterling amount in its own books, but to fill up a document called a "bordereau," under which it purported to hold to the credit of its Manchester branch a sum of sterling equal to the amount of the bill of exchange. This *bordereau* was on February 4, 1919, actually sent from Beirut to the Manchester branch of the appellants' bank. They were, accordingly, in this position as advised from Beirut by the bank that the respondent was entitled to be credited with that sum of sterling money.

The position of the bank, however, now is that the respondent is only to be credited with the value of piastres at the greatly fallen price at which they subsequently stood; and the simple question in the case is, was the transaction in Beirut a transaction in which "value cheque on London" had been paid, that is to say, the equivalent of sterling money? In my opinion the case is substantially concluded upon facts by the evidence of Mr. Naville, formerly in the employment of the defendant bank and manager of the branch at Beirut up to July 15, 1915. This is the record:—

"(Q.) Have you any doubt whatever that the bank acted in the same way precisely as they always acted?—(A.) To the best of my knowledge, I should think they did.

"(Q.) When they come to estimate—say that they have got a bill sterling—how do they estimate how much money they are going to make this man pay?—(A.) The man would have the moneys that he brings to the counter at the rate at which you can get a cheque in London or Paris.

"Mr. Justice Rowlatt.—Therefore, they did not ask for more, and they would not take less because he had got to pay for it at the rate?—(A.) The sterling rate of London.

"Mr. Cyril Atkinson.—And you understand that, as the result of what he is paying you, you are going to credit Manchester with so much sterling?—(A.) Yes.

"(Q.) And you fix the price which you want to enable you to do that?—(A.) The Ottoman Bank in Beirut fixes on Monday morning an official price, which is distributed and is absolutely official, and the bank provide for any normal amount, and any balance that is wanted they buy in the market.

"Mr. Justice Rowlatt.—The long and short of it is that the drawee paid in sterling but you could not remit it?—(A.) That is so; that is the whole thing in a nutshell."

It is perfectly true that after the outbreak of War the Beirut branch of the Ottoman Bank could not make any remittances of money to any English national, which would include its agent in Manchester. But it is to be observed that there was no bar whatsoever to the acceptance in sterling or in the full market equivalent of the day of a cheque upon London from another Turkish subject, namely, the customer in Beirut. Both bank and customer were Turkish subjects there; and the legitimacy of the payment to the bank in Beirut is, therefore, beyond question, there being no international quality about that part of the transaction.

In Turkey the bill of exchange was retired in full by a payment which, although in piastres, was acknowledged by the bank not only to the customer but to their own English branch to have been full payment for the goods. In my view, it is a mere juggle on the part of the appellants to suggest that these goods were got on a payment which meant something less or something different in result from full payment in English sterling. The piastres that passed were passed into the hands of the bank itself at the bank's official valuation of the equivalent of sterling. When they have now fallen in value it does not seem to me to be open to the bank to plead that the transaction, so far as regards the English merchant, was not fully completed by delivery of the goods by the bank on the one hand and full payment of the bill by the merchant on the other.

There are in the case other elements which would confirm this view, as I hold it to be established that not only were the amounts of Turkish currency in all cases fixed by the appellants themselves as the price of providing the sterling credit, but that it was open to the bank to have converted the Turkish currency into Swiss or United States currency. That they did not do so was simply because, as I hold, they thought themselves then fully paid at the Turkish piastres rate of the day. In my view they were right in so thinking; and they have been paid in "value cheque on London."

Prohibitions against doing business with English or other enemy nationals cannot apply to a case of a payment made between two Turkish nationals and goods delivered on the head of that payment, documents and goods passing from one Turkish national in Beirut to another. The appellants' Manchester branch was given credit for the sum of sterling money which they have been advised by the bank itself is the proper sum to credit on this particular account.

In this view all questions of conversion or of agency by necessity drop out of the case. There remains, however, Article 84 of the Treaty of Lausanne between Great Britain and Turkey of date August 12, 1924. The appellants desire to utilize the words of that article as justifying them in payment of the currency agreed upon at the rate of the currency in its country of origin. I do not think the currency agreed upon in this transaction was piastres and, therefore, in my view the reference to the Treaty fails, but upon this subject I desire to agree expressly with the language of my noble and learned friend, Lord Dunedin.

In the Court of Appeal the case was decided on the footing of wrongful conversion and the result would probably be that the sum to be awarded after inquiry on that ground—the value of the goods having greatly increased—would be in amount more onerous to the bank, but as your Lordships hold that this was made and concluded and credited as a sterling transaction such inquiries are out of place.

It should be added that the House was informed at the Bar that on the judgment of the Court of Appeal being delivered intimation was made by letter to the appellants that all that the respondent wanted was to be credited and paid in sterling, as *per* the judgment of Mr. Justice Rowlatt. This offer was declined and the appeal was brought to this House. In these circumstances the respondent should have his costs of the entire cause, including this appeal.

I think the judgment of Mr. Justice Rowlatt fully and correctly covered the case and that his judgment should be restored.

LORD PHILLIMORE.—My Lords : The plaintiff in this case is an Armenian carrying on business in Manchester. The defendant bank carries on business in Great Britain, Turkey, Syria, and elsewhere, having one of its head offices in London and branch offices, among others, at Manchester and at Beirut in Syria.

The plaintiff before the War was in the habit of buying Manchester goods and transmitting them to correspondents in Syria. Business was conducted in the following manner : the plaintiff took a bill of lading making the goods deliverable to the bank ; he also drew a bill upon his particular correspondent for whom the goods were destined and endorsed it to the bank ; he took the bill of lading and the bill of exchange and other shipping documents to the Manchester branch of the bank and obtained an advance of 80 per cent. on the value of the bill.

When the goods reached Beirut, if the Syrian correspondent had come forward in time and paid the bank, he took delivery. If not, the bank took delivery ex ship, and the correspondent, when he came along, took delivery from the bank.

The form of the bill of exchange required payment to be made of the value as if payment were made in London : the words ran—"Please pay to our order value cheque on London the sum of £ ."

The practice of the bank—a perfectly reasonable one in time of peace—was to take payment in Turkish piastres (the current coin of Syria), and then to credit in account the head office in London with the sum in sterling. The head office then paid to the plaintiff the balance due to him.

When the War broke out, several consignments were in transit, or at any rate had not been delivered to the correspondents. As each came along, however, the bank handed the goods to him on receiving that sum in piastres, which at the moment was equivalent to sterling in London.

There being war between the two countries, Turkish law did not permit money to be remitted to Great Britain, but for the purpose of ascertaining a correspondency between the sterling sum in London and Turkish piastres in Beirut, it was possible to calculate the exchange through the neutral country of Switzerland. By the time when Syria ceased to be in possession of the enemy, and thenceforward till the war came to an end and thereafter, the value of the piastre greatly depreciated.

The defendant bank then offered to pay the plaintiff a number of piastres equal to those which the bank had received when it handed over the several parcels of goods or—which came to the same thing—the sterling value of the depreciated piastres.

The plaintiff refused to accept this and brought the present action for the sterling value of the several consignments, amounting in all to £3,161 6s. 6d., and he also claimed interest from a certain date.

Alternatively he claimed to treat the delivery of the several parcels as having become wrongful during the war, and damages for the conversion.

The defendant bank pleaded the Turkish law precluding it from making payment to any person in Great Britain during the war, said that any previous agreement had become illegal or alternatively impossible of performance, that it had acted reasonably in parting with the goods, as otherwise there would have been charges for storage and insurance, and the goods might have deteriorated and were liable to confiscation if they were held still to belong to the plaintiff ; and it said that it acted reasonably and in a businesslike way in collecting from the various recipients the equivalent of the sterling value ; and it pleaded section 84 of the Treaty of Lausanne and said that under that section its liability was limited to paying now the sums as collected in Turkish currency.

Mr. Justice Rowlatt gave judgment for the plaintiff for the sum sued for. He did not think it was a case of conversion or of giving damages for conversion ; but he thought that, however the branch of the defendant bank in Syria collected the price of the several parcels, the defendant bank rendered itself accountable for the value in sterling in London, and that, though this could not be paid while the war suspended all payments, it did become payable when the war came to an end.

There might have been some question as to whether the duty to pay first arose when the war came to an end, or whether it did not arise earlier when the Allies came into possession of Syria, but the plaintiff only asked for interest from March 31, 1919, and that date appears to have been accepted by the defendant bank, and judgment was accordingly given for interest as from that date.

The defendant bank appealed to the Court of Appeal. In this Court the learned Lord Justices thought that Mr. Justice Rowlatt had put his judgment on a wrong footing, that the plaintiff would have failed if that were the only ground, but that the true view was that the defendant bank never should have delivered the parcels to the several recipients, and that the bank was therefore liable in damages for wrongful conversion, and they directed an inquiry as to damages.

This view of the case would operate more hardly upon the defendant bank than the judgment of Mr. Justice Rowlatt, and the bank has accordingly appealed to your Lordships' House claiming that neither judgment is right, and that it is only liable for that which it has always offered, the present value of a sum in piastres equal to that which it had received.

The respondent in his printed case supported both judgments, but his solicitors had previously written to the bank's solicitors saying that he would be satisfied if he could hold the judgment of Mr. Justice Rowlatt.

My Lords, your Lordships at an early stage of the argument came to the conclusion that the judgment of the Court of Appeal, so far as it differed from that of Mr. Justice Rowlatt, could not be supported.

As each recipient came along in time of peace, the branch of the bank at Beirut was entitled to deliver to him his parcel of goods provided that the bank made itself debtor to the plaintiff for the proper sum in sterling in London. After the war had begun there was nothing unlawful in two parties, both subjects of the Ottoman Empire, dealing with each other. So far therefore there was nothing wrong in the bank delivering parcels to the several recipients. As between the branch bank in Beirut considered as a Turkish subject and the plaintiff as a British subject, all dealings were suspended during the war, and therefore the bank was not bound to carry out the plaintiff's mandate. But the plaintiff could not complain that his mandate was carried out. Indeed he may be presumed to have desired it. Provided that the proper payment was made in the proper manner, no harm was done ; and the bank either in fact took proper payment in the proper manner or must be deemed to have done so. Indeed it not merely admits but contends that it did so. The plaintiff's case therefore must rest upon the judgment of Mr. Justice Rowlatt.

As far as the plaintiff was concerned, though he had framed his case in such a way as to claim the alternative relief given by the Court of Appeal, he was content, as already stated, with the judgment given by Mr. Justice Rowlatt. It was the bank which by appealing from this judgment brought upon itself the more severe order of the Court of Appeal.

My Lords, I think that Mr. Justice Rowlatt was right. The bank escapes from a judgment for wrongful conversion of the goods upon the supposition that it took in return for them that which it was bound to take, a credit on London—a credit unavailable at the moment because things were put to sleep by the war, and therefore not producing interest during the war, but becoming available when the war came to a close. That which it could easily do through its machinery by the simple process of debiting the Syrian branch and crediting the London head office, it had, as soon as the war was over, to do; and therefore it is liable both for principal and for interest from the agreed date.

For the same reason the article in the Treaty of Lausanne on which the bank relied does not protect it. The bank cannot say that it collected the money "in a currency other than that mentioned in the contract" because the only way in which it can show that it performed its duty is by accepting the position that it took or procured or produced a London cheque.

For these reasons I am of opinion that the judgment of Mr. Justice Rowlatt should be restored. As to the further costs from the date of his judgment, those of going unnecessarily to the Court of Appeal ought to be paid by the bank.

With regard to the costs of the appeal to your Lordships' House, this appeal was no doubt necessary, but it was necessary because the bank had brought an order to the Court of Appeal upon itself, and the bank was informed that the respondent would be content with the judgment of Mr. Justice Rowlatt. It ought therefore to pay these costs also.

LORD CARSON.—My Lords, I have had the advantage of reading and considering the speech of my noble and learned friend on the Woolsack, with which I entirely agree, and I do not desire to add anything.

LORD BLANESBURGH.—My Lords: I find myself in entire agreement with the rest of your Lordships as to the proper result of this appeal. In reaching that conclusion, however, I have had a special difficulty of my own to overcome. To me it has appeared that the very unusual terms in which the bills of exchange employed in these transactions were invariably couched had and were intended to have a meaning and effect sufficient to invest the appellants' argument on section 84 of the Treaty of Lausanne with a cogency which, had it not been neutralized by other considerations, might have carried their appeal.

As I read it, the effect of the expression "value cheque on London" found in each of these English bills of exchange addressed to a drawee resident and carrying on business in Turkey was to make it incumbent upon the appellants' branch at Beirut as their only duty to receive from the drawee in Turkish currency the sum which the bank accepted as the equivalent in value of the sum in sterling mentioned in the bill. This is, I think, the effect of the words whether they are merely construed according to their natural meaning in the setting in which they are found or whether they are interpreted with due regard to the invariable course of dealing between the parties in these transactions and to the business requirements or convenience of one or other of them. It was not, I think, supposed by anybody that payment for the bill in any other than Turkish currency would ever be made or asked for. Tender by the Turkish acceptor of a cheque on London, good, bad, or indifferent, for the amount in sterling named in the bill would not, in my view, have been such a payment as, in their natural signification, is connoted by the words used. Such a payment gives no effect to the word "value," which strikes me as the governing word in the phrase. It would, moreover, have failed to be a payment which in a business sense would have subserved either the interest or convenience of any of the parties concerned. And it is not without significance in this connexion to note that an allegation originally made by the respondent's statement of claim that it was the duty of the appellants' branch at Beirut to transmit to the respondent cheques on London so collected was, before the trial, at the respondent's own instance, struck out.

My Lords, in each transaction there were three parties concerned whose interests had presumably to be adjusted in carrying it to completion. There was, first of all, the respondent, entitled as the result of his arrangement with his Beirut correspondent to receive in England, if he so required, his agreed price in sterling for goods supplied. There were, next, the appellants, entitled normally in respect of their advances to the respondent to 80 per cent. of the sterling amount named in the bill, and interested, moreover, as exchange bankers to secure for themselves the ordinary profit on any exchange transaction involved. There was, lastly, the Turkish correspondent of the respondent, drawee of the bill, who, while in account liable to the respondent in sterling for the agreed price of the goods supplied, had for his own convenience to be enabled to discharge that liability by a payment made in Beirut in local currency.

Only by an arrangement under which the appellants' branch at Beirut collected from the respondent's Turkish correspondent the amount in Turkish currency which the appellants were ready to accept as the equivalent in value of the sum in sterling mentioned in the bill could either the convenience or the interests of the parties as so described have been met. But by it all were subserved. As the exchange rate accepted was the rate published by themselves, the appellants thereby secured their own profit on the transaction viewing it as one of exchange, and they were also thereby left at liberty, so far as their own share of the proceeds of the bill was concerned, either to retain these in Turkey or otherwise dispose of them as their occasions, for the moment, dictated. In other words, so far as it touched the appellants' own interests, collection in Turkish currency was of the essence. That it was in accord also with the interest and convenience of the Turkish acceptor seems obvious; nor was it otherwise than to the interest of the respondent, for it might well have been, on occasion, highly useful for him to have his share of the currency proceeds applied or retained in Turkey on his account.

Accordingly, my Lords, if that were all, I should myself, on this interpretation of these bills of exchange, have difficulty in resisting the case made by the appellants on section 84 of the Treaty of Lausanne. The currency "mentioned" in the contract is, I think, sterling, and the collection, although conventionally so made, has in fact been made in

Turkish currency. But, in the circumstances, this is not, I think, enough for the appellants. It is, I think, clear that as between the appellants and the respondent the collection in Turkish currency actually made was only authorized, and, as between the respondent's Turkish correspondent and the appellants' Beirut branch, payment in Turkish currency was only made, on the terms that thereupon and without any variation by reason of any subsequent alteration in the rate of exchange, whether up or down, the appellants became accountable to the respondent in sterling for the precise sum representing his final share of the sterling value of the bill. And in my view the effect of this additional term in the transaction was to make section 84 of the Treaty inapplicable to the present case. In the result, therefore, I agree that the order of Mr. Justice Rowlatt should be restored.

My Lords, I am satisfied that there was in this case no wrongful conversion by the appellants, and I am relieved to find that the respondent's alternative claim on that footing, a claim really unconscionable, cannot, for the reasons given by your Lordships who have preceded me, be supported, and in ordinary circumstances it would, I think, have been proper that the costs of litigating that issue should have fallen upon him. But the respondent has throughout been ready to accept the order of Mr. Justice Rowlatt, and as the appeals of the bank to the Court of Appeal and to this House have been brought really in order to obtain a reversal of that order, I agree in the view that although the appellants have now succeeded in displacing the order of the Court of Appeal they should bear the costs of both appeals, as the final result has been only to restore an order with which from its date the respondent was well content.

[Solicitors—Messrs. Bischoff, Coxe, Bischoff, and Thompson ; Messrs. Pritchard, Englefield, and Co., for Messrs. Brett and Co., Manchester.]

K.B. Div. } 1928.
(Salter and Talbot, JJ.) } Apr. 24.

BROOKE v. BOOL.*

Negligence—Gas explosion—Search for escape of gas by two persons—Agency—Control of proceedings—Joint tortious enterprise.

The landlord of a shop where the tenant carried on business lived on adjoining premises communicating internally with the shop. The tenant had requested the landlord to visit the shop occasionally at night to see that everything was secure. The landlord and a lodger of his entered the shop one night, believing that there was an escape of gas. In the shop was a gas-pipe running down from the ceiling to the floor. The landlord lit a burner at the lower end of the pipe, and nothing untoward occurred. The lodger, who was a much younger man than the landlord, then got on to the counter of the shop and began to examine the upper part of the pipe with a naked light. An explosion followed, and the tenant's goods on the premises were damaged. In an action by the tenant against the landlord,

Held, that the landlord was liable on the grounds (1) that the lodger was his agent, (2) that the landlord was in control of the proceedings, and (3) that the proceedings constituted a joint tortious enterprise.

The Koursk (40 *The Times* L.R., 399 ; [1924] P., 140) applied.

Held, further (*per* Talbot, J.), that the landlord was liable also on the ground that, having undertaken the examination, he was under a duty to take reasonable care to avoid damage resulting from it, and could not escape liability by getting another person to make the examination or part of it for him, whether that person was an agent or contractor or a mere voluntary helper.

The plaintiff, Mrs. Elizabeth Brooke, was the tenant of a shop and basement at 86, Warwick-square, W. The defendant, Mr. Bool, was her landlord and occupied adjoining premises, communicating internally with the plaintiff's shop. Owing to burglaries that had taken place the plaintiff requested the defendant to visit the shop at night from time to time in order to see that everything was secure. During the night of May 3, 1927, a lodger of the defendant, named Morris, informed the defendant that he thought he could smell an escape of gas in the shop next door. The defendant got up and went through into the plaintiff's shop, followed by Morris. In the shop there was a gas pipe running down from the ceiling and terminating in a burner which was accessible from the floor, and also a gas stove. In order to examine the upper part of the pipe it was necessary to get up on to a counter. The defendant applied a naked light to the lower part of the pipe, but found there was no escape there ; and then Morris, who was a much younger man than the defendant, got up on to the counter and proceeded to examine the upper part of the pipe, also with a naked light, in the same way as the defendant had examined the lower part. A violent explosion followed, resulting in serious personal injuries to Morris, and damage to the plaintiff's goods on the premises. The plaintiff brought an action for the damage to her goods against the defendant, alleging that the damage had been caused by negligence on the part of the defendant.

The county court Judge gave judgment in the following terms: "I find that the explosion was caused by the negligent act of Morris and was not caused directly or indirectly by any negligence on the part of the defendant. I accept as accurate the evidence of the defendant. I think that the plaintiff is a perfectly honest witness, but I reject her evidence wherever it contradicts or qualifies the evidence of the defendant. That being so, I am of opinion that there is no evidence that would entitle me to draw the inference that Morris was the agent of the defendant in doing the negligent act that he did, or to find that the defendant is responsible on the ground of joint enterprise or joint negligence, or on any other grounds, for the negligent act of Morris, I have very grave doubts as to whether my opinion is correct. If the Divisional Court should say that there is any evidence entitling me in law to draw that inference, or to find that the defendant is responsible on any ground for the negligent act of Morris I should draw such inference and I should find

* Reported by T. R. F. Butler, Esq., Barrister-at-Law.

the defendant responsible. Judgment for defendant with costs."

The plaintiff appealed.

Mr. A. Cairns appeared for the appellant; Mr. G. M. Welsford for the respondent.

The following considered judgment was delivered by MR. JUSTICE SALTER.—This is an appeal from the learned Judge of the Westminster County Court, who gave judgment with considerable doubt in favour of the defendant. The plaintiff appeals.

The defendant, accompanied by another man named Morris, went on to premises in the occupation of the plaintiff and there searched for a suspected escape of gas with naked lights. The result was an explosion, and the question is whether the defendant is in law responsible in damages to the plaintiff, whose goods were injured by the explosion. The learned Judge found himself unable to find for the plaintiff, but said that, if in the opinion of this Court he was entitled in law to find for the plaintiff, he should be taken to have found for her so far as matters of fact were concerned. [His Lordship then stated the facts in detail, and continued]: The evidence of the plaintiff and the defendant was in conflict at many points. The learned Judge preferred on those points the evidence of the defendant, and I shall, therefore, read the evidence of the defendant and take it that those are the facts which the Judge accepted. The evidence is as follows: "I am owner of premises. I have never had occasion to complain of escaping gas. Occasionally plaintiff left gas burning after she left the shop for the night. Once or twice she had done it. I turned it out at least once and on neither occasion said anything to plaintiff. Plaintiff did complain to me that some of her goods had been stolen but I had no proof of it. I went occasionally into the shop at night after she had left. May 3. I did not go into the shop before I went to bed. I was in bed about 10.30 p.m. In consequence of what Morris said I went into the shop. I went into the shop followed by Morris. I had no light in my hand. I smelt no gas, though I stood for a minute. There was a gas burner. I took a box of matches and turned on the gas burner and lit it. Nothing happened, and I turned out the gas burner. The gas burner had certainly been turned off before plaintiff had left. I did not try the gas stove. I tried nothing but the gas burner. Nobody tried the gas stove. Morris stood watching me. He stood still, doing nothing but watch me. Morris got up on the counter and had some matches of his own. Morris struck a light and then explosion. I did not lend him any matches. I did not tell him to get on the counter; he had not struck any matches before.

". . . I welcomed Morris' help to assist in finding out cause of gas escape and to put it right. I think Morris was wrong in doing what he did."

Cross examined.—I said to Morris, "Perhaps there is an escape higher up." Morris is about 40; I am 78. It was desirable (to see if there was an escape higher up) that someone should get on a chair by the counter. Morris got on the counter. I thought he was going to see if there was an escape higher up. I wanted to find out whether there was an escape higher up. I thought to myself, "Let him find out." I did not say, "Do not get on the counter." Getting on the counter was the only way. After he got on the counter he struck a match. I think he struck it on a matchbox. I said nothing to him. It was all over in a second. I suppose that Morris intended to find out whether there was a leak, and, if so, to put it out. We both wished to do the same. I turned on the gas bracket. It lighted, then I put it out. We both intended to stop the leak, if any.

[His Lordship then read the judgment of the county court Judge and continued.]

In my opinion, there are three grounds on which it was competent in law for the learned Judge to find that the defendant was responsible for what was obviously a grossly reckless act on the part of Morris—namely, holding a naked light near to a place where he suspected an escape of gas. First, I think that there was evidence of agency. The defendant desired to examine this pipe, and examined it himself so far as he could in a most reckless and dangerous way with a naked light. He then desired to examine the upper part of it. Now the defendant was an old man of nearly 80 years of age, and he had in his company a much younger man. I think that there was ample evidence that the defendant impliedly invited and instructed Morris to get up on to the counter and complete the examination, when it was not convenient for him to continue it himself, and that Morris did what he did on the instructions of the defendant. The maxim *Qui facit per alium facit per se* applies, and on that first ground I think that there was evidence on which the Judge could have found the defendant responsible.

Secondly, he could have been held responsible on the score of the control which he exercised over the proceedings. It is necessary to bear in mind the difference between the position of the defendant and that of Morris. The defendant was on the premises lawfully, at the request of the plaintiff, whereas Morris was a trespasser, unless the defendant had a right to invite him there to help. There was ample evidence on which the Judge could find that the invitation by the plaintiff to the defendant to keep a watch over the premises extended to the right to bring in someone to help him on an occasion of that kind. In my opinion, Morris was there by the permission and invitation of the defendant, since otherwise he would have been a trespasser, and the defendant was in control of the enterprise. There are two cases sufficiently in point for me to refer to them: *Wheatley v. Patrick* (2 M. and W., 650) and *Samson v. Aitchison* (28 *The Times* L.R., 559; [1912] A.C., 844). Both were cases of street accidents arising from negligent driving, and in both cases the defendant was in personal control of the vehicle that caused the damage and was riding in it. In both cases the person driving negligently was driving by permission of the defendant, but was not the defendant's agent, and in both cases the defendant was held responsible in damages to the person injured by the driver. The principle laid down in those cases applied here, and the defendant, having the right to control Morris and having invited Morris to do what he did, was responsible for the consequences.

Thirdly, I think that there was here a joint enterprise on the part of the defendant and Morris, and that the act which was the immediate cause of the explosion was their joint act done in pursuance of a concerted enterprise. A case in which the question of joint tortfeasors was much discussed was *The Koursk* (40 *The Times* L.R., 399; [1924] P., 140). There there had been a collision between vessels called the Clan Chisholm and the Koursk in consequence of separate and independent acts of negligence on the part of those controlling each vessel, and in direct consequence of that collision and without any intervening act of negligence the Clan Chisholm ran into and sank the plaintiffs'

vessel. The plaintiffs, having recovered judgment against the owners of the Clan Chisholm (who limited their liability), then brought an action against the owners of the Koursk. It was set up on behalf of the owners of the Koursk that the owners of the Clan Chisholm and the owners of the Koursk were joint tortfeasors, and that the judgment recovered against the former barred any subsequent judgment against the latter. In that case the Court of Appeal considered the law in regard to joint torts and joint tortfeasors, and there are two passages in the judgment of Lord Justice Scrutton to which I desire to refer. The first occurs at page 155, where the Lord Justice is discussing the true meaning of joint tortfeasors, and is as follows: "The substantial question in the present case is: What is meant by 'joint tortfeasors'? and one way of answering it is: 'Is the cause of action against them the same?' Certain classes of persons seem clearly to be 'joint tortfeasors': the agent who commits a tort within the scope of his employment for his principal, and the principal; the servant who commits a tort in course of his employment, and his master; two persons who agree on common action, in the course of which, and to further which, one of them commits a tort. These seem clearly joint tortfeasors; there is one tort committed by one of them on behalf of, or in concert with, another."

This case falls within the third class to which the learned Lord Justice refers. Here the defendant and Morris went into the room, obviously proceeding by tacit agreement to examine this pipe and both employing the same negligent means. I think that what Morris did negligently was done by him in concert with the defendant and in pursuance of their common enterprise. The other passage to which I wish to refer occurs on page 156 of the report. Lord Justice Scrutton there says: "I am of opinion that the definition in Clerk and Lindsell on Torts, 7th ed., page 59, is much nearer the correct view: 'Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design. . . . But mere similarity of design on the part of independent actors, causing independent damage, is not enough: there must be concerted action towards a common end.'" That appears to me precisely to describe this case, and on that third ground also I think that the county court Judge was fully entitled in law to find for the plaintiffs.

Inasmuch, therefore, as the Judge says that he is to be taken to have found all the facts in favour of the plaintiff, I think that the appeal must be allowed, and that the judgment entered for the defendant must be set aside, and judgment entered for the plaintiff.

The following judgment was read by MR. JUSTICE TALBOT: I am of the same opinion, and I do not differ from the judgment just delivered or from any part of it. There is, I think, another principle on which the liability of the defendant can be satisfactorily based. The evidence in this case shows that the defendant was, by arrangement with the plaintiff, in charge of the shop occupied by her during business hours, in the sense that he had the right, and possibly on occasions, the duty, to enter it and see that it was safe and to do anything which needed to be done there at once in order to make it safe. Morris, on the other hand, had no right to enter the shop; and accordingly when he noticed a smell of gas which he thought came from the shop he went to the defendant for leave to go in and investigate. Thereupon the defendant got up, went with Morris into the shop, and there proceeded for the protection, both of the plaintiff's premises and of his own, to ascertain by means of lighted matches whether gas was escaping. It is obvious that to examine a place in which an escape of gas is suspected is highly dangerous, unless proper care is taken, and that one of the necessary precautions against disaster is to avoid the use of a naked light.

In my opinion, the defendant having undertaken this examination was under a duty to take reasonable care to avoid damage resulting from it to the shop and its contents; and, if so, he could not escape liability for the consequences of failure to discharge this duty by getting (as he did) someone to make the examination, or part of it, for him, whether that person was an agent or a servant or a contractor or a mere voluntary helper. This is the principle of such cases as *Bower v. Peate* (1 Q.B.D., 321); *Black v. Christchurch Finance Co., Limited* ([1894] A.C., 48); *Hughes v. Percival* (8 App. Cas., 443); *Hardaker v. Idle District Council* (12 *The Times* L.R., 207; [1896] 1 Q.B., 335). See also the judgment in *Dalton v. Angus* (6 App. Cas., 740, at p. 829). The principle is that if a man does work on or near another's property which involves danger to that property unless proper care is taken, he is liable to the owner of the property for damage resulting to it from the failure to take proper care, and is equally liable if, instead of doing the work himself, he procures another, whether an agent, servant, or another, to do it for him. A like principle applies to work done in or near a highway involving damage to those who use it; see, for example, *Holliday v. National Telephone Company* (15 *The Times* L.R., 483; [1899] 2 Q.B., 392).

It appears to me, therefore, that the defendant is liable to the plaintiff for damage caused to her property by the negligence of Morris, who, by the defendant's authority, continued the examination of the premises which the defendant had undertaken and begun. It is, I think, a reasonable inference from the evidence that the defendant thought that Morris would use lighted matches just as he himself had been doing, but it is quite immaterial. It was the defendant's duty to take care that the dangerous operation which he had undertaken was done safely; and he is as much liable for the carelessness of Morris in doing part of the work as he would have been if he had done it himself in the same way.

[Solicitors—Mr. F. H. Adams; Messrs. MacDonnell and Co.]

Court of Appeal.
(Lord Hanworth, M.R., Lawrence and Russell, L.JJ.)

1928. Apr. 27.

IN RE A BANKRUPTCY NOTICE
(No. 292 OF 1928).*

Bankruptcy—Married woman—Carrying on a business—Series of speculative transactions—Bankruptcy Act, 1914 (4 and 5 Geo. V., c. 59), s. 125 (1).

A series of speculative transactions by a married woman, if they involve the making of genuine commercial contracts extending over a long period of time, may amount to carrying on a "business" within s. 125 (1) of the

* Reported by G. T. WHITFIELD-HAYES, Esq., Barrister-at-Law.

Bankruptcy Act, 1914, so as to make her subject to the bankruptcy laws.

This was an appeal from a decision of a Registrar in Bankruptcy raising the question whether the appellant, a married woman, had carried on a business so as to be amenable to the conditions of section 125 of the Bankruptcy Act, 1914.

The facts, as found by the Master of the Rolls in his judgment, were that the appellant had for some three years been engaged in a series of transactions in francs, pesetas, kroner, and dollars through the medium of Messrs. Ironmonger and Co., a firm of foreign bankers. As the result of some 280 such transactions there had been profits and losses, but, ultimately, heavy losses.

A recent decision of the Court of Appeal, *Ironmonger and Co. v. Dyne* (44 *The Times* L.R., 497), held that the appellant was liable to Messrs. Ironmonger and Co. for differences in respect of those contracts to the amount of nearly £39,000, and that, the contracts being real commercial contracts, it was not open to the appellant to rely upon the Gaming Acts as a defence.

Messrs. Ironmonger and Co. having issued a bankruptcy notice against the appellant under the provisions of section 125 (1) of the Bankruptcy Act, 1914, which directs that "Every married woman who carries on a trade or business . . . shall be subject to the bankruptcy laws . . . ," the appellant resisted the notice on the ground that she had not been carrying on any trade or business.

The Registrar decided that the notice must issue, and the appellant accordingly appealed to the Court of Appeal.

Mr. W. N. Stable, for the appellant, contended that, although the Court had decided that the appellant's transactions were commercial contracts, yet she herself had carried them on as speculations pure and simple. She had never taken delivery of any currency, and had simply gone in for what was well known as "gambling in differences."

Mr. St. John Field, for Messrs. Ironmonger and Co., was not called on to argue.

The Master of the Rolls (Lord Hanworth) said that it was not necessary to discuss the exact meaning of the words "trade" or "business." In the case of *In re a Debtor* (*No.* 3 *of* 1926) ([1927] 1 Ch., 97), he had called attention to the fact that in recent statutes the word "business" had been added to "trade" to enlarge the sphere of responsibility of a married woman. He could not agree that the transactions here must be treated as speculations and nothing more.

In *Cooper v. Stubbs* (41 *The Times* L.R., 614; [1925] 2 K.B., 753) he had said that the speculative nature of a transaction might be one of the material facts to be considered; but, although speculative, a transaction might none the less be a real business transaction. The simple consideration of the matter led to this: that when the Court found a series of operations involving the making of a number of genuine commercial contracts extending over a long period of time, that series of transactions might well be said to be the carrying on of a business. The appeal must, therefore, be dismissed.

Lord Justice Lawrence and Lord Justice Russell delivered judgments to the same effect.

[Solicitors—Messrs. Kenneth Brown, Baker, Baker; Messrs. H. S. Wright and Webb.]

Court of Appeal.
(Scrutton and Sankey, L.JJ., and Tomlin, J.)
1928. May 2.

LLOYDS BANK, LIMITED v. CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA.*

Bankers—Crossed cheques—Protection of collecting banker—No title in customer—Receipt of payment by banker without negligence—Failure of banker to discharge burden of proof—Bills of Exchange Act, 1882 (45 and 46 Vict., c. 61), s. 82.

One L., who was the chief accountant at a branch of the plaintiff bank, and who had authority to sign cheques on their behalf, fraudulently drew upon another bank crossed cheques, signed by himself and by another official of the branch, and payable to the defendant bank, and, by letters written on the plaintiffs' office paper, he instructed the defendant bank to credit the proceeds to the joint account of himself and his wife at the defendant bank. The defendant bank collected the amounts of the cheques and credited them to the account, and L.'s practice was to draw the amounts out quickly after paying them in, and observation of the account would have shown that L. was engaged in extensive speculations through stockbrokers. In an action for damages for conversion of the cheques the defendants relied on the provisions contained in s. 82 of the Bills of Exchange Act, 1882.

Held, that although the cheques were payable to the defendants themselves they had received payment "for a customer" within the meaning of the section and had done so in good faith, but that they had not discharged the burden of proving the absence of negligence on their part, and the plaintiffs were entitled to recover.

Decision of MacKinnon, J. (44 *The Times* L.R., 165), affirmed with a variation.

This was an appeal by the defendants from the decision of Mr. Justice MacKinnon (44 *The Times* L.R., 165) in an action in which Lloyds Bank, Limited, sued to recover from the defendants, the Chartered Bank of India, Australia and China, damages for the conversion of certain cheques. Alternatively, they claimed the amount represented by the cheques as money had and received.

The claim related to 19 crossed cheques drawn by one Lawson, who was chief accountant at the Bombay branch of the plaintiffs' bank and had authority to sign cheques on their behalf. The cheques were drawn at various times from March, 1922, to January, 1924, and were for sums in rupees which were equivalent in all to between £17,000 and £18,000. The cheques, which were signed by Lawson, and also by another official of the plaintiffs' Bombay branch, were drawn on the Imperial Bank of India, and were payable to the defendant bank. The proceeds of them, which were collected by the defendants, were, on Lawson's instructions, credited to a joint account

* Reported by E. J. M. Chaplin and T. W. Morgan, Esqrs., Barristers-at-Law.

which Lawson and his wife kept at the defendants' bank.

All the cheques were drawn without the knowledge of, and in fraud of, the plaintiffs. Lawson was an officer of the bank whose payments for salary and allowances amounted to less than £1,500 a year. The defendants put in various defences, and relied in particular on section 82 of the Bills of Exchange Act, 1882, and the equivalent section, 131, of the Indian Negotiable Instruments Act, 1881.

Mr. Justice MacKinnon held that, although the cheques were payable to the defendants themselves, they had received payment "for a customer" within the meaning of the section and had done so in good faith, but that as they had not discharged the burden of proving the absence of negligence on their part the plaintiffs were entitled to recover. He further held that, as Lawson had paid a certain amount of the money so obtained by him by fraud into his account with the plaintiffs' bank and that money had gone back into the coffers of the plaintiffs, their claim for conversion would be reduced *pro tanto*.

The defendants appealed, and there was a cross-appeal by the plaintiffs.

Mr. Jowitt, K.C., and Mr. James Wylie appeared for the appellants; Mr. Stuart Bevan, K.C., and Mr. Le Quesne, K.C., for the respondents.

The following considered judgments were delivered:—

Lord Justice Scrutton.—This appeal in a case where one bank sues another for conversion of cheques, drawn by an employee of the plaintiff bank in fraud of his employer, on the bank of the plaintiffs, and collected by the defendant bank, raises a number of difficult questions.

The plaintiff bank, Lloyds Bank, Limited, are the successors of Messrs. Cox, whose business they took over. No point was taken as to the change of parties, and I deal with the case as if Lloyds Bank were interested throughout the whole relevant period. They banked with the Imperial Bank of India, and their cheques must be signed by two of their officials. One of those officials was one Lawson, their accountant, who had over him in the bank three superior officials, a manager and two sub-managers. Lawson had an account in the joint names of himself and wife at the Chartered Bank of India, Australia, and China, the defendant bank. From March, 1922, to January, 1924, Lawson carried on a complicated system of fraud involving some 19 fraudulent cheques. He signed, and by fraud procured another authorized official to sign, 19 cheques on the Imperial Bank of India made payable to the defendant bank. He sent them to the defendant bank for collection on his behalf; the instructions to collect in that way being contained in a paying-in slip, or more generally in an accompanying letter, requesting the defendant bank to place the accompanying cheque to the credit of his joint account, and signed by Lawson only. The letter was on the bank's letter paper with a printed heading, "From Cox and Co.," the word "From" being sometimes struck out. The defendant bank collected the cheque, which was duly honoured by the Imperial Bank of India, and placed it to Lawson's account. As appears from the account itself, it was generally in small credit till the arrival of each fraudulent cheque, the funds collected from which were promptly drawn out, frequently in favour of stockbrokers. These fraudulent cheques were not discovered for a long time by reason of a complicated series of fraudulent entries, which it is unnecessary to trace in detail, partly also by the neglect by the plaintiff bank of a series of elementary precautions. Lawson was the only person who checked the plaintiff bank's pass-book when returned daily, and the auditor only troubled himself with totals and not with items. When the first fraudulent cheque was discovered the other 18 were traced in a day or so.

Under these circumstances the plaintiff bank sued the defendant bank for conversion of the cheques. Conversion primarily is conversion of chattels, and the relation of bank to customer is that of debtor and creditor. There might be thought to be some difficulty, as there are no specific coins in a bank which are the property of any specific customer, in treating the payment by a bank of part of its debt to the customer to a person not authorized to receive it as conversion of chattels; but a series of decisions binding on this Court, culminating in *Morison v. London County and Westminster Bank, Limited* (30 *The Times* L.R., 481; [1914] 3 K.B., 356) and *A. L. Underwood, Limited v. Bank of Liverpool and Martins* (40 *The Times* L.R., 302; [1924] 1 K.B., 775), have surmounted the difficulty by treating the conversion as of the chattel, the piece of paper, the cheque under which the money was collected, and the value of the chattel converted as the money received under it. (See the explanation of Lord Justice Phillimore in *Morison's* case (*supra*, at p. 378). The plaintiffs' case as to conversion was rested on these authorities and the trial Judge adopted it.

The defendant bank attempted to answer this case in various ways. Their counsel said, as I understood his argument, that each cheque was "issued" on behalf of the plaintiff bank, by two agents who had ostensible authority to issue it, to the defendant bank, which was entitled to rely on the ostensible authority; it was perfectly true that one of those agents, as between the bank and himself, had no authority to issue such a cheque for his own benefit, but to outsiders he was acting within his ostensible authority, and unless they had notice of his fraud, or until the principal, learning of his fraud, avoided the transaction, they were protected in their dealings with the apparently regular cheque. This position was said to be justified by the authorities referred to in the judgments in *Reckitt v. Barnett, Pembroke and Slater, Limited* (44 *The Times* L.R., 428) and in *Lloyd v. Grace, Smith, and Co.* (28 *The Times* L.R., 547; [1912] A.C., 716) and *Hambro v. Burnand and Others* (20 *The Times* L.R., 398; [1904] 2 K.B., 10).

In my view it is established that a third party, dealing in good faith with an agent acting within his ostensible authority, is not prejudiced by the fact that, as between the principal and his agent, the agent is using his authority in such a way that the principal can rightly complain that the agent is using his authority for his own benefit and not for that of his principal. Probably the plaintiff bank could not successfully sue the Imperial Bank of India for honouring these cheques signed by persons who had ostensible authority to sign, because in fact one of them was using his ostensible authority for his own benefit. But it is otherwise where the third party has notice of irregularity putting him on inquiry as to whether the ostensible authority is being exceeded. Now in the present case a subordinate official of a bank is steadily paying cheques of a bank by which he is employed, made payable to the collecting bank into his own account at that collecting bank. They are not cheques which on their face have any relation to Lawson except that he is one of the officers signing; and their amounts are such that they cannot be payments of salary. The only authority to use cheques for Lawson's benefit which on their face have

no connexion with Lawson is a signature by Lawson himself. It appears to me that as in *Underwood's* case (*supra*) these facts put the defendant bank on inquiry. It is very important, in my view, to maintain safeguards against employees' dealing with their master's property without authority. If the cheque had come forward without the accompanying authority of Lawson I do not think the defendant bank would have committed conversion by collecting the proceeds and asking for further instructions. The learned Judge below has taken the view that the cheque was never issued and therefore the payee had no rights. By section 2 of the Bills of Exchange Act, 1882, "issue" is defined as "the first delivery of a bill or note, complete in form, to a person who takes it as a holder"; and "holder" means "the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof." But the House of Lords has decided in *R. E. Jones, Limited v. Waring and Gillow, Limited* (42 *The Times* L.R., 644; [1926] A.C., 670) that the original payee of a cheque is not a holder in due course. The Indian Negotiable Instruments Act, 1881, however, to which the Judge was not referred on this point, includes by section 9 in the definition of "holder in due course" the payee of a cheque. It does not define "issue," but does in section 14 define negotiation, so as to make the payee under a cheque transferred to him a holder by negotiation. It seems to me that each cheque taken by itself was "issued," being signed and dealt with by persons having ostensible authority to sign and issue it, but the accompanying memorandum, signed by Lawson alone, and its directions gave notice of irregularity, which destroyed the "holding in due course." I prefer this view to that of the learned Judge as to "no issue." It seems to me that the position is rather that of an issue with notice of irregularity than an issue under a voidable title—good till avoided. In *Corporation Agencies, Limited v. Home Bank of Canada* ([1927] A.C., 318) the cheques drawn in fraud were treated by the Privy Council as drawn with ostensible authority, and the distinction between that case and *John and Others v. Dodwell and Co., Limited* (34 *The Times* L.R., 261; [1918] A.C., 563) was made to turn on no notice or notice. I think in this case there was notice, as in *Underwood's* case (*supra*). There being conversion not waived but relied upon, the plaintiffs could not sue for money had and received, and they so stated to us and to the defendants, by letter, after judgment was reserved. The fact of the notice also prevents the defendants from treating themselves as holders in due course of the second cheque, which they credited to their customer's account before collection; this fact also prevents the defendants from claiming the protection of the Indian Act, section 131, as they did not collect for a customer, having already credited him with the amount.

The defendants next relied on section 131 of the Indian Negotiable Instruments Act, 1881, which takes the place of section 82 of the English Act and gives protection to a banker who, in good faith, and without negligence, collects for a customer a crossed cheque. The Indian Act uses the language "In case the title to the cheque proves defective," which is the language of section 12 of the English Crossed Cheques Act of 1876. The English Act of 1882 expands this to "The customer has no title or a defective title." It was argued that the Indian Act only applied to cases of an ostensible but defeasible title, and not to cases of no title. I do not know why the language was altered. I noticed that in *Matthiessen v. London and County Bank* (5 C.P.D., 7) Mr. Justice Lindley uses the language "has a bad title." But as it seems to me in the present case the bank had a title as holder under the Indian Act, defective through notice. I do not think the difference in the Acts is material. It was also said that the Acts could not protect the bank, as they were the true owners, being payees, and could not owe a duty to themselves. As they were payees with notice of irregularity in the accompanying memorandum, I do not think they were "true owners."

There remains the question which gave the learned Judge a great deal of trouble, whether the defendant bank showed that they collected without negligence. Negligence involves duty, and as the collecting bank, apart from statute, owed no duty to the owner of the cheque, the duty must be one created by the statute itself. I accept the measure of duty stated by Lord Dunedin in *Commissioners of Taxation v. English, Scottish, and Australian Bank* (36 *The Times* L.R., 305; [1920] A.C., 683, at p. 688), where he says: "Mr. Justice Isaacs says: 'Apart from the well-established rule that whether or not the evidence establishes that a person acts without negligence is a question of fact, the legal principles found in *Morison v. London County and Westminster Bank* (*supra*), and relevant to the present, are (1), that the question should in strictness be determined separately with regard to each cheque; (2), that the test of negligence is whether the transaction of paying in any given cheque was so out of the ordinary course that it ought to have aroused doubts in the banker's mind, and caused them to make enquiry.' If there be inserted after the words 'given cheque' the words 'coupled with the circumstances antecedent and present,' their Lordships think this is an accurate statement of the law." Lord Dunedin adds to it the qualification, which I entirely accept, that to require a thorough inquiry into the history of each cheque would render banking business impracticable, and that therefore there must be something markedly irregular in the transaction. The learned Judge finds, after careful consideration, that the defendant bank failed to prove absence of negligence. He rests his judgment on the payment by Lawson of large cheques of his bank into his private account, and failure to make inquiries of the manager of the plaintiff bank as to the regularity of the transactions. I agree in this finding, and would add that I think examination of Lawson's account (and I am sure that general examination of the accounts of every customer takes place from time to time in all well-managed banks) should, I think, have put the defendant bank on inquiry as to the source from which these heavy payments to stockbrokers were being made, in the case of an account generally in low water, except for these payments in, immediately reduced by payments out.

The only remaining defence was that the defendant bank was "lulled to sleep" by the failure of the plaintiff bank to detect these frauds. The learned Judge has dismissed this on the ground that no one from the defendant bank came to say he was "lulled to sleep"; their attitude was that they remembered nothing about the matter. This is enough to dispose of the matter, but though a similar defence succeeded in *Morison's* case (*supra*), I am not at all satisfied as to the grounds of such a decision. It does not seem consistent with the decisions in *Bank of Ireland v. Trustees of Evans' Charities in Ireland* (5 H.L. Cas., 389), and *Swan v. North British Australasian Co.* (10 Jur., N.S., 102), that negligence, to act as an estoppel, must be the proximate cause of the loss. If my butler for a year has been selling

my vintage wines cheaply to a small wine merchant, I do not understand how my negligence in not periodically checking my wine book will be an answer to my action against the wine merchant for conversion. However, the ground of the learned Judge's decision is enough to dispose of this point. This, I think, substantially exhausts the points taken on the appeal, which must be dismissed with costs.

The plaintiffs had a cross-appeal which originally raised four matters. Of these a claim in respect to salvage from Lawson's property has been arranged ; a claim for interest on the amount recovered was abandoned ; a claim to treat the sum as awarded on a claim for moneys had and received (in which case consideration of exchange would make the amount larger) was abandoned, if the plaintiffs succeeded in conversion, by letter after the hearing before us, on the ground that if the plaintiffs did not waive the tort, but succeeded on conversion, they could not claim *in assumpsit*. There remained a contention that the Judge was wrong in allowing the defendants to reduce the sum awarded against them by the items set out in paragraph 10 (*a*) of the amended claim, being sums which Lawson was said to have paid back to the plaintiffs out of the amount converted by him, so that the plaintiffs had not, in fact, suffered the damage alleged. It seems to me clear that damages in conversion may be reduced by the return of the chattel converted ; and that where there has been a series of conversions of the same chattel, the return of the chattel by one of the wrongdoers may be used to reduce the damages against each wrongdoer. But when you come to the conversion of a cheque, it is not at all clear how the fact that one of the persons converting has after conversion paid to the plaintiffs, not the cheque converted, but some currency, not necessarily the currency derived from the cheque converted, can be treated without more as a reduction of the damages for the original conversion. The servant of a tradesman converts a cheque of his employer through a bank, and at a later period comes into his employer's shop and buys for £10 a chattel sold by the employer. Can the bank claim to reduce damages for conversion by £10, because the employer has received £10 from the original wrongdoer ? Will proof that the £10 came out of the proceeds of the cheque converted make any difference ? There are authorities beginning with *Blackburn Building Society v. Cunliffe, Brooks and Co.* (22 Ch.D., 61), the latest application of which is by Mr. Justice Wright in *B. Liggett (Liverpool), Limited v. Barclays Bank, Limited* (43 *The Times* L.R., 449 ; [1928] 1 K.B., 48), which support the view that, if the person converting without authority can show that he used the proceeds in discharging debts of the plaintiff, that fact may reduce to that extent the sum claimed from the wrongdoer. But whether any particular payment to the plaintiff by one of the wrongdoers reduces the damages for conversion must depend on the facts of each case, and cannot be settled by mere proof of receipt without more. In *Underwood's* case (*supra*) the Court of Appeal, therefore, ordered an inquiry as to the circumstances of each payment ; the parties, however, settled the matter. Mr. Justice Wright ordered a similar inquiry in *Liggett's* case (*supra*). I take, as a sample, in the present case, the first five payments alleged in paragraph 10 (*a*) of the claim, which are closely connected with the first fraudulent cheque in this case. This cheque was one for 15,000 rupees, dated March 31, 1922. Against it five cheques were drawn, which all, in various ways, came to the plaintiffs. They amounted to 15,617 rupees, and changed Lawson's account with the defendants from a credit of 232 rupees to a debit of 385 rupees. Obviously, therefore, to allow the defendants to deduct 15,617 rupees, as has been done, is to give them the advantage to the extent of 617 rupees of payments which were not derived from the first cheque converted. It seems also to assume that any chance which the owner of the property converted had of appropriating property of the wrongdoer, to meet his claim, though the owner did not know of the conversion, may be used to reduce the damages payable by any wrongdoer. Next, these five cheques, which the defendants claim to be allowed to deduct from the damages, were the following: (1) A cheque for 2,250 rupees paid by Lawson into his account at the plaintiff bank, turning his account, which was then 2,075 rupees in debit, into 175 rupees in credit. I do not see how Lawson could claim this as reducing his damages, as he promptly proceeded to draw against it till his account was again 900 rupees overdrawn. If he could not so use it, I do not see how the defendants could so use it, unless they showed some duty to them, on the part of the plaintiff bank, to discover Lawson's frauds, and I do not see any justification for inferring such a duty. (2) Two cheques for 7,917 and 4,750 rupees respectively, paid by Lawson to the plaintiff bank, to purchase two telegraphic transfers to London. Lawson was buying these apparently to meet two drafts on London which he had obtained from Cox and Co., for 7,649 rupees on February 20, and 4,663 rupees on March 13, 1922. Our attention was not called to the details of these transactions, but it looks as if the plaintiff bank gave value for these cheques, and if so, to allow the defendant bank to take credit for the whole sum would be to inflict a double penalty on the plaintiff bank. Lastly, there were two cheques for 350 rupees paid to the plaintiff bank, not into Lawson's account. Our attention was not called to any explanation of these amounts, and I do not see any justification for the defendant bank, without more, claiming to debit the plaintiff bank with them. No evidence was given that any of the sums in paragraph 10 (*a*) went to pay debts of the plaintiff bank, which might bring the matter within such authorities as *Bannatyne v. MacIver* ([1906] 1 K.B., 103) and *Reid v. Rigby and Co.* (10 *The Times* L.R., 418 ; [1894] 2 Q.B., 40). In my opinion the mere proof of receipt of moneys from the wrongdoer, which, if the owner of the property converted had known of the conversion, he might have appropriated against his loss by conversion, does not, in the absence of knowledge of the conversion, justify the deduction claimed.

The cross-appeal, therefore, succeeds on this point, and the judgment for the plaintiffs should be increased to £17,044 15s. 2d.

The appeal must be dismissed with costs, and the plaintiffs must have the costs of the cross-appeal.

Lord Justice Sankey.—In February of 1923 the plaintiffs took over the business carried on by Messrs. Cox and Co. as bankers in England, India, and elsewhere, and in the remainder of this judgment I propose to refer to Messrs. Cox and Co. and Lloyds Bank, Limited, as the plaintiffs.

The plaintiffs alleged that on various dates between March 30, 1922, and January 21, 1924, one Lawson, the chief accountant of their Bombay branch, with another official, drew cheques to the number of 19 on the Imperial Bank of India, with which the plaintiffs had an account. The said Lawson drew the

cheques in favour of the defendants, and delivered them to the defendants, the first cheque with a paying-in slip, and each of the others with a memorandum containing instructions by Lawson to the defendants to put the said cheques or the proceeds thereof to the credit of Lawson's joint account in the Bombay branch of the defendants. The plaintiffs further alleged, as indeed was the fact, that Lawson acted in fraud, and without the authority, of the plaintiffs, and that the defendants wrongfully converted the said cheques by collecting the same from the Imperial Bank of India and putting the proceeds to the credit of the said joint account, whereby the plaintiffs suffered damage.

The plaintiffs claimed a sum of £17,044 15s. 2d., and, alternatively, a rather larger sum on a count for money had and received.

The defendants contended : (1) that they were not guilty of conversion ; (2) that they are protected by the Negotiable Instruments Act, 1881, as modified up to September 1, 1909, of the Indian Code of Law, which reads as follows : "A banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment." They further contended that they acted in good faith, which is not disputed, and without negligence in the circumstances, and upon that issue is joined. The learned Judge accepted the plaintiffs' contention, but said that they were liable to give credit in respect of certain amounts, being part of the proceeds of the above-mentioned cheques which had found their way back into Lawson's account with the plaintiffs, and in the result he gave judgment for £12,470. From that judgment the defendants appeal, and the plaintiffs have a cross-appeal in respect of the credits allowed.

The plaintiffs had in their employment at all material times the said Lawson, who had for ten years been in the position of chief accountant. He had, besides his duties of looking after the accounts, full powers under a power of attorney to sign cheques, and to commit the plaintiffs by his signature (clauses 2, 3, 6, 7, 10, and 12). His salary was at the rate of 1,200 rupees a month, which was credited to him in a current account which he had with the plaintiff bank. He had also a banking account with the plaintiffs in London, and, thirdly, he had a current account with the defendant bank, originally in his own name, but later on as a joint account in the name of himself and his wife. The plaintiffs had an account with the Imperial Bank of India. Lawson was a rogue who has since been convicted and sentenced to a long term of imprisonment, and the above-mentioned nineteen cheques were fraudulently obtained and used by him, the first fraud being in respect of a cheque of March 31, 1922, and the last fraud in respect of a cheque of January 22, 1924. Before he began the frauds he had a considerable number of honest dealings, by means of which money was transferred from the plaintiff bank to his own account with the defendants by means of pay slips. These sums ranged from the small amount of 687 rupees to the large one of 7,649 rupees. It is necessary to mention this fact because one of the considerations urged by the defendants is that, before the fraudulent transactions, Lawson had with them considerable transactions which were admittedly honest.

The nineteen cheques drawn upon the Imperial Bank of India, which are the subject of this action, required to be signed by two signatories in order to make them valid cheques drawn by the plaintiffs. Lawson was entitled to sign a cheque, and various other persons were entitled to be one of the two joint signatories required. These cheques are in the form : "Pay the Chartered Bank of India, Australia and China"—that is, the defendants—"or order," and they are crossed. They are drawn upon the plaintiffs' account with the Imperial Bank of India. Every one is signed by Lawson, and also signed by some second signatory. The fact is that they were fraudulently prepared by Lawson, who fraudulently got the other officials to sign them because he intended to use them, not for the proper purposes of the plaintiffs' business, but for his own fraudulent purposes, and for his own improper enrichment. Every one of these cheques was, in fact, paid in by Lawson to his joint account with the defendants, it was collected by the defendants from the Imperial Bank of India, and was credited by them to Lawson's joint account. The first cheque was apparently handed in over the counter ; but all the others were sent by Lawson with a covering letter, addressed to the defendants, the effect of which was as follows : "Dear Sirs,—Please place the amount of the enclosed cheque for 1,100 rupees to the credit of my joint account and oblige, Yours truly, T. D. Lawson." These personal letters from Lawson to the defendants were in each case written upon the office paper of the plaintiffs. No particular ingenuity appears to have been exercised in the perpetration of the fraud. When Lawson was in need of money, presumably to meet his losses in speculation, he issued a cheque duly signed on behalf of the plaintiffs, drawn on the Imperial Bank of India, but passed no entries until the last day of the month, when to reconcile the Imperial Bank account he debited the plaintiffs' Bombay account with their Calcutta Agency account in the books at Bombay on account of a payment to a local firm. A cheque on the Imperial Bank was made out in favour of the firm for the said payment, but the cheque was subsequently destroyed. It was Lawson's duty as accountant to check the books each day and to reconcile the Imperial Bank account, and to send to the head office a reconciliation at the end of each month. The day following the above entries they were reversed until the end of the month, when the operation was completed. There was no examination of vouchers by a senior officer, but each member of the staff went through the vouchers daily to verify his own signature. It was not the custom to exchange continuation of both inward and outward accounts with the Calcutta branch, or the fraud might have been discovered sooner. The plaintiff bank were undoubtedly negligent. Mr. Buckler, their district manager, who investigated the fraud, writes on March 27, 1924 : "I cannot think that had Bombay had an adequate staff, or trained men, Lawson would have been able to defraud the bank over a period of 23 months without detection." The same officer says in his report on April 2 : "The methods employed by Lawson disclosed very grave defects in the system at the Bombay office, or, to put it bluntly, an entire lack of system, and a complete reliance on one man who was allowed not only to make out vouchers, draw cheques, and obtain a second signature to the cheques without the slightest query, but also to check up and reconcile the accounts on which he was operating. The position of an accountant in a

big office must carry a considerable amount of weight, particularly with the junior staff, but it is almost incredible that so many members of the staff should have gone on so long without querying a system by which they signed cheques blindly, or raising some protest on their own responsibility in doing so. To all intents and purposes Bombay has been a one signature branch, for the second signature is added merely on the strength of the first, and in order to conform to the rule of two signatures." A considerable body of evidence was given to explain the system by which the frauds were committed, and by which the transactions were carried out by officials, both of the plaintiff bank and of the defendant bank, but only one expert banker was called, namely, Mr. Allen, who had a large experience of Indian banking, and he was called for the plaintiffs.

I come now to the points raised, and the questions which arise are : (1) Were the defendants guilty of conversion of the cheques in question ? (2) Are they protected by the Indian Act above referred to, by reason that they have in good faith and without negligence received payment for a customer of the cheques in question ? Several points emerge for decision here which are applicable to both questions. As to (1) whether the defendants were guilty of conversion, the defendants put their argument as follows : (1) There was no conversion because we had a voidable title to the cheques in question which had not been avoided before we dealt with them by collecting the money and placing it to Lawson's account. (2) This also applies to the case made against us under the count for money had and received. The plaintiffs informed the Court that if they were successful in their case for conversion they did not desire to rely on the count for money had and received. The defendants refer to the case of *Tate v. Wilts and Dorset Bank* ([1899] Journal of the Institute of Bankers, vol. 20, p. 376), which they say is conclusive in their favour, and urge that, in the circumstances, they have no need to rely upon their statutory defence. Their reasoning is that this is a case where a negotiable instrument was issued by the plaintiffs who were induced, it is true, to do so by the fraud of Lawson ; but still they did issue a negotiable instrument, and it carried with it all the rights of third parties to deal with it, and the plaintiffs cannot claim to impair these third parties' rights by reason of the fact that they were induced to do what they did by the fraud of their servant. Even if *Tate's* case (*supra*) can be held to be good law since the decision in *Morison's* case (30 *The Times* L.R., 481 ; [1914] 3 K.B., 356), the facts there were entirely different, and it is not applicable to the present circumstances. The cheque there was issued, and meant to be issued, by Tate himself, and was made payable to the order of Dixon, who had a voidable title. The Court held that the banker who has collected an uncrossed cheque for a customer is protected where that customer holds under a voidable title. The learned Judge decided against this point upon the ground that the plaintiffs did not issue the document, but that the document was issued by Lawson, a fraudulent servant, as part of his fraud. There is some ground for taking this view to be found in *Morison's* case (*supra*). The fraudulent person there was a man of the name of Abbott, who issued the cheques, purporting to do so under authority which was given him by the plaintiff Morison. Lord Reading, C.J., said, at page 364 : "The cheques were at all times, until issued [*i.e.*, by Abbott], the property of the plaintiff. They never were the property of Abbott, who had no title to them." Lord Justice Buckley said, at page 375, that the plaintiff was the true owner of the cheques in question ; and Lord Justice Phillimore, at page 378, said that the cheques were the plaintiff's instruments until he chose, or until Abbott on his behalf chose, to issue them to some outside person. There is, however, this distinction to be drawn between the present case and *Morison's* case (*supra*). In *Morison's* case (*supra*) Abbott had no authority to draw the cheques, and so the defendants' title to such cheques was defective, as Abbott issued them to the defendants in fraud of the plaintiff. In the present case Lawson had actual authority to draw cheques. I should prefer to state the point as to whether the defendants were guilty of conversion in the following way. It must be admitted that, upon a proper construction of the power of attorney, Lawson had actual authority to be one of the signatories of the cheques in question, as indeed in each case the other signatory had. Mr. Curling, the manager of the defendants' Bombay branch, admitted that Lawson had this authority jointly with another person. (See question 47 of his evidence taken on commission.) But he had no authority to send the cheque, with the private memorandum above referred to, requesting the defendants to put it to his joint account, and in doing so he was guilty of conversion, and so were the defendants who carried out his instructions. As Lord Ellenborough said in *McCombie v. Davies* (6 East, 538, at p. 540) : "A man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it ; for what is that but assisting that other in carrying his wrongful act into effect ? " Both upon this ground and upon the ground taken by the learned Judge in the Court below, I am clearly of opinion that the defendants were guilty of conversion of the plaintiffs' cheques. Indeed, *Morison's* case (*supra*) is a direct authority for this proposition.

As to point 2, which is probably the most important one, are the defendants protected by the section of the Indian Act above referred to ? That depends upon whether they were guilty of negligence in these transactions. Both this section and the corresponding section 82 of the Bills of Exchange Act, 1882, have given great trouble to the Court. What is negligence under the circumstances ? The difficulty is that the statute does not speak of any corresponding duty, but leaves that to be inferred. I think the duty of the defendants to the true owner of the cheque was (1) to exercise the same care and forethought with regard to the cheque paid in by the customer as a reasonable man would bring to bear on similar business of his own (see Sir John Paget on Banking, 4th Edition, page 274), and (2) to provide a reasonable and competent staff to carry out this duty.

There are numerous tests which have been applied in the Courts from time to time suggesting what may or may not be negligence. For example, a bank may be negligent in not making inquiries as to a customer on opening an account—*Ladbroke v. Todd* (30 *The Times* L.R., 433), *Commissioners of Taxation v. English, Scottish, and Australian Bank* (36 *The Times* L.R., 305 ; [1920] A.C., 683)—and there may be negligence in not noticing the account of the customer from time to time and considering whether it is a proper or a suspicious one. See *Morison's* case (*supra*). In this case the plaintiffs formulate their charges of negligence in the following way. They say : (1) Lawson, an employee of the plaintiffs, was transferring large sums of money from the plaintiff bank to the defendant bank. Why ?

If he had an account at the plaintiff bank only, the money would be accessible there. (2) Heavy payments were made directly afterwards to persons some of whom the defendants knew to be stockbrokers. (3) The methods by which the transfers were made were uncommon transactions ; they were not made by a cheque drawn by Lawson on his own account with the plaintiffs, but by cheque purported to be drawn by the plaintiffs on the Imperial Bank of India in favour of the defendants. (4) They were accompanied by a memorandum signed by Lawson in person instructing the defendants to put the cheque in question to the credit of his joint account. (5) One signatory to the cheque was always Lawson himself, and the cheque was, as stated above, accompanied by the personal memorandum from Lawson himself, which was on the plaintiffs' printed form but was not signed by two, as the cheque was. The defendants seek to avoid this by referring to the pay slips above mentioned, which were admittedly honest transactions, and to this the plaintiffs reply : True, they were honest transactions, but the pay slips are equivalent to cheques drawn by Lawson on his own account with the plaintiffs. They are quite different from the fraudulent cheques, which have nothing to do with Lawson's own account. It would be difficult for a lawyer to come to a conclusion merely upon the argument of counsel, but here in this case there is evidence upon which the Court can act. For example, Mr. Curling, the defendants' manager at Bombay, at page 23 of Document 8, said : "I feel that the Chartered Bank should have queried receiving cheques in their own favour, and not in favour of Lawson, when drawn by Cox and Co. and/or Lloyds Bank on their account at the Imperial Bank ; I also feel that their attention should have been more closely drawn to that, owing to the fact that one of the signatories on every cheque was Lawson ; I feel, further, that the Chartered Bank must have known that Lawson was an employee of Cox and Co., and Lloyds Bank in turn owing to the fact that the memoranda which Lawson sent covering the cheques for his credit were all on paper bearing the title of Cox and Co. or Lloyds Bank," and Mr. Lane, the deputy manager of the Bombay branch, said in the same document, at page 121, as follows : "I consider that the defendants were negligent not once but many times in accepting instructions from a private individual regarding the disposal of a cheque made payable to themselves which was not signed by the individual giving instructions." And at page 129 he further says : "I have said in my evidence that if I was giving a confidential opinion I should see that the account was never overdrawn and describe the account as a satisfactory account, and seeing that there were considerable sums of money passing through, I would describe it as 'means fair,' but if I had any reason for suspicion I should have examined the items in the account and if I did that I should find that constant differences were being paid to share brokers in Bombay, which would give any bank man the feeling that this man was speculating." Mr. Lenney, of the defendants, at question 655 of Document 9, excused the bank by referring to the above-mentioned honest transactions, but the independent witness already referred to, Mr. Allen, said, on page 81 of Document 6a, in answer to the question, "Ought it to have gone through ? " " (A.)—Oh no. If I like to put a young man in a position where he should exercise discretion and he is not capable of doing it I cannot shield behind him, I am afraid. (Q.)—If that young man, with such knowledge of his business as he should have had, had stopped and looked at the cheque, and looked at the paying-in slip, and examined both documents, ought he to have let it go through ? (A.)—Oh no. He should have queried it to his manager." With reference to the last answer of Mr. Allen, the admission is made in the correspondence by Mr. Buckler on March 27, where he says : "I cannot think that had Bombay had an adequate staff of trained men Lawson would have been able to defraud the bank over a period of 23 months without detection." Mr. Justice Bailhache in *Ross v. London County Westminster and Parr's Bank, Limited* (35 *The Times* L.R., 315 ; [1919] 1 K.B., 678, at p. 685), says : "I must, however, attribute to the cashiers and clerks of the defendants the degree of intelligence and care ordinarily required of persons in their position to fit them for the discharge of their duties. It is therefore necessary to consider whether a bank cashier of ordinary intelligence and care on having these cheques presented to him by a private customer of the bank would be informed by the terms of the cheques themselves that it was open to doubt whether the customer had a good title to them." Lord Dunedin says, in *Commissioners of Taxation v. English, Scottish, and Australian Bank* (*supra*), approving the words of Mr. Justice Isaacs in the High Court of Australia : " 'Apart from the well-established rule that whether or not the evidence establishes that a person acts without negligence is a question of fact, the legal principles found in *Morison v. London County and Westminster Bank, Limited* (*supra*) and relevant to the present are : (1) That the question should in strictness be determined separately with regard to each cheque ; (2) that the test of negligence is whether the transaction of paying in any given cheque was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind, and caused them to make inquiry.' If there be inserted after the words 'given cheque' the words 'coupled with the circumstances antecedent and present' their Lordships think this is an accurate statement of the law."

The items of negligence to which I am disposed to attach the greatest importance are : (1) The fact that the defendants knew that Lawson was an employee of the plaintiffs and was transferring these large sums of money from the plaintiff bank to the defendant bank, and (2) the methods by which the transfer was made.

In my view, a bank cannot be held to be liable for negligence merely because they have not subjected an account to a microscopic examination. It is not to be expected that the officials of banks should also be amateur detectives. It is not easy, nor is it desirable, to define the degree of negligence which would render them liable. Many factors have to be taken into consideration, the customer, the account, and the surrounding circumstances. But, whilst it is difficult to draw the line, the problem upon which side of the line a particular case falls does not present such difficulties. Having regard to the uncommon nature of the cheques in question, having regard to the fact that Lawson was an employee of the plaintiffs, as was well known by the defendants, and having regard to the heavy payments made at crucial times to persons known to be brokers, I cannot come to any other conclusion but that the defendants were negligent in this case.

In the case of *Bissell and Co. v. Fox Brothers and Co.* (51 L.T., 663), Mr. Justice Denman said, at page 666, in reference to section 82 of the Bills of Exchange Act, 1882, which is similar to the words in the Indian Code, "It is clear, I think, that the

negligence contemplated in section 82 must mean the neglect of such reasonable precautions as ought to be taken with reference to the interests, not of the customer who purports to have the authority, but of the principal whose authority he purports to have, the section being framed wholly with reference to the liability of the banker to the 'true owner' of the cheque and not with reference to his liability to his customer." That statement was approved on appeal (1 *The Times* L.R., 452 ; 53 L.T., 193), and is, I think, followed by Mr. Justice Kennedy in *Hannan's Lake View Central, Limited v. Armstrong and Co.* (16 *The Times* L.R., 236), although in *Ladbroke v. Todd* (*supra*), Mr. Justice Bailhache, at page 261, puts it rather differently. Who, then, is the true owner of the cheque to whom the bank owes the duty ? The defendants' contention was that they were the true owners, and the duty in such circumstances was one which they owed to themselves only, and therefore they could not be guilty of negligence towards the plaintiffs. In my wiew, this is wholly inapplicable. The plaintiffs were the true owners of the cheques in question. (See the judgment of Lord Justice Buckley in *Morison's* case (*supra*), at p. 375.) It is not necessary, in my view, to discuss all the points raised, having regard to the conclusion to which I have come on the main points. It is only necessary to refer to the second cheque of July 10, 1922, which was credited to Lawson before it was cleared. In my view, the defendants have no defence to that, as they did not receive payment for the customer within the meaning of the section and they were not collecting it for their customer. I think under the Indian Code, the original payee of a cheque can be a holder in due course, the Indian Act differing from the English Act in this respect, under which Viscount Cave, Lord Chancellor, in *R. E. Jones, Limited v. Waring and Gillow, Limited* (42 *The Times* L.R., 644 ; [1926] A.C., 670, at p. 680), held that the original payee of a cheque was not a holder in due course, and I do not think the principles laid down by the majority of the Court in *Reckitt's* case (44 *The Times* L.R., 428) assist the defendants. There was ample material which should have aroused the defendants' suspicions and put them on inquiry with regard to this cheque. The defendants contended that, even if they were negligent, they were entitled to say that after a time they were, as it is put in *Morison's* case (*supra*), "lulled to sleep" (see *per* Lord Justice Buckley, at p. 377) by the plaintiffs' failure to take proper precautions, and, therefore, they ought not to be held liable in this case, where the plaintiffs were themselves so negligent. This doctrine of lulling to sleep, as it was called during the course of the argument, must depend either upon estoppel or upon ratification, and, having regard to the facts of the present case, I do not think that the doctrine is applicable or that it can be said that anything which the plaintiffs did ratified the defendants' actions or created an estoppel preventing the plaintiffs from succeeding in this action. Giving the best consideration I can to this matter, I have reached the conclusion that the charges of negligence set up by the plaintiffs have been made out and the defendants cannot rely on the Indian Act as a defence.

In the result, I think the appeal of the defendants must be dismissed, and there remains to be considered the cross-appeal of the plaintiffs. The facts here may be stated shortly. It is said that some of the proceeds of the fraudulent cheques found their way back into Lawson's account at the plaintiff bank, and that, therefore, credit must be given in this action for the amount of those cheques. The number of the cheques is twenty-four, amounting to £4,574 0s. 10d., and the particulars will be found in paragraph 10 (a) of the defence. It is clear on the authorities that the damages for conversion of a cheque are the face value of it. The law has always regarded very jealously the conversion of a man's property by another, *Edmondson v. Nuttall* (17 C.B., N.S., 280). But where the defendant in an action for conversion is able to prove that the plaintiff has got back part of the proceeds of the property wrongfully converted, he is *pro tanto* excused. See *Hiort v. London and North Western Railway Co.* (4 Ex.D., 188). *Bannatyne v. MacIver* ([1906] 1 K.B., 103), where the defendant was entitled to take credit for the sums which he had used for paying the legal debts of the plaintiffs, and *Reversion Fund and Insurance Company, Limited v. Maison Cosway, Limited* ([1913] 1 K.B., 364), where *Bannatyne v. MacIver* (*supra*) was commented upon, are distinguishable.

The defendants have not satisfied me that the plaintiffs did get back any of the proceeds of the cheques. Part of the proceeds were paid for or into Lawson's account when it was in debit and therefore went to pay the debt of Lawson. Part of them went into Lawson's account when it was in credit and were used by him for his own purposes. It is impossible to say that any part of the proceeds of the fraudulent cheques was received by the plaintiffs.

In my view, therefore, credit cannot be given for them and the cross-appeal should be allowed with costs.

Mr. Justice Tomlin.—Upon the facts of this case I think that, though each of the fraudulent cheques was on its face signed in accordance with the apparent authority, no one of them passed from Lloyds Bank (in which expression I include Cox's Bank and their successors in title) into the possession of the Chartered Bank under any authority from Lloyds Bank either actual or apparent. Each cheque was signed by Lawson in furtherance of his fraudulent purpose, and by the other signatory for some other purpose in respect of which he was deceived by Lawson. Having been signed the cheque was never passed officially out of the custody of Lloyds Bank to the Chartered Bank. Lawson acting in his private capacity was the sole channel of communication between the two banks, and the only instruction to the Chartered Bank was, in one case, a pay-in slip, and, in the other cases, a written memo, signed by Lawson in his personal capacity and purporting to direct that the proceeds of the relative cheque should be placed to the credit of the joint account of Lawson and his wife with the Chartered Bank.

Now it is not admissible, in my opinion, in these circumstances to separate the signing of the cheque from the acts whereby the cheque and the instructions for dealing with it passed into the hands of the Chartered Bank. The transaction must, I think, in each case be regarded as a whole for the purpose of determining where the property in the cheque lay, and, upon the facts which I have mentioned, it remained in my judgment with Lloyds Bank. If this be the true view, I think that the Chartered Bank are liable for conversion in respect of the 19 cheques unless they can escape by bringing themselves within the protection of section 131 of the Indian statute, the Negotiable Instruments Act, 1881, and I may add here, in regard to the second cheque, that I agree with the learned Judge below that the Chartered Bank are in no better position because

they advanced money to Lawson against this cheque before it was cleared.

Now I cannot doubt that the protection, which section 131 affords to a banker, by necessary implication imposes upon the banker, as a condition of the benefit conferred, a duty of care towards some one or more of the persons who may be affected by his action. It may be difficult to define in general terms applicable to every case the person to whom the duty is owed or the ambit of the duty itself, but, if the section applies here, I think there was upon the Chartered Bank a *prima facie* duty towards Lloyds Bank as the apparent drawers of the cheque, and that the Chartered Bank might have expressed to themselves that duty in some such terms as these : "Here is a cheque of Lloyds Bank drawn on their account at the Imperial Bank to our order although we have no claim against Lloyds Bank requiring to be satisfied out of it. It has come to our hands, not from Lloyds Bank acting through any of its authorized officials, but from a person who, though an official of the bank, is acting in his personal capacity only, and who, though one of the signatories of the cheque, is claiming the money for his own benefit. In this state of affairs we must treat the cheque as still belonging to Lloyds Bank until an official direction is obtained."

The first question is, does the section apply at all ? It is said it does not because (1) Lawson had no title to the cheque, and (2) because the Chartered Bank being the payees did not collect the cheque for a customer. Upon the construction of the section I do not think that its operation is confined to cases where there is some title though a defective one, but extends to cases where there is no title at all. Further, having regard to the decision in *Morison v. London County and Westminster Bank, Limited* (30 *The Times* L.R., 481 ; [1914] 3 K.B., 356), where one of the cheques was drawn to the order of the collecting bank, I do not think that it would be possible to hold that in the present case the Chartered Bank did not collect for a customer. To do so would be to put upon the Indian section, which is substantially identical with section 82 of the English Act, a meaning different from that attributed to the latter section by this Court. The section therefore, in my opinion, applies, and the next question is whether the Chartered Bank have established that they acted in good faith and, having regard to the duty resting on them, without negligence. In view of what the Bank actually did, I do not think that they can establish that they acted without negligence, though admittedly acting in good faith, unless they can justify their conduct either (1) by reference to some recognized banking practice, or (2) by reason of some special circumstances in the case. The learned Judge below has not found, nor do I think the evidence established, the existence of any special banking practice to justify the course taken by the Chartered Bank. The Chartered Bank, however, rely upon certain special circumstances which, they say, relieve them of the charge of negligence.

The point may be put shortly in this way. Before the first fraudulent cheque was presented, that is, before March 31, 1922, Lloyds Bank had been from time to time paying considerable sums of money to Lawson by means of pay slips signed by Lawson on behalf of Lloyds Bank. These pay slips Lawson passed to the Chartered Bank for collection for the credit of his joint account, and in two instances the pay slips had been drawn in favour of the Chartered Bank and had come to the Chartered Bank from Lawson in his personal capacity with a private memorandum of Lawson instructing the Chartered Bank to credit the proceeds to the joint account. These were all legitimate payments, and it is said that, having regard to them, any suspicion which the first fraudulent cheque ought otherwise to have aroused might reasonably have been allayed, and that there was still less ground for suspicion in the case of the second fraudulent cheque which was received some four months after the first, with a pay slip transaction intervening between them, and that when it was found that no question arose on the pay slip transactions or on the first two cheques *a fortiori* there was no reason to treat as suspicious the subsequent cheques. I do not think that this contention can be supported. The pay slip transactions differed in at least two material respects from the cheque transactions. They were for substantially smaller amounts, and the money receivable in respect of them was payable directly by Lloyds Bank. When the first fraudulent cheque was received it was a transaction of a novel and, in my opinion, of a suspicious character, and I do not think that the prior pay slip transactions justified the omission of any precaution which ought otherwise to have been taken. If the first cheque transaction was suspicious, I think that each repetition of the transaction was calculated to aggravate rather than to allay suspicion. There can be no presumption that every fraud must be discovered or that discovery must be made within any given time, and, except upon the basis of some such presumption, I am unable to see why the Chartered Bank should have been entitled to assume that the absence of complaint in respect of any one transaction established the regularity of that or any subsequent transaction. In my judgment nothing short of estoppel or ratification would assist the Chartered Bank, and upon the facts I do not think that either estoppel or ratification is made out. I think therefore that the appeal fails and should be dismissed with costs.

There remains the question on the cross-appeal, whether the money paid by Lawson to Lloyds Bank ought to be treated as having diminished the damages for conversion. When Lawson was credited in his account with the Chartered Bank with the proceeds of the fraudulent cheques, he from time to time drew upon the credit balances thus created cheques either in favour of Lloyds Bank or in his own favour and used these cheques either (1) to discharge his indebtedness to Lloyds Bank in respect of overdrafts on his account with them or other liabilities of his own to Lloyds Bank, or (2) to supplement the balances to the credit of his account with Lloyds Bank and thus enable him to continue his drawings upon them. These sums the learned Judge has allowed as a deduction from the damages for conversion. I do not think that they ought to have been so allowed. The principle of such cases as *Bannatyne v. MacIver* ([1906] 1 K.B., 103) has, in my opinion, no application to the facts of the present case. No part of the money wrongfully obtained from Lloyds Bank was ever paid to them or applied for their benefit as their money. The payments made by Lawson were made as out of his own money to discharge his own debts to Lloyds Bank, or to create as between them and him the relation of banker and customer, and to enable him to draw, as he did in fact draw, for further sums upon them. The damage to Lloyds Bank was not diminished by these payments. The only effect of

deducting them would be either to increase the claim of Lloyds Bank against Lawson, or to leave Lloyds Bank without any right to recover the amount of them from any one at all.

I think, therefore, that the judgment below was wrong in this respect, and that the cross-appeal on this head should succeed with costs.

[Solicitors—Messrs. Barlow, Lyde, and Yates; Messrs. Linklaters and Paines.]

K.B. Div.
(Lord Hewart, C.J., Avory and Shearman, JJ.)
1928. May 1.

MARSLAND v. TAGGART.*

Justices—Case stated—Death of justice after hearing in police court—Case signed by two surviving justices—Validity—Summary Jurisdiction Act, 1857 (20 and 21 Vict., c. 43), s. 2.

The Summary Jurisdiction Act, 1857, s. 2, provides: "After the hearing and determination by a justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way . . . either party to the proceeding before the said justice or justices may, if dissatisfied with the said determination, as being erroneous in point of law, apply in writing . . . to the said justice or justices to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon of one of the superior courts of law. . . ."

The effect of this section is not to oust the jurisdiction of the High Court to entertain an appeal by case stated where the case is signed by only two of the three justices who heard the complaint in the police court, the reason for the absence of the signature of the third justice being that he has died between the determination of the complaint and the statement of the case.

A preliminary objection taken to the hearing of this case stated by Derbyshire justices raised the question whether the absence from the case of the signature of one of the justices who had died after the hearing of the matter in the police court deprived the High Court of jurisdiction to entertain the appeal.

On May 30, 1927, Joseph Marsland, the appellant and surveyor for the Mellor parish of the rural district council of Hayfield, Derbyshire, preferred a complaint against Aaron Taggart, the respondent, under section 19, subsection 2, of the Public Health Acts Amendment Act, 1907, alleging that certain necessary repairs to a street known as Shiloh-road, in the parish of Mellor, of which the respondent was a frontager, and which was not a highway repairable by the inhabitants at large, had been executed by the Hayfield rural district council after the respondent had failed to do them. The appellant claimed £22 3s., the cost of the repairs.

The complaint came before Derbyshire justices sitting at New Mills on June 29, 1927. The hearing was adjourned until August 3 and then until August 24 when the claim was dismissed with costs. Three justices—Mr. Reekie, Mr. Chell and Mr. Wainwright—heard the complaint. On August 30 the appellant applied to the justices to state and sign a case for the opinion of the High Court. On September 23 Mr. Wainwright died and the case, which was stated on November 18, was signed only by Mr. Reekie and Mr. Chell.

Mr. Scholefield, K.C., and Mr. Ridgeway Bennett appeared for the appellant; Mr. Montgomery, K.C., and Mr. R. W. Leach for the respondent.

When the case was called on, Mr. Leach took the preliminary objection that in view of the terms of section 2 of the Summary Jurisdiction Act, 1857, the fact that only two of the three justices who had heard the complaint had signed the case ousted the jurisdiction of the Court to deal with the matter.

After argument the following judgments were delivered:—

The Lord Chief Justice.—The objection which is taken here is that the Court has no jurisdiction to hear this appeal by way of case stated because the case is signed by only two of the three justices who heard the complaint, the third having died between the date of the justices' decision and the date of the statement of the case. There is no doubt that in ordinary circumstances all the justices who have heard an information or complaint are required to state and sign a special case. As was said by Lord Alverstone, C.J., in *Barker v. Hodgson* (68 J.P., 310): "I attach considerable importance to the signatures of all the justices being affixed to a case, especially of the minority, in a case like this where there has been a difference of opinion." That judgment was concurred in by Mr. Justice Darling and Mr. Justice Channell. But in that case the reason why some of the justices had refrained from signing the case was that they dissented from the decision of the Court. The present case raises no such question. Nothing depends on the volition of any individual. The signature is absent because the signatory is dead.

On the matters so raised the case which appears to be relevant is *Kean v. Robinson* ([1910] 2 I.R., 306). There a case, the draft of which had been agreed on behalf of the parties, had been approved and signed by one of three justices who had heard the complaint. The second justice had also approved the case, but he had died without signing it, while the third justice had died without having either approved or signed it. The question arose whether the King's Bench Division in Ireland had jurisdiction in those circumstances to hear the case, and the majority of the Court decided that it had. One, at any rate, of the grounds of that decision was concisely stated by Mr. Justice Madden when he said ([1910] 2 I.R., at p. 319): "An authority which affords a satisfactory basis for my judgment is *Reg. v. Leicestershire Justices* (15 Q.B., 88). In that case the sending of notice of appeal was, by the statute, a condition precedent to the right of appeal. The person upon whom the notice should have been served was dead at the time of posting the notice. It was held—I quote from the judgment of Mr. Justice Patteson—'that, as the duty of the appellant to give such notice was cast upon him by the law, not by his own voluntary contract, he is excused from performing that duty by its becoming impossible by the act of God.'" Those words of Mr. Justice Patteson were also cited with approval by Lord O'Brien, C.J., who said ([1910] 2 I.R., at p. 321): "This is the language of Mr. Justice Patteson, stating what is now the well-established law. It draws the familiar distinction between a duty created by law and a duty created by voluntary contract, when a party can introduce any stipulation

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

he likes." Those observations were made as illustrating the principles *Actus Dei nemini injuriam facit* and *Lex non cogit ad impossibilia.*

Kean v. Robinson (*supra*) went to the Court of Appeal in Ireland ([1910] 2 I.R., at p. 323), where the Court ordered the case to be struck out because the decision of the King's Bench Division, which had been said to have no jurisdiction, was final. In my opinion, similar considerations apply here. As the reason of the absence of the signature is the death of the justice who would otherwise have signed it this Court has jurisdiction to proceed with this matter.

MR. JUSTICE AVORY agreed.

MR. JUSTICE SHEARMAN said that he was of the same opinion. Justices came and went, but justice itself should endure. He saw no sense in an objection which meant that when the Summary Jurisdiction Act, 1857, provided that an aggrieved party might apply to the justices to state and sign a case, justice should come to an end because one of the justices who had heard the complaint or information happened to die. That sort of objection ought to be as extinct as the thumbscrew.

The Court proceeded to hear and to allow the appeal on its merits, but the decision does not call for report.

[Solicitors—Mr. P. R. Christie, for Boddington, Jordan and Bowden, Manchester; Messrs. Gibson and Weldon, for Mr. H. S. Sleigh, Denton.]

K.B. Div.
(Lord Hewart, C.J., Avory and Shearman, JJ.)
1928. May 10.

PICKUP v. DENTAL BOARD OF THE UNITED KINGDOM.*

Dentists—Register—Erasure of name—Conviction — "Felony or misdemeanour" — Offence triable summarily—Dentists Act, 1878 (41 and 42 Vict., c. 33), s. 13—Dentists Act, 1921 (11 and 12 Geo. V., c. 21), s. 8.

The power given to the General Medical Council by s. 13 of the Dentists Act, 1878, as amended by s. 8 of the Dentists Act, 1921, to erase from the Dental Register the name of any dentist who has been convicted of "felony or misdemeanour," includes a power of erasure in the case of an offence triable summarily and not upon indictment.

This was an appeal under section 9 of the Dentists Act, 1921, from an order of the General Medical Council that the name of Mr. James Pickup should be erased from the Dentists' Register on the ground that he had been convicted of misdemeanours within the meaning of section 13 of the Dentists Act, 1878. Under that section, as amended by section 8 of the Dentists Act, 1921, it is the duty of the Dental Board to hold an inquiry in cases where it is alleged that a registered dentist is liable to have his name erased from the register under that section, and on the report of the Board the General Medical Council may order the name to be erased. The section provides:—

"Where a person registered in the dentists' register has, either before or after the passing of this Act, and either before or after he is so registered, been convicted either in her Majesty's Dominions or elsewhere of an offence which, if committed in England, would be a felony or misdemeanour, or been guilty of any infamous or disgraceful conduct in a professional respect, that person shall be liable to have his name erased from the register. . . .

"Provided that the name of a person shall not be erased under this section . . . on account of a conviction for an offence which, though within the provisions of this section, does not, either from the trivial nature of the offence or from the circumstances under which it was committed, disqualify a person for practising dentistry. . . ."

Mr. Maurice Healy appeared for the appellant; Mr. Cecil Whiteley, K.C., and Mr. D. C. Bartley for the Dental Board.

THE LORD CHIEF JUSTICE (Lord Hewart), in giving judgment, said that the question of substance raised by the appeal was what was the true meaning of the expression "misdemeanour" in section 13 of the Dentists Act, 1878. The scheme and method of that section were quite clear. [His Lordship read it.] It was contended on behalf of the appellant that the word "misdemeanour" in that section meant "misdemeanour triable on indictment." In his opinion that contention could not be supported. His Lordship referred to a passage in the judgment of Lord Alverstone, C.J., in *Du Cros v. Lambourne* (23 *The Times* L.R., 3; [1907] 1 K.B., 40, at p. 44).

When one looked at the words of the section which they had to construe, he thought that it was clear that the meaning of "misdemeanour" was not confined to "indictable misdemeanour." It seemed from the proviso that it was contemplated that the offences might be of a trivial nature, and that because of their trivial nature the person convicted might be allowed to retain his name on the register. It seemed to be contemplated that the conditions of the section might be fulfilled and the liability to erasure incurred for offences which, by their trivial nature, made the application of the proviso proper. He thought, therefore, that the appeal should be dismissed.

MR. JUSTICE AVORY and MR. JUSTICE SHEARMAN delivered judgments to the same effect.

[Solicitors—Messrs. Gregory, Rowcliffe, and Co., for Messrs. Hall and Smith, Bury; Mr. C. J. S. Harper.]

K.B. Div.
(Lord Hewart, C.J., Avory and Shearman, JJ.)
1928. May 8.

EVANS v. MORGAN.*

Poor Law—Relief by way of loan—Information against person relieved — Jurisdiction of magistrate—Poor Law Act, 1927 (17 and 18 Geo. V., c. 14), s. 46 (1).

A court of summary jurisdiction is not "a court for the recovery of small debts" within s. 46 (1) of the Poor Law Act, 1927.

This was a case stated by the stipendiary magistrate for the Division of Caerphilly Higher, Glamorgan. The appellant, on behalf of the guardians of the Merthyr Tydfil Union, preferred an information against the respondent alleging that the appellant had given to the respondent relief by

* Reported by J. W. HALL, Esq., Barrister-at-Law.

way of loan amounting to £23 6s. The respondent admitted the relief, but objected to the jurisdiction of the magistrate on the ground that a court of summary jurisdiction could not make an order against a debtor for the recovery of a civil debt except under statutory authority, and that there was no such authority applicable to relief by way of loan.

The appellant contended that such relief might be recovered in a court of summary jurisdiction by virtue of section 8 of the Poor Law Amendment Act, 1848, which was re-enacted in section 46 (1) of the Poor Law Act, 1927, which provides :—

"Any relief granted by way of loan to any person may be recovered in the county court or other court for the recovery of small debts for the district wherein the poor law union or the greater part thereof is comprised, on the plaint of the Board of Guardians."

The respondent replied that that section only applied to a county court or some other civil court for the recovery of small debts analogous thereto.

The stipendiary magistrate held that he had no jurisdiction to make an order under section 46 (1), and that an application should have been made under subsections (2) and (3) for recovery of the amount through the respondent's employer.

Mr. Vaughan Williams, K.C., and Mr. Wilfrid Lewis appeared for the appellant; Mr. Artemus Jones, K.C., and Mr. J. MacMillan for the respondent.

The Lord Chief Justice (Lord Hewart), in giving judgment, said that it was a little important to observe the contention of the appellant in the court below. It was one contention, in plain language, and was set out in the case as follows :—

"For the appellant it was contended that such relief may be recovered in a court of summary jurisdiction by virtue of section 8 of the Poor Law Act of 1848, which has been re-enacted in section 46, subsection 1, of the Poor Law Act, 1927."

The magistrate, having before him the objection taken by the respondent and the reply thereto, decided that the application should not have been made under section 46 (1), but under the later subsections, which contemplated a different procedure with the presence of the employer. He decided that he had no jurisdiction and dismissed the information.

It was quite obvious on reading the case that the contest before the magistrate was : What was the true meaning of section 46 (1) ? It was clear that the appellant's argument was that the magistrate's court was a court for the recovery of small debts. The magistrate rejected that argument, and was right in so doing. It was really sufficient to decide the case on that ground.

But they had listened to a long and interesting argument on another contention, exactly the opposite of that in the case—namely, an argument that, because the information was preferred before October 1, 1927, a right survived from the Poor Relief Act, 1819, section 29, to proceed in a court of summary jurisdiction, notwithstanding all the intervening legislation.

That was a point not taken below, it was the opposite of the point taken below, and it was not open to the appellant on the facts of the case. If it had been open it was clear that the Poor Law Act, 1927, was a consolidating statute, the object of which, *inter alia*, was to get rid of the remnants of the Act of 1819. He said "the remnants" of the Act of 1819, because section 29 was repealed by the Statute Law Revision Act, 1873, and the appellant's argument involved the proposition that the jurisdiction remained after the repeal of the section creating it. It would be *pessimi exempli* to allow a point to be taken which was not only not in the case, but was the direct opposite of the point taken in the case.

Mr. Justice Avory delivered judgment to the same effect.

Mr. Justice Shearman concurred.

[Solicitors—Messrs. Wrentmore and Son, for Mr. Frank T. James, Merthyr Tydfil; Messrs. Warren and Warren, for Mr. Edward Roberts, Dowlais.]

K.B. Div.
(Lord Hewart, C.J., Avory and Shearman, JJ.) 1928. May 11.

BENNETT v. EWENS.*

Gaming—Whist-drive—Charge for admission—Prizes—Offence—Betting Act, 1853 (16 and 17 Vict., c. 119), s. 1.

The holding of a whist-drive, with a charge for admission and the offer of prizes, is an offence against s. 1 of the Betting Act, 1853.

This was a case stated by Hampshire justices. The appellant, Mr. Sydney Bennett, a police officer, preferred an information charging Mr. Ivor Ewens, the respondent,

"That he on November 14, 1927, in a room in the Alexandra Hall, Bordon, unlawfully did use the said room for the purpose of certain money being received on behalf of the said occupier as and for the consideration of a certain assurance, undertaking, promise, or agreement to pay or give thereafter a certain valuable thing, to wit, a voucher on the happening of a certain event or contingency of and relating to a card game, to wit, whist, contrary to section 1 of the Betting Act, 1853."

On November 14, 1927, a notice outside the Alexandra Hall, Bordon, of which the respondent was the owner or occupier, advertised that a whist-drive would be held there that evening, that admission would be 1s., and that prizes would be given to the value of £5.

Two police officers attended, paid 2s., and received a card entitling them to play as partners throughout the evening. After each hand the partners moved so as to meet another pair of opponents. There were 39 or 40 tables, and after a certain number of hands had been played prizes of £3, £1, 12s., 6s., and 2s. were given in the form of vouchers on shops in the district.

After the whist-drive there was a "knockout competition," for which an entrance fee of 3d. was charged. In the first round three hands were played at each table, the losers then dropping out. In subsequent rounds one hand was played, till finally there was one pair undefeated, who received a voucher for £1. The losers in the final round received a voucher for 5s.

The appellant contended that the offence was proved, and that it was immaterial whether whist as played was a game of skill or not. He referred to *Rex v. Peers and Brown* (33 *The Times* L.R., 231), *Peers v. Caldwell, Taylor v. Caldwell* (32 *The Times* L.R., 190; [1916] 1 K.B., 371).

The respondent contended (1) that those cases related to automatic machines and were not applicable

* Reported by J. W. Hall, Esq., Barrister-at-Law.

to a game of cards; (2) that a card game was not a game within the meaning of the Betting Act, 1853; and (3) that whist as played on this occasion was a game of skill.

The justices, being of opinion that the game of whist as played was not an event or contingency, and did not amount to a betting transaction within the Act, dismissed the information.

Mr. W. E. Lloyd appeared for the appellant; the respondent was not represented.

The LORD CHIEF JUSTICE (Lord Hewart), in giving judgment allowing the appeal, said that he thought the case was too clear for argument. The case showed that money prizes to the value of £5 were offered in the whist-drive itself, the entrance fee being 1s., and that in the supplementary competition the entrance fee was 3d. and the prizes amounted to 25s. The justices came to the conclusion that the game of whist as played was not an event or contingency within the meaning of the Betting Act, 1853. The offence was the promising to give a valuable thing on the happening of a contingency relating to that game—namely, victory or defeat. The case was covered by *Peers v. Caldwell* (32 *The Times* L.R., 190; [1916] 1 K.B., 371) and *Rex v. Peers and Brown* (33 *The Times* L.R., 231). It was clear that the justices misdirected themselves and that the case ought to go back to them to convict.

MR. JUSTICE AVORY agreed.

MR. JUSTICE SHEARMAN agreed. There were formidable arguments put before the Court in 1915 that this kind of thing was not within the Betting Act, 1853. The Court decided the other way, and frequent attempts were made, especially in *Rex v. Peers and Brown* (33 *The Times* L.R., 231), to upset the decision but without success. It was now too late, and those cases settled the law.

[Solicitors—Messrs. Robbins, Olivey, and Lake, for Mr. F. V. Barber, Winchester.]

K.B. Div. (Swift, J., and a Special Jury.) 1928. May 7.

MORE v. WEAVER.*

Defamation—Libel—Privilege—Absolute privilege—Letter to solicitor from client.

Defamatory written communications made to a solicitor by a client for the purpose of obtaining professional advice and assistance are absolutely privileged.

This action was brought by Miss Kathleen Frances Mervin More, of Lancaster-street, W., who claimed from Miss Flora Gertrude Weaver damages for alleged libel which, she said, was contained in letters which the defendant had sent to her solicitor.

The defendant denied that the words complained of were defamatory, and pleaded that the letters were privileged.

The plaintiff appeared in person. Mr. Rayner Goddard, K.C., and Mr. O'Hagan were for the defendant.

Miss More gave evidence and called three witnesses.

Mr. GODDARD submitted that in so far as the statements complained of were libels, which he denied, they were privileged. He also contended that there was no evidence of malice. He said that there had been no decision on this particular point of privilege, but that the question of defamatory matter in letters written by a client to a solicitor had been referred to in several cases. He submitted that the letter in question was absolutely privileged, and that if it were held that the privilege was only qualified there was no evidence of malice.

His LORDSHIP, in giving judgment, said that although only a line or two had been abstracted from the defendant's letters, it was quite obvious that they were communications which she had made to her solicitor for the purpose of his advising and assisting her. In his opinion, by the law of this country, those communications were absolutely privileged. He thought that there was ample authority for that statement of the law to be found in the opinion of Lord Bowen in *Browne v. Dunn* (6 R., 67, at p. 80). He was fortified in his view that that was a correct statement of the law by a passage in "The Law of Libel," by the late Mr. Justice Fraser, at p. 190, where he suggested that the privilege in such a case as the present one was an absolute privilege, and that the decision in *Morgan v. Wallis* (33 *The Times* L.R., 495) would not now be upheld in the Court of Appeal.

In those circumstances he held that the communications in question were absolutely privileged, and that no action for defamation lay in respect of them. If he were wrong in that view, and those libels were the subject of a qualified privilege, then there was no evidence of any malice to destroy that privilege. In either event there was no case to go to the jury and the action failed. There would be judgment for the defendant with costs.

The plaintiff intimated that she would appeal.

[Solicitors—Messrs. Maitland and Co.]

* Reported by W. E. HURT, Esq., Barrister-at-Law.

K.B. Div. (Salter and Talbot, JJ.) 1928. Apr. 30.

BRISTOL CORPORATION v. VIRGIN AND OTHERS.*

Housing—Notice to repair premises—Service on owner of fee simple—Notice not complied with—Statutory charge—Priority to fee farm rentcharge previously reserved—Housing Act, 1925 (15 Geo. V., c. 14), s. 3 (3).

A charge conferred on a local authority in respect of repairs by section 3 of the Housing Act, 1925, is a charge on the whole of the proprietary interests of the premises, and therefore obtains priority over a fee farm rentcharge previously reserved on the grant of the fee simple.

Paddington Borough Council v. Finucane ([1928] W.N., 100) followed.

This was an appeal from a decision of his Honour Judge Parsons, sitting at the Bristol County Court, who had held that the statutory charge granted to a local authority by section 3 (3) of the Housing Act, 1925, in respect of repairs did not take priority over a fee farm rentcharge already granted by the owner of the premises.

Section 3 (3) of the Housing Act, 1925, provides: "Any expenses incurred by the local authority [on account of repairs] . . . may be recovered in a

* Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.

court of summary jurisdiction and until recovery of such expenses . . . the same shall be a charge on the premises. . . ."

The following statement of facts is taken from the judgment of Mr. Justice Salter :—

By an indenture dated September 30, 1905, the defendant Mr. Joseph Horsey Cordeux (therein called the grantor) granted to the defendant Mr. Alfred Charles Virgin (therein called the grantee) the land and house then in course of erection, 57, Seneca-street, Bristol, to hold the said premises unto the grantee to the use that the grantor should have in fee simple a perpetual rentcharge of £3 issuing out of the said land and premises, and subject to the said rentcharge and to the statutory powers and remedies for recovering payment thereof to the use of the grantee in fee simple. The indenture contained a covenant by the grantee to pay the rentcharge, to complete the house, to keep it in repair, to insure it and to reinstate it if damaged by fire or tempest and gave a right of re-entry for non-payment of the rentcharge or other breach of covenant. The defendant Virgin afterwards mortgaged to the defendants Bevan Hancock and Co.

The premises being premises to which the Housing Act, 1925, applied, and having become out of repair, the plaintiffs served a notice to repair on the defendant Virgin under section 3 of that Act, and in default of compliance by him with such notice they did the work at a cost of £60 10s.

The plaintiffs sued in the Bristol County Court claiming, *inter alia,* a declaration that they were entitled under section 3 of the Housing Act, 1925, to a charge on the premises in question, and that such charge ranked in priority to the mortgage of the defendants Bevan Hancock and Co. and to the fee farm rent vested in the defendant Cordeux. The learned Judge held that the plaintiffs were entitled to the charge and that it ranked in priority to the mortgage, but not to the fee farm rent.

The plaintiffs appealed.

The Hon. R. Stafford Cripps, K.C., and Mr. R. Gilbert appeared for the appellants ; the respondents did not appear and were not represented.

The following considered judgment was read by Mr. Justice Salter [after stating the facts as set out above].—The plaintiffs are admittedly entitled to a charge on the premises, and the question is whether such charge ranks in priority to the rentcharge of the defendant Cordeux.

By the Law of Property Act, 1925, section 1 (2) (*b*), a perpetual rentcharge in possession issuing out of land is a legal interest in or charge over land. By section 205 (1) (xxiii.) rentcharge includes a fee farm rent. By section 121 remedies are given for the recovery of annual sums charged on land if such remedies might have been conferred by the instrument creating the charge, and such remedies include a right to distrain and a right to enter and receive the rents. By section 146 (5) (*a*) "lease" includes a grant at a fee farm rent.

Section 3 (3) of the Housing Act, 1925, provides that the expenses incurred by the local authority on account of repairs may be recovered from the owner, "and until recovery of such expenses and interest the same shall be a charge on the premises." In the absence of authority it might be suggested that Parliament did not intend that this charge should override existing charges, but that it should be such a charge as the defaulting owner could give. The decided cases make it clear that the words are not to be so restricted, and if it is admitted that the charge may give rights that the owner could not confer I see no ground on which it can be held that the plaintiffs' charge does not rank in priority to this rentcharge. There is only one reported decision on these words in this section, but there are decided cases on similar words in earlier statutes. In *Tottenham Local Board of Health v. Rowell* (15 Ch.D., 378) expenses had been incurred by the plaintiffs for street works, and the charge was created by section 62 of the Local Government Act, 1858, which provided that "such expenses shall be a charge on the premises in respect of which they were incurred." Lord Justice James said at page 390 : "There is a distinct statutory charge in respect of those expenses, and it is not an unreasonable thing, because the property is improved. The works were done for the benefit of the property, fitting the property for building, and the like, and therefore it is not at all unreasonable or surprising to find it declared in an Act of Parliament in default of other remedies, that the property which is improved, and which has had the benefit, must bear the onus. There are the words 'that such expenses shall be a charge on the premises in respect of which they were incurred,' and the premises, no doubt, mean the property which has been improved, and not any particular interest in the property." In *Birmingham Corporation v. Baker* (17 Ch.D., 782) the charge was to secure repayment of sewering and paving expenses and was created by section 257 of the Public Health Act, 1875. The defendant, a mortgagee, contended that the charge was only on the interest of the owner as defined by the statute and that her mortgage had priority. The words of the section are "and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred." Sir George Jessel, Master of the Rolls, said at page 785 : "The works in question are an improvement to the property, not to the interest of any particular owner of the property, but of every owner of the house ; and consequently there is no good reason in the world why there should not be a charge on the property, that is, on the respective interest of every owner of the property according to the value of his ownership." After citing *Tottenham Local Board of Health v. Rowell* (*supra*) he said : "I agree, it is most rational that the property which has been improved should bear the burden, and that all the houses in the street shall bear their burden in proportion. Now, the houses *per se* being inanimate, they cannot bear the burden. If there be a charge on the houses it is a charge on the total ownership—if I may call it so, on the proprietorship ; not on any particular section or portion of the proprietorship, but on the whole." In *Tendring Guardians v. Dowton* ([1891] 3 Ch., 265) the charge created by section 257 of the Public Health Act, 1875, was held by the Court of Appeal not to override a covenant restricting the use of the land charged for the benefit of an adjoining owner. Lord Halsbury, Lord Chancellor, cited with approval the judgment of the Master of the Rolls in *Birmingham Corporation v. Baker* (*supra*). Lord Justice Fry said : "I think there is nothing to justify a declaration that the charge overrides the restrictive covenant. All the Act does is to create a charge on the premises—that is, on the land—that is, on all the interests of the owners of the land."

The only reported decision on the present section is a judgment of Mr. Justice Russell in *Paddington Borough Council v. Finucane* ([1928] W.N., 100). The learned Judge said that the first point to be determined was what was the effect of section 3 of the Housing Act, 1925, as regards the charge it

purported to give. Was it a charge upon all the proprietary interests in the property? On the authorities that had been cited there was no difficulty in saying that the section, when it conveyed a charge on the property, meant not a charge on the interest of the owner of the rackrent in the premises but a charge upon the entirety of the interests of the premises, the whole proprietary interests of the premises.

The interests in land which have been postponed to the statutory charge in the above cases have been interests created by grant. The interest of the defendant Cordeux is created by reservation. The learned county court Judge, if I apprehend his judgment rightly, relied on this distinction, but it seems to me immaterial. The language used in the cases cited above is studiously wide and general. I think that the interest of the defendant Cordeux under his rentcharge is part of the total ownership or total proprietorship. I think it is part of the interests of the owners of the land and part of the entirety of the interests in the premises and of the whole of the proprietary interests.

On the words of the statute and the authorities above cited I think that the plaintiffs' charge must rank in priority to the rentcharge of the defendant Cordeux. The appeal must be allowed and the declaration amended accordingly.

MR. JUSTICE TALBOT.—I am of the same opinion. I had prepared a judgment in this case but it follows so closely the judgment which has just been delivered that no useful purpose would be served by reading it.

I would only add that there are two cases which were quoted to us in argument, the case of *Creed v. Creed* (11 Cl. and F., 491, at p. 508), see the judgment of Lord Cottenham, and *Pitt v. Lord Dacre* (3 Ch. D., 295, at p. 299), which show that, apart from the special statutory enactments which have been referred to, such a rentcharge as this is an interest in the land itself and a part of the property, and, it may also be worth while to add, there is really no distinction other than a technical one between the position of an owner in fee subject to a term of 2,000 years, as in the case of *Paddington Borough Council v. Finucane* ([1928] W.N., 100) and that of the owner of the rentcharge in the present case.

[Solicitors—Messrs. Robins, Hay, Waters and Hay, for the Town Clerk, Bristol.]

K.B. Div. (Branson and MacKinnon, JJ.) 1928. May 1.

RATKINSKY v. JACOBS.*

Landlord and Tenant—Restrictions—Decontrol—Whole dwelling-house decontrolled—Part subsequently let—Whether decontrolled—Rent and Mortgage Interest Restrictions Act, 1923 (13 and 14 Geo. V., c. 32), s. 2 (1).

Where a dwelling-house becomes decontrolled by reason of the landlord's coming into possession of the whole of it, and where the landlord subsequently lets part of that dwelling-house, the part so let remains decontrolled.

Cohen v. Gold (43 *The Times* L.R., 376; [1927] 1 K.B., 865) and *Lloyd v. Cook* (44 *The Times* L.R., 455) not followed.

Prout v. Hunter (40 *The Times* L.R., 868; [1924] 2 K.B., 736) and *Finey v. Gougoltz* (42 *The Times* L.R., 501; [1926] 2 K.B., 322) applied.

This was an appeal by a tenant from a decision of his Honour Judge Cluer, sitting at the Shoreditch County Court, in favour of a landlord who claimed possession of premises which were within the limits of the Rent Restriction Acts.

In February, 1927, the plaintiff, Mr. Morris Ratkinsky, had become the landlord of 80, Cazenove-road, Stoke Newington, N., by purchasing the house from his father, Mr. Barnet Ratkinsky. The latter had bought the house in 1917, and had let four rooms and a scullery to a Mr. Cohen, who vacated possession in February, 1926. Mr. Barnet Ratkinsky was then in possession of the whole house, and in May, 1926, he let to the defendant, Mr. Solomon Jacobs, four rooms at a rent of 30s. per week. Of those four rooms, three had formerly been occupied by Mr. Cohen, and one had been in the occupation of the landlord.

On November 21, 1927, the plaintiff served notice to quit on the defendant, who claimed to be protected under the Rent Restriction Acts. The plaintiff then brought an action for possession, and the county court Judge held that the premises were decontrolled under section 2 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, which provided:—

"Where the landlord of a dwelling-house to which the principal Act [the Act of 1920] applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house. . . ."

The county court Judge made an order for possession.

The tenant appealed.

Mr. D. Weitzman appeared for the appellant; Mr. A. Jackson for the respondent.

MR. WEITZMAN contended that the premises in question had never become decontrolled. He relied on *Cohen v. Gold* (43 *The Times* L.R., 376; [1927] 1 K.B., 865) and *Lloyd v. Cook* (44 *The Times* L.R., 455) as showing that, to effect decontrol, it was essential that the landlord should have come into possession of the "dwelling-house" constituted by the four rooms let to the defendant. Possession of the larger structural house, out of which the new dwelling-house was carved, was not sufficient.

MR. JACKSON contended that the argument of the appellant involved the contradiction that the greater did not include the less. He submitted that the decisions in *Cohen v. Gold* (*supra*) and *Lloyd v. Cook* (*supra*) were inconsistent with the decisions in *Prout v. Hunter* (40 *The Times* L.R., 868; [1924] 2 K.B., 736); *Brooks and Others v. Liffen* (44 *The Times* L.R., 350; [1928] 1 K.B., 441); and *Oakley v. Wilson* (43 *The Times* L.R., 521; [1927] 2 K.B., 279). It was clear that the Acts applied to premises *in rem*. The question here at issue was what was the status of this house. That fact was decided in February, 1926, when Cohen vacated possession, and the house thereby became decontrolled. He referred

* Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.

also to *Finey v. Gougoltz* (42 *The Times* L.R., 501 ; [1926] 2 K.B., 322).

Mr. Justice Branson.—This is an appeal from a decision of his Honour Judge Cluer, who found for the plaintiff in the following circumstances. The plaintiff's father had been the owner of a house, 80, Cazenove-road, Stoke Newington. He had bought the house in 1917, and had let four rooms and a scullery therein to one Cohen, while he and his family resided in the rest of the house. Cohen left in February, 1926, and the plaintiff's father came into possession of the rooms occupied by him, and then had the whole house in his legitimate possession. In May, 1926, he let to the defendant three of the rooms which had been previously let to Cohen, and one room which he had previously occupied himself. In 1927 the father sold the house to the son, who was the plaintiff in the action before the county court Judge. Notice to quit was given by the plaintiff to the defendant, and the question in the action was whether the plaintiff was entitled to the possession of these four rooms as against the defendant or whether the defendant was protected by the Rent Restriction Acts. The county court Judge held that the plaintiff was entitled to possession. He said that it was admitted that three of the rooms now occupied by the defendant became decontrolled in February, 1926, and that he decided that the fourth room also was decontrolled, because at the time when the Act of 1923 came into operation it was in the possession of the landlord. He made an order for possession in three weeks, and gave the plaintiff the costs of the hearing. From that decision the defendant appeals, and the question is whether the county court Judge was right in holding that these four rooms were decontrolled, or whether he was wrong.

Mr. Weitzman for the appellant relies very strongly on the authorities of *Cohen v. Gold* (43 *The Times* L.R., 376 ; [1927] 1 K.B., 865) and *Lloyd v. Cook* (44 *The Times* L.R., 455), and I think it right to say that if those cases were rightly decided the county court Judge here was wrong. I see no means of distinguishing *Lloyd v. Cook* (*supra*) from the present case, though it might be possible to distinguish *Cohen v. Gold* (*supra*). If the matter rested there, I should be inclined to follow the practice of this Court and to say that, whatever my own personal opinion on the correctness of the decisions might be, I should feel it right to follow the decisions already given, but the position does not remain there. Authorities have been cited to us that are not consistent with either decision—authorities two of which are judgments of the Divisional Court and one a decision of the Court of Appeal. Those authorities are, taking them in order of date, *Prout v. Hunter* (40 *The Times* L.R., 868 ; [1924] 2 K.B., 736), *Finey v. Gougoltz* (42 *The Times* L.R., 501 ; [1926] 2 K.B., 322), and *Brooks and Others v. Liffen* (44 *The Times* L.R., 350 ; [1928] 1 K.B., 441).

There being, then, those two lines of authorities, which to my mind are inconsistent, it becomes my duty to express my own opinion on the construction of the statute, and to decide for myself the point raised.

The decision of the case depends primarily on the true construction of section 2 (1) of the Rent and Mortgage Interest Restrictions Act, 1923. [His Lordship read the subsection and continued.] Applying the language of that section to the facts of this case as found by the county court Judge, it appears that, in regard to the whole of the house with the exception of the four rooms let to Cohen, the owner was in possession at the date of the passing of the Act, and with regard to the four rooms let to Cohen, the owner and landlord came into possession after the passing of the Act—namely, in February, 1926. When Cohen had gone, therefore, the whole of the house was in the possession of the landlord, and it seems to me that unless one has got to depart from the ordinary meaning of the language used, the subsection applies exactly to the situation created, and the result is that the principal Act ceases to apply to that house. It was decided by the Court of Appeal in *Prout v. Hunter* (*supra*) that the Acts apply to things and not persons—that they operate *in rem* and not *in personam*. If that is correct, the Act, having operated *in rem* on that house has decontrolled that part which was in the possession of the landlord at the passing of the Act, and also has decontrolled that part which came into the possession of the landlord when Cohen left in 1926, and consequently the whole house has ceased to be subject to the application of the principal Act.

How is it suggested that that is not the true position ? It is said, in the first place, that one must not regard that part of the house which was occupied by the owner at the passing of the Act as a dwelling-house, because " dwelling-house " must mean a dwelling-house to which the Act applies, and inasmuch as that part of the house was not let to anybody, there was nobody who was a landlord of it so as to effect decontrol. For that proposition the authority of *Cohen v. Gold* (*supra*) is cited. That appears to have been a decision that a person cannot be said to be a landlord in respect of any part of a house which has not been let. I confess that, if that is the true meaning of the language of the subsection, I find it difficult to see how the first part of the subsection could have any application. That that is not the real meaning to be given to the language appears from the decision of the Divisional Court in *Brooks and Others v. Liffen* (*supra*). Mr. Justice Talbot, who was a party to the decision in *Cohen v. Gold* (*supra*), points out that the word " landlord " is used loosely in the subsection. Mr. Justice Salter says : " The word ' landlord ' must be loosely used in that subsection because, strictly speaking, there cannot be a landlord without a tenant and a tenure, and the subsection deals with a case where there is neither tenant nor tenure. ' Landlord ' clearly must mean nothing more than ' owner.' " If landlord means nothing more than owner, why was not that part of the house, which was in the possession of the plaintiff's father, decontrolled—or rather, let me say, taken out of the application of the principal Act ? That is my view of the decision in *Cohen v. Gold* (*supra*).

With regard to the case of *Lloyd v. Cook* (*supra*), as I understand the decision of the Court, it amounts to this. Three rooms which had been let to a tenant had come back into the possession of the landlord and had therefore ceased to be within the principal Act ; but two of them were subsequently re-let to another tenant, and thereby a new dwelling-house was created, which was not a dwelling-house erected or in the course of erection on April 2, 1919, or one which had been bona-fide reconstructed, so as to come within section 12 (9) of the Act of 1920 ; and, therefore, as soon as by the re-letting of the rooms a new dwelling-house had been created, that dwelling-house fell within the operation of the Act, and the rooms composing it, which had once been decontrolled, ceased to be so, and came again within the principal Act. In the first place, that decision seems to offend against the decision of the Court of

Appeal in *Prout v. Hunter* (*supra*) by disregarding the principle there laid down that the Acts operate *in rem* ; and, secondly, it is contrary to the decision in *Finey v. Gougoltz* (*supra*). It is perfectly true that the particular point taken here was not taken and argued before the Court which decided *Finey v. Gougoltz* (*supra*) ; but still the fact remains that that decision must be wrong, if the decision in *Lloyd v. Cook* (*supra*) was right. I find it impossible to reconcile the two cases.

Considering, therefore, that the decision in *Finey v. Gougoltz* (*supra*), coupled with the decision of the Court of Appeal in *Prout v. Hunter* (*supra*) and my own view on the construction of the Act, lead me to the conclusion that the decision of the county court Judge was right, I think, in spite of other decisions to the contrary, it is my duty to hold that this appeal should be dismissed.

Mr. Justice MacKinnon.—I agree. At the date of the plaint the plaintiff was the owner of the whole of 80, Cazenove-road and all the rooms it contained. Four rooms therein were let to the defendant, and the plaintiff had served on the defendant notice to quit, and claimed possession of those four rooms. At common law there was no defence to the plaintiff's claim, but the defendant said that his four rooms constituted a "dwelling-house" within the meaning of section 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and therefore that, by reason of section 5 of that Act [re-enacted by section 4 of the Rent and Mortgage Interest Restrictions Act, 1923] no order for the recovery of possession could be made in respect of them. To that contention the plaintiff replied that the rooms were decontrolled by section 2 (1) of the Act of 1923. He agreed that the Act of 1920 did apply to them, but contended that as his father, who was his predecessor in title, was in possession of one of the rooms let to the defendant at the passing of the Act, and came into possession of the other three rooms after the passing of the Act by the departure of the former tenant Cohen, the Act of 1920 had ceased to apply to the dwelling-house for which the defendant claimed protection. The county court Judge decided that that rejoinder of the plaintiff was good and valid.

Apart from any authority, I should have thought that there could not be the slightest doubt that the county court Judge was right. It seems to me quite clear that where section 2 (1) of the Act of 1923 speaks of "landlord" and "tenant" it is referring to the two parties who will be protagonists before the Court in proceedings under section 5 of the Act of 1920. That section provides : "(1) No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom shall be made or given," &c., and there are subsequent references to a "landlord" in various places, *e.g.*, in clause (*c*). I think that in section 2 (1) of the Act of 1923 the terms "landlord" and "tenant" are not used technically, and that "landlord" is not used in the sense of a person who has let a dwelling-house to a tenant, so that there is a relation of tenure between them, but that "landlord" and "tenant" merely mean the parties to whom, but for that section, the provisions of section 5 of the Act of 1920 would apply. I am encouraged in that view by the consideration that section 2 (1) speaks of a landlord of a dwelling-house being in possession of the whole house at the passing of the Act. If "landlord" is there used in the technical sense, the landlord could be in possession of the dwelling-house at the passing of the Act only if he was in possession in defiance or in breach of the rights of the tenant. There could be no other occasion or means by which any landlord, using the term strictly, could be in possession of a dwelling-house at the date of the passing of the Act.

I am further encouraged in that view by the observations of Mr. Justice Salter in *Brooks and Others v. Liffen* (44 *The Times* L.R., 350 ; [1928] 1 K.B., 441) in the passage already cited by Mr. Justice Branson. Taking that view further, I think it perfectly clear that the plaintiff's contention in this case was right, and that the landlord was in possession of one of the rooms subsequently let to the defendant at the passing of the Act, and came into possession of the remaining three after the passing of the Act, and that from that date the principal Act ceased to apply to the four rooms or to any part of them.

It was argued on behalf of the appellant that that view was wrong, and reliance was placed principally on the decision in *Cohen v. Gold* (43 *The Times* L.R., 376 ; [1927] 1 K.B., 865), where, as I understand, the other view was taken, that the term "landlord" in this section has a highly technical meaning. Mr. Justice Talbot there said : "The Act does not apply to a case where possession by the person who is now in fact the landlord was not possession at the material time of a dwelling-house let separately, nor was possession by a landlord : and therefore there was no possession of the whole of the dwelling-house, that is at the passing of the Act of 1923." That followed on an observation by Mr. Justice Acton in the course of the argument. "How can you say that the plaintiff was 'landlord' of this dwelling-house at the passing of the Act of 1923, when there was no tenancy existing ?" Not only does there seem to me to be a contradiction and a difference between the reasoning in *Cohen v. Gold* (*supra*) and that referred to in *Brooks and Others v. Liffen* (*supra*), but the principle applied in *Cohen v. Gold* (*supra*) seems to me to be inconsistent also, first with the decision in *Oakley v. Wilson* (43 *The Times* L.R., 521 ; [1927] 2 K.B., 279), in which case the Divisional Court was constituted by the same two Judges, and, secondly, quite inconsistent with the decision in *Finey v. Gougoltz* (42 *The Times* L.R., 501 ; [1926] 2 K.B., 322). If *Cohen v. Gold* (*supra*) is right, *Finey v. Gougoltz* (*supra*) must, I think, be wrongly decided. *Finey v. Gougoltz* (*supra*) was referred to in the argument for the appellant in *Cohen v. Gold* (*supra*), but no reference seems to have been made to it in the judgments.

In these circumstances we are in the position of considering two lines of authority based on inconsistent reasoning, and it is unhappily our duty to say which seems to be correct. I have no doubt, speaking for myself, that the view expressed in *Cohen v. Gold* (*supra*) that "landlord" in section 2 (1) of the Act of 1923 has the highly technical meaning of a person who has a tenant, so that a relation of tenure exists between them, is not correct. I think that landlord there means "owner" or one of the two parties to the litigation contemplated by section 5 of the Act of 1920, and that therefore in this case the landlord was in possession or had come into possession of the whole house.

In my view, therefore, the decision of the county court Judge was quite correct, and this appeal ought to be dismissed.

Leave to appeal was granted.

[Solicitors—Mr. L. Silkin ; Messrs. J. Howard Smith and Skelt.]

House of Lords.
(Viscount Sumner, Lord Warrington of Clyffe, and Lord Atkin.)
1928. May 11.

BUSBY AND ANOTHER v. AVGHERINO AND OTHERS.*

Tithes—City of London—Rate prescribed by statute—Exemption from prescribed rate—Premises for which less paid before Act—Onus of proof—37 Henry VIII., c. 12.

By the Act 37 Henry VIII., c. 12, and a decree made in pursuance of it in the same year and having the force of a statute, the lessees of houses and all other hereditaments (with certain immaterial exceptions), situated in the City of London, are liable to pay a tithe of 2s. 9d. for every rent of 20s. by the year, "and so above the rent of 20s. by the year . . . by the rate aforesaid." The decree contained a proviso that in the case of premises in respect of which less sums had been accustomed to be paid for tithes before 1545, the date of the Act, the tithes should be paid only at the accustomed rate. In an action by the owners of tithes against the occupiers of premises in the City for tithe at the rate prescribed by the statute,

Held, that the onus was on the defendants to prove that the tithe paid before 1545 in respect of the premises was less than the sum prescribed by the statute, and (Lord Atkin dissenting) that they had not discharged that onus, and the action succeeded.

Appeal from decision of the Court of Appeal (43 *The Times* L.R., 367 ; [1927] 2 Ch., 33) allowed.

This was an appeal from a decision of the Court of Appeal (43 *The Times* L.R., 367 ; [1927] 2 Ch., 33) reversing a judgment of Mr. Justice Tomlin (43 *The Times* L.R., 91).

The appellants were the executors of the will of Mary Busby and, as such, were the owners of all the rectorial or freehold tithes issuing out of, or payable for or in respect of, such parts of 15, Great St. Helen's, in the City of London, as were situated in the parish of St. Helen's, Bishopsgate.

The respondents had for various periods since March 25, 1921, held and occupied portions of 15, Great St. Helen's, all of which were situated in the parish of St. Helen's, Bishopsgate.

The tithes were payable under and by virtue of the statute 37 Henry VIII., c. 12, "An Act for Tithes in London," and a decree made thereunder in the same year. By that decree the tithes were to be computed at the rate of 2s. 9d. upon every 20s. and at 1s. 4½d. upon every 10s. of the rent of the premises in respect of which the tithes were payable, but by clause 18 of the decree it was stated that where less sums had been accustomed to be paid for tithes, those tithes should only be paid at the accustomed rate.

The appellants claimed to recover as from March 25, 1921, tithes at the rate of 2s. 9d. for every 20s., or 1s. 4½d. for every 10s. of rent. The respondents alleged that the sum of 4s. 9d. a quarter, or 19s. per annum, was accustomed to be paid for tithes in respect of 15, Great St. Helen's at and before the date of the decree, and they admitted liability to that extent only and paid into Court the sum of £3 6s. 6d. to answer the tithes at that rate from March 25, 1921, to the beginning of the action.

It was admitted by the appellants that tithe at the rate of 2s. 9d. in the £ never had been paid in respect of No. 15, Great St. Helen's, but they contended that the onus was on the respondents to prove the alleged customary payment.

Mr. Justice Tomlin held that the amount of tithe payable had been in doubt over a long period, arrangements having been made from time to time between the titheowner and the tithepayer, and that it was not possible to infer that during the periods when there was no evidence of payment, 19s. per annum was paid rather than some other sum. He therefore held that the respondents were liable to pay tithe in respect of their premises at the rate of 2s. 9d. in the £.

The Court of Appeal (the Master of the Rolls, Lord Justice Sargant, and Lord Justice Lawrence) held, on the evidence, that 19s. was a customary payment within the meaning of the proviso in clause 18 of the decree, and that the action failed.

Mr. G. B. Hurst, K.C., and Mr. Collingwood appeared for the appellants ; Mr. Herbert Preston, K.C., and Mr. Lionel Cohen for the respondents.

VISCOUNT SUMNER.—My Lords : The rectorial and freehold tithes, payable in respect of 15, Great St. Helen's, E.C., are vested in the plaintiffs, whose title is not contested, and the defendants, as occupiers of that tenement, are bound in respect of it by 37 Henry VIII., c. 12, and by section 2 of the decree, which it incorporates, to pay or make payments in the nature of tithe at the rate of 2s. 9d. in the £ of yearly rent, unless section 18 applies, which by way of proviso enacts that "in places where less sum than after 2s. 9d. in the pound rent hath been accustomed to be paid . . . the said inhabitants shall pay but only after such rate as hath been accustomed." In principle the burden of establishing such a customary payment must rest on those who set it up, because it is a particular exception out of the general charging provision made for all cases where no such customary rate exists, and it has long ago been laid down in the decided cases that such a defence must bear the onus of proof (*Bennet v. Trepass,* Gwillim, 633 ; 4 Brown's Parl. Cases, 650; *Warden, &c., of St. Paul's v. Kettle,* 2 Ves. and B., 1). I need not elaborate them.

The burden is a very real and a heavy one. The impropriator is entitled to the statutory charge unless an accustomed rate can be proved applicable to the tenement in question, and existing in respect of it in A.D. 1545. We need not now trouble with the length of its anterior existence. If it can be carried back to the time when the Act passed, under the circumstances of this case that will do. We need not go back to Richard I.

Proof is required but it is hard to come by. The rules of evidence are liberal in matters of such antiquity, but they remain rules of evidence and, with every willingness to admit all such inferences as can properly be drawn, we must distinguish clearly between reasonable inference and plausible conjecture. The defendant must have the benefit of all legal presumptions, but he can take nothing by any resort to mere surmise, however ingenious, and

* Reported by H. B. HEMMING, Esq., Barrister-at-Law.

his proof, though scanty, must still be "rational and solid," (*per* Lord Eldon, L.C., in *Warden, &c., of St. Paul's, London v. Morris,* 9 Vesey, 155, at p. 170).

It is not only the pedigree of the accustomed payment that must be proved, but its amount. The tithepayer has to pay something, whether on the footing of the statutory rate on his rental value or under section 18. It is for him to show what the sum is; otherwise he fails. I think there is a further material consideration in connexion with this burden of proof. The tithepayer cannot succeed merely by reason of the weakness of the titheowner's proof. In aid of his own affirmative case, he can make use of the barrenness of the claimant's, but if the claimant proved nothing, the occupier would still have to trace his accustomed sum back to 1545. It follows that a very different significance attaches to weak spots in the defendants' claim from that which at most can arise from gaps in the case of the titheowner. The latter is under no duty nor is it much to his interest to keep documentary records of transactions in the past. The statute of Henry VIII. is his charter, and, the more rental values have varied, the less can it matter to him what actual sums have been paid in particular past years. With the tithepayer it is otherwise. His interest has been all along to preserve documentary evidence of the continuous payment of an accustomed sum, and he and his predecessors have disregarded it at their peril. A dozen receipts at suitable intervals for 19s. (which is the sum to which the defendants pledge themselves), being the tithe as anciently "accustomed due from X. Y.," would have concluded the matter. Equivalent evidence will serve, but mere comment on the claimants' shortcomings avails nothing.

At the trial extracts from various books and papers, forming part of the Vestry archives, were produced, and they were to the following effect. In 1632 one Thomas Jennings paid, along with others, a sum for five years' tithe in advance, which makes his annual tithe 35s., and in 1654 he is entered as liable to pay the same amount in respect of a tenement, which, it is reasonably plain, included the site of what is now No. 15, Great St. Helen's. It is common ground that in these two entries Thomas Jennings is the same person and the 35s. is payable in respect of the same tenement. In 1705 Henry Durley appears as liable for an annual payment of 19s. The respondents' case is that his 19s. was arrived at because five houses, of which Thomas Jennings's house of 1632 was one, were so altered as to become six. This, in itself, it is settled, would not break the continuity or uniformity requisite to an "accustomed sum" within section 18 (*Williamson v. Gosling,* Gwillim, 902). The rearrangement of the sums payable is another matter. In 1714 the house is again entered as liable to the same payment, the tithepayer's name now being Jane Bowie. The record of 1714 was printed in 1795, but here Jane Bowie's payment is 16s. In 1822, on the occasion of a sale of the tithe, the particulars of sale show the house in the occupation of one Tottie, with 19s. as the sum payable, and it has been assumed, though I think without any direct evidence, that Tottie must actually have paid it, but for how long does not appear. Another statement got out from the records of the parish by two assistant overseers for the purposes of this case shows actual payments for this house, then occupied by a wine merchant named Page, from Midsummer, 1796, to Midsummer, 1807, of only 16s. per annum. There is no material to bridge the gap between 1807 and 1822 or between Page and Tottie, so far as extracts from original documents go, but a quotation from Cox's Annals of St. Helen's, which was admitted without objection, as were all the other documents in the Record, throws some light on it, if the author was well informed. It appears that about 1805 the Reverend Edward Cook bought these tithes for under £700 from a predecessor named King, who had bought them for £505 in 1795. He sold them in 1822 by public auction for £6,300. The tithe payable according to the records of 1714 and 1795, above mentioned, had been rather over £64 6s. per annum. On a comparable basis for the return from such an investment, it must have been increased to something like £560. The explanation is that Mr. Cook was a hard man and perhaps no great credit to his cloth. He screwed up the tithe; he bullied the tithepayers, and he spoke disrespectfully of Chief Barons of the Exchequer. It is not, however, necessary to suppose that he got more than his rights, or that the occupiers were forced by his resolution to abandon pretended but groundless claims to a customary payment. The erection of new buildings on ground never built on before or on the site of sheds, which were not liable to tithes, may explain it (*Bramston v. Heron,* Gwillim, 1314). In 1822 the particulars of sale state that there were 13 houses, of which No. 15 was one, in respect of which the tithe payments were called customary, but, adds the document, they were not all so admitted by the vendor. Extracts from statements of tithe for 1841, 1854, and for two later years, not named, show that in these years the sum of 19s. had been raised to 40s. This is stated to be "by composition" with the tenant at some date earlier than 1841. They distinguish between payments under composition and customary payments, and No. 15 now comes under the former and not under the latter head. The collector, who drew up the document of 1854, has a significant note:—

"Statement of the Tithes of St. Helen's parish, showing, as far as yet ascertained, what are payable under leases, agreements and compositions. The remainder, some being customary payments, the majority payments acquiesced in and received but subject to increase. It appears by the old payments they have varied as to a large portion. In these cases, therefore, there can be no customary payments."

With this extract there should be compared the document which shows how this series of parish records originated. Shortly before the Restoration the tithes were in the hands of one John Langham, who commenced proceedings by English bill in the Exchequer against Spurstowe and others. He alleged that they occupied premises for which, "either by custom some rate or customary payment or sum of money either according to the yearly rents or values" of those premises "or otherwise had been used to be yearly paid to the proprietors or farmers of the rectory or else according to the decree made for payment of tithes in London" in 1545. The Court then made an order for the trial of a feigned issue at law, in which Spurstowe and his co-defendants were put to proof of the custom and customary payments on which they relied in answer to the plaintiff's claim. This issue was never tried, but in February, 1662, an order was made by consent by which the defendants were to pay, according to the several rates and customary payments set forth in their several and respective answers, and the decree concluded, "and shall continue the payment of the same for the future accordingly for so long as the said plaintiff shall continue impropriator of the said rectory and

the said defendants, each one respectively, shall continue inhabitants of their respective houses."

The recitals show that the plaintiff (how far truthfully we cannot tell) accused the defendants of conspiring to defeat his just claims by concealing from him in concert the true and improved rents of the houses and the alleged customary sums that they had been in the habit of paying and the ancient rents, according to which they claimed that their rates of payments should be fixed. It is accordingly not clear that the defendants' contention was rested under section 18 on sums "accustomed" in or before 1545 and not rather on ancient rents then and previously payable, to which, notwithstanding any increase in the value of the premises, they contended that the 2s. 9d. was alone applicable. Their respective answers are not forthcoming. Thomas Jennings was not a party to these proceedings at all. The suggested reason—namely, that he was a man too honest to conceal anything, who made a clean breast of his 35s. and so got its customary character acknowledged—strikes me as being ingenious but fanciful.

The Vestry, however, took the matter up, apparently considering this settlement, though only a personal one between the parties themselves, to be of general importance to the parish. The Old Register Book, dated 1705, contains a comparative tabular statement setting out for 1654 and 1705, respectively, along with the quarterly sums payable, the names of occupiers, far beyond those who were defendants in 1662, and adds indications of changes made, when the number of the houses was increased or diminished by alterations in them, which resulted in new allocations of payments. It is headed rather inaccurately, "A tithe book for St. Helen's parish, reduced to a settlement made by a decree in the Court of Exchequer, 9th February, 1662, in a cause between Sir John Langham and the parishioners of the said parish, defendants, as the same appears by tithe books bearing date 1653-1657, which were made exhibits in the said cause on behalf of the said parishioners."

My Lords, I think that from this it may reasonably be inferred that on some ground, now unknown, it was generally thought among the vestrymen of 1705 that the settlement of 1662 was valuable to them, as securing parishioners generally from increases in the sums payable in respect of tithe, and that an elaborate record was made up accordingly. On what this was founded we do not know. The personal settlement of the action is apparently relied on, for, rightly or wrongly, the actual named defendants are spoken of as if they had defended on behalf of all other parishioners; apparently, also, there were either no earlier records, except the list of 1632, or they did not carry matters so far as the decree did, nor is there anything before us to show that any information then existing with regard to the period before 1654 contained anything to connect the payments of that day with the customs of 1545, except by mere conjecture. At any rate the parish "Paper Book" for Vestry orders, which was first directed to be kept in 1558, has not yielded anything further for use in this case.

This history, extending over nearly 200 years, is in the amount of its information probably all that could have been expected. It was admitted at the hearing, though I do not know on what material, that payment of 19s. per annum had been made from 1705 to 1714. Of course, nobody supposes that some payments were not made in other years between 1632 and 1822, though it is equally improbable that there were no years in which the tithe for No. 15 went unpaid. This, however, is not the serious part of the case, for it is not non-payment but variable payment that must weaken and may destroy the defence to the titheowners' claim (*Andrews v. Drever*, 3 Cl. and F., 314; *Payne v. Esdaile*, 4 *The Times* L.R., 781; 13 App. Cas., 613; *Esdaile v. City of London Assessment Committee*, 3 *The Times* L.R., 770; 19 Q.B.D., 431, at p. 441).

So much for the positive side of the respondents' case. In view of this affirmative evidence the absence of evidence *contra* becomes negatively important. (1) There is no direct proof of any payment that can be shown to have been calculated at 2s. 9d. in the pound on any known rent. (2) Neither 35s. nor 19s. nor 16s. represents, at 2s. 9d. in the £, any rent exactly expressible in current coin of the realm without fractions. (3) No rent, but one, is directly proved for No. 15 or for Thomas Jennings's larger holding and that is £50, reserved by lease to John Page for 21 years from Christmas, 1789. An attempt was indeed made to show that £50 must also have been the rental value nearly 100 years before, when the first valuation was made for land tax. I think this failed. It rested on the assessment for Bishopsgate Ward for 1793, when £8 15s. "to pay" was attributed to Page, £50 being put opposite his name, almost certainly as the value on which that sum was payable. Why any value should be entered in 1793 does not appear. None is mentioned in such previous documents as we have. The suggestion was made that, though the record of the actual valuation for Bishopsgate Ward is missing, still as the original valuation to land tax in 1692 was the only one ever made, it must be supposed to have been repeated in all subsequent assessments, and that, as that valuation is stated by historians to have been careless and dishonest, £50 must be taken to have been too low a value even at the end of the 17th century, for all the mistakes must be deemed to have been made against the Crown. For my part I am not satisfied that £50 in the assessment of 1793 is meant to be the original valuation to land tax at all, and, if so, it carries us no farther. (4) Finally, from first to last there is no record or even evidence of any litigation between the impropriator of the day and the successive tenants of No. 15 or of the tenement of Thomas Jennings for the recovery of any sum for tithe. Whether they did not pay or did not pay enough, there is a complete absence of any proof that any attempt was made to collect more by process of law and, until the Reverend Mr. Cook came on the scene, there is no proof that the impropriator ever pressed for more than he was getting.

How far then, if at all, does this fall short of satisfying the burden of proof, which rests on the respondents? For the period from 1871 to the commencement of this action it is enough to say that nothing is proved either way. Tithe, as such, was not then being collected from tithepaying occupiers. Some family arrangement took its place, and the former position is unaffected. In the period before 1871—the period of the 40s. payments by arrangement, preceded by several years in which no payment is recorded at all—it is the surmise of the Court of Appeal that the tithepayer may have paid this greatly increased but still unimportant sum rather than go to the cost and expense of contesting it. That may be, but the same explanation applies equally in earlier centuries in favour of the titheowner and, unless the 19s. is established between 1545 and 1822, it leaves things as they were. Between 1714 and 1795 or earlier, he may have arranged to take 19s. for the time being, rather than go to law.

This was the explanation which commended itself to Mr. Justice Tomlin. Acquiescence, so explained, does not evidence an origin for the 19s. payment dating from 1537 or 1545.

In the period between 1705 and 1882 falls the period of years when 16s. was apparently the sum that was recognized. *Prima facie* it is evidence that the 19s. was not a uniform customary sum, but the tithepayer is at liberty to explain it, if he can. It might be due to compassion for the poor ; it might be due to simple error. It is the latter explanation that is selected and I will briefly point out how speculative it is.

The printed list of 1795 purports to be a correct copy of the list exhibited in the Vestry since 1714. It is not. Jane Dowie's payment is sixpence down ; Philip Sandford's is threepence up. The spelling varies ; sometimes for the better, sometimes for the worse. A careless printer is likely enough ; a careless Vestry, spending their money for the general information of those concerned and letting two slips in the figures pass, which might get the tithepayers into some trouble, is also possible, but both negligences have to be assumed. The error has then to be connected with the subsequent collection of 16s. only and the hypothesis is that the sale of the tithes, then said to amount to £64 10s. 6d. per annum, which took place in 1795, was based on this printed copy as the particulars of sale, and that the new impropriator, knowing no better, only asked Mr. Page for 4s. a quarter. This Page paid. He dissembled his satisfaction and held his tongue. How this impropriator settled the matter, when he sold out to Mr. Cook, we do not know, but of course in itself the sum was trivial.

My Lords, I cannot see on what ground it is to be assumed that this sale took place merely on the basis of the print of 1795. Most, if not all, of the names of the tithepayers had, as an examination of the land tax documents shows, been changed in the intervening 80 years. Wensley's house in 1796, afterwards Cooper's in 1822, was a composite of Bailey's and Best's houses of 1714. Barbara Drew's house of 1714 had been divided into two between Robinson and Rawlinson by 1796. The undated "Schedule of customary payments, with Mr. Cook's remarks," shows that he thought the print of the particulars was inaccurate with regard to Nos. 18 and 17, Ximenes and Debarry of 1714, the sums payable having been differently distributed between them. The significance of his list is this, that, according to him, the tithes of St. Helen's, which were "claimed to be customary payments pr. order of the Vestry of December 16th, 1714, but not admitted" by himself, were only Nos. 1 to 19, Great St. Helen's inclusive, out of all the 112 houses in the 1714 list. It would seem that either new building or his operations had cut down the claims to customary payments to about one-sixth of the whole, and, if he had remained owner a little longer, the present dispute might never have arisen.

My Lords, I think it very unlikely that a printed document, in which the names were all obsolete, would have been used as the sole basis for collecting the tithe after the purchase. The houses were not numbered, so far as we know, in 1795. Numbers first appear in Mr. Cook's schedule. Identification of the houses by the names of householders long dead would have been impossible. It is much more likely that by employing the former collector or by local inquiry of his own the new impropriator found out and got in what the parties had been recently paying. If so, the 16s. is not a payment in error but a payment varying from the 19s., which remains unexplained. It is not for the claimant to explain it. The occupier of No. 15 may have been impecunious or a bad payer. The latter is not unlikely, for I note that in 11½ years the then owner of the tithe only got 40 quarters' payment out of Mr. Page, and only about 35 out of Mr. Wensley. The underpayment may have been a "usurpation of a deficiency" (*Shephard v. Payne,* 16 C.B., N.S., 132) to which Mr. Cook refused to submit though his predecessors had done so. All I can say is that the evidence leaves the explanation in doubt, and by any doubt on the point the respondents must suffer.

The respondents must further trace the pedigree of their 19s. to and through Jennings and so back to 1545. The difficulty, which I think is unexplained, is this. Between 1654 and 1705, when or how we do not know, five houses, of which Jennings occupied one, became six. From 1705 onwards these six houses always appear in the same order with Richard Stert at one end and John Boteler (afterwards Anthony Bailey) at the other. They appear to have stood as a consecutive series. I judge from the respondents' tracing of a recent ordnance map that this block is almost an island site and is all but surrounded by thoroughfares for pedestrians. Accordingly, if these thoroughfares are ancient, as doubtless they are, the half-dozen houses were not built in a row but filled up the site in some other way. Still, as they had to open on to some thoroughfare, the natural way of arranging the names in order and eventually of numbering them would be by taking one door after another in sequence. Now Crew and Durley are two householders who between them make up most of Thomas Jennings's 35s. Stert makes up the residue. Boteler, Somaster, and Deane continue to pay as their predecessors did in 1654. How could Stert be the person on whom part of the 35s. was cast if it was a genuine reapportionment of an ancient accustomed sum ? Between Crew and Stert two other houses intervened, and they continue tithed as before. I find it very difficult to see how Durley's 19s. is identified, as it has to be for an old customary pedigree, with a part of the older 35s., for the break-up of the 35s. is only accomplished by something (it is not for me to say what) which is much more like some private arrangement than a mere consequence of turning Jennings's single house into two others. Nothing but conjecture is available to the respondents here. It is, indeed, contended that an actual and sufficient appropriation of 19s. to Durley's house may be inferred from the long uncontested payments of that sum without dissent on the impropriator's part, but I think that the payments themselves, except between 1705 and 1714, are too conjectural to found such an inference.

There remain the 87 years between the first appearance of the 35s. and the last date, 1545, in which an accustomed sum could have arisen under section 18. Whatever the circumstances under which the 19s. payment came into existence, they do not serve to show that the 35s. payment was a customary payment going back to 1545. The judgment in *Foster's* case in 1900 (unreported) was cited as authority for relying on tradition in a proper case. I do not dispute it, but is this such a case ? In a family the memory of a striking event may last for generations, and in public affairs for centuries. If Jennings had been shown to have belonged to a family resident at No. 15 for a century, a tradition that his grandfather had been burnt at the stake in one reign or drawn and quartered in another would

be likely to persist even without the addition of a ribald ballad on the subject. Here, however, there is no question of one family but of a succession, probably numerous, of householders, not so far as we know connected together, and the fact to be remembered is neither public nor material, but is the prosaic circumstance, interesting only to the parties, that, beginning at latest in 1545, a precise sum, 35s., and no other had been payable, because it was accustomed in and before that year and did not rest on any other foundation. For this, I think, tradition is an impossible basis. I think it should also be borne in mind that, as between the impropriator and the tithepayer, the issue was not necessarily confined to 2s. 9d. in the £ of the rent, then payable, or else an accustomed lump sum. For a long time it was in dispute what the "rent" was on which the 2s. 9d. was to be reckoned. Long after the actual history of No. 15, Great St. Helen's begins, it was still being contended that the rent to be tithed was the old Tudor rent, and the right to reckon the rate on the improved rent for the time being was not fully established till Lord Eldon's time. (*Ivatt v. Warren,* Gwillim, 1054 ; *Antrobus v. East India Company,* 13 Vesey, 9, at pp. 24-25). This must be why in *Langham v. Spurstowe* the occupiers concealed the amount of their rents and, as above stated, sometimes rested their contention on a fixed sum and sometimes on a fixed rent. Even if an oral tradition is postulated, which handed down from tenant to tenant the fact that 35s. had always been the sum payable, this would still leave the origin of that sum to be supplied by memory, and this seems to me exceedingly problematical. Again, tradition is not very likely to have discriminated between an origin before 1545 and an origin after it. The numerous traces of some standing quarrel about the tithe on the buildings in Great St. Helen's and of the importance of adhering to traditional payments are just as likely to be due to resistance to payments based on improved rents as to insistence on a supposed accustomed sum payable since the time of Henry VIII. We are not informed whether the Great Fire extended to Great St. Helen's or not, but the time of acute dispute would come when the time of rebuilding began, then or afterwards. Till then medieval tenements might well lose value, as they aged, as fast and as much as the site itself grew more valuable, and thus leave the rent payable unchanged for generations, and it must be remembered that, as rent is tithed but fines are not, if a fine was taken on renewal and the old rent left, any increase of letting value would be accounted for.

My Lords, the Court of Appeal, sensible of the difficulty presented by their gap of 87 years, considered that there was a presumption of a legal origin for a state of things found to exist so long ago as the 17th century. As it was put to your Lordships at the Bar, it was said that that state of things must be deemed to have originated "in right and not in wrong." I think this application is fallacious. Such a presumption does not extend to presuming a date, nor are we here concerned with quieting title or giving validity to something which has been in long and uninterrupted use, nor is the presumption required to invest with legality something which otherwise would be unexplained and without the law, *Jenkins v. Harvey,* 1 C., M. and R., 877, at p. 894 ; *Shephard v. Payne* (*supra*). In the first place the origin would be equally legal whether it was before 1545 or after it, but if after that date it would be inefficacious. In the second, choice of an origin here does not lie between a right and a wrong, but between two legal origins, each, if established, equally good. Two shillings and ninepence in the £ on the rental or an accustomed payment of a lump sum would equally serve as a root of title for what is proved later on, but the difficulty is to know which it is to be. You cannot say that 35s. would be "in wrong" of the impropriator unless it is deemed to have been an accustomed payment in right of the occupier, until it is first certainly known that the 35s. could not itself be a payment arrived at on the basis of a rate—not necessarily the maximum rate—on an actual rent. I think it has been far too readily assumed that 35s. could never have been the sum payable on the basis of the impropriator's claim in and after 1545. Certainly 2s. 9d. is a rate often likely to lead to awkward fractions, either in the rent or in the payable tithe, but there is not much difficulty with 35s. An impropriator does not lose his rights altogether by accepting something less than his full due. On a rent of £12 15s. he could collect at 35s. his full 2s. 9d. tithe less only about three farthings, and that as a sensible man he would of course forgo. This is a likely legal origin for Jennings's payments, but at any rate I do not think that the respondents proved, either by evidence or presumption, that uniform and regular payment of a fixed sum which is necessary if they are to succeed. I think the appeal should be allowed and the judgment of Mr. Justice Tomlin should be restored, and so I move your Lordships.

Lord Warrington of Clyffe.—My Lords : The appellants, the plaintiffs in the action, are the lay impropriators of the tithe payable in respect of (amongst other hereditaments) the house known as 15, Great St. Helen's, in the City of London. The respondents, the defendants in the action, are the occupiers of various portions of the house. The title of the appellants and the liability of the respondents to the tithe, whatever be its legal amount, are not in dispute.

The question is whether the tithe is a customary sum of 19s. per annum or whether it is the full sum of 2s. 9d. for every £ of the annual rental of the house.

This question was decided in favour of the appellants by Mr. Justice Tomlin, but his judgment was reversed in the Court of Appeal. Hence the present appeal to your Lordships' House.

By a decree dated February 24, 1545, made by Thomas Lord Archbishop of Canterbury and others in pursuance of a statute of the same year, under which such decree has the same effect as an Act of Parliament, it was decreed that the citizens and inhabitants of the City of London should yearly pay their tithes to the parsons, vicars, and curates of the city and their successors after the rate following, to wit, of every 10s. rent by the year of all and every house and houses and so forth 16½d. and of every 20s. rent by the year of all and every such house and houses and so forth 2s. 9d. and so above the rent of 20s. by the year ascending from 10s. to 10s. according to the rate aforesaid. It was also provided that the tithe should be paid quarterly at Easter, St. John the Baptist Day, Michaelmas Day, and Christmas Day by even portions. The decree contained the following proviso (clause 18) : "Provided also and it is decreed that where less sum than 16½d. in the 10s. rent or less sum than 2s. 9d. in the 20s. rent hath been accustomed to be paid for tithes then in such places the said citizens and inhabitants shall pay but only after such rate as hath been accustomed."

It is now settled by authority (1) that the expression "places" includes individual houses; (2) that the custom referred to is not an immemorial custom, but it is sufficient if it be proved to have existed in 1545 and for eight years previously; speaking generally, in modern times, 1545 is taken to be the date as at which the custom must be proved to have existed; (3) that the custom may be inferred to have existed at that date from evidence of the regular payment in more recent times of a certain sum less than 2s. 9d. in the £ of the annual rent.

The respondents have pleaded that in their case the less sum payable in respect of their house is 19s. per annum or 4s. 9d. per quarter, and the question therefore is whether such sum was accustomed to be paid in respect of the house, No. 15, Great St. Helen's, in 1545 and the few previous years.

As to the onus of proof, it is, in my opinion, clear, on the form of the decree, that it is on those who seek to establish a special custom to pay a less sum than that made generally payable under the earlier part of the decree. But, however this may be, the question is settled by authority, and there is an end of it.

Does then the evidence adduced by the respondents bring to my mind the conviction that the sum of 19s. per annum, no more and no less, was accustomed to be paid in respect of the house in question in 1545 and the few preceding years. I have come to the conclusion, as did Mr. Justice Tomlin, that the evidence leaves the matter in doubt, and I am therefore compelled to hold that the alleged custom has not been established.

As to the house in question and its successive occupiers the following facts are, I think, found or admitted. In 1632 one Thomas Jennings was the occupier of certain houses of which one was the predecessor of No. 15. He was also the occupier of the same houses in 1654. In 1705 the house now represented by No. 15 was in the occupation of Henry Durley, and it and the other house or houses making up the total occupation of Thomas Jennings were included in the group of six houses appearing in the tithe book hereinafter mentioned. By 1714 Jane Bowie had become the occupier of No. 15 and the same name appears in a list of 1795. In 1796, however, and for 10 years thereafter we find the tithe being paid by one Page, and in 1822 by one Tottie. Since 1822 the house has been in the occupation of various tenants, whose names need not be mentioned.

I now come to the evidence of payment. In 1632 there is a document recording the payment by certain persons of "five years' tithe beforehand," beginning at Christmas, 1632. In this list is included the name of Thomas Jennings as making a payment of £8 15s., being five years at 35s. a year—namely, 8s. 9d. per quarter. There is no evidence on the question whether this is a payment in respect of what was then a single "place" within the meaning of the decree or whether it was the aggregate of payments in respect of several places. Assuming in favour of the respondents that it represents an alleged customary payment it cannot, for lack of evidence, be treated as the aggregate of several payments, but must, I think, be regarded as a single payment of 35s. in respect of the "place" occupied by Jennings.

The next material date is February 9, 1662, that of the decree of the Court of Exchequer on an English bill exhibited by Sir John Langham, the lay impropriator, against Sir John Lawrence and a number of other tithepayers, amongst whom the name of Thomas Jennings does not appear. The defendants by their answers set up claims to be entitled to make customary payments only, and the suit appears to have been compromised, for it was heard on bill and answer, and a decree was made by consent. The effect was that the several defendants were to make the alleged customary payments to continue for so long as the plaintiff should remain the impropriator, and the defendants should continue to be inhabitants of their respective houses and so forth. This, therefore, settled nothing; it shows that the existence of the alleged custom was then a matter of dispute.

The next document is dated April, 1705, and is entitled "A tithe book for St. Helen's parish reduced to a settlement made by a decree in the Court of Exchequer, 9th February, 1662, in a cause between Sir John Langham, plaintiff, and the parishioners of the said parish, defendants, as the same appears by tithe books bearing date 1653 and 1654, which were exhibits in the said cause on behalf of the said parishioners." Comparing this description of the decree with the copy of the decree itself the compilers of the book appear to have misconceived both the nature of the suit and the indecisive effect of the decree.

The book itself is divided into columns the left hand group of which purports to represent quarterly sums payable by a large number of persons in 1654, while the right hand group purports to represent the sums payable in respect of the same premises respectively by persons in 1705 with a final column for the annual sums representing the several quarterly sums. In the columns relating to 1654 there is a group of five persons of whom Thomas Jennings is one. The quarterly sum against his name is 8s. 9d. and the total of the several payments in the group is £1 0s. 6d. Under 1705 there appears a note "now six houses viz." and there follow the names of six persons including Henry Durley with 4s. 9d. against his name. The sums set against the six persons amount to the same total as those set against the five persons under 1654—namely, £1 0s. 6d. The entries in this book seem to me to confirm the view that in 1632 and in 1654 the 8s. 9d. was a single sum payable in respect of one house, that house being between 1654 and 1705 split up in some way, part, that which is now No. 15, being then occupied by Durley, and the residue being apparently as to the bulk occupied by Dudley Crew and a small portion added to Stert's occupation, the sum payable by him being increased by 6d.

This is the first appearance of the 19s. a year. As to how or by what authority the 35s. previously paid in respect of Jennings's holding got split up into 19s. for Durley's, 3s. 6d. for Crew's, and 6d. for Stert's there is not a particle of evidence. I might stop here, for, I think, on the facts already stated, there is no evidence of such a sum as 19s. being payable as a customary payment in or before 1545; if it really was a separate payment included in the larger aggregate of 35s. it was incumbent on the respondents to establish the fact. At present all we have is a payment in 1632 of 35s. per annum for property which included No. 15 with a statement that in 1705 a smaller sum of 19s. was payable in respect of No. 15 alone.

But from this, its first appearance, the 19s. has such a chequered career that I am driven as shortly as may be to say something of its history.

It is admitted by the appellants that it was in fact paid from 1705 to 1714 inclusive.

In the year 1714 it was ordered by the Vestry that the modes or accounts of tithes payable to the impropriator by the inhabitants of the parish be tran-

scribed and hung up in the Vestry that the said inhabitants at any time may have recourse unto.

This order was apparently complied with by the preparation of the "Engrossment" printed at page 52 of the Appendix and hung up in the Vestry. In this engrossment the name of Jane Bowie, the tenant of No. 15, appears, and against it there is entered a quarterly sum of 4s. 9d.

In 1795 the engrossment was printed by order of the Vestry, and at the foot of the print is a statement, signed by the churchwardens, to the effect that it is a copy of the engrossment hanging in the Vestry "and which agrees as to the rates with the rental entered in the old Register Book amongst the records of the Parish."

In this print the quarterly sum set against the name of Jane Bowie is 4s., and that sum and no more was paid from 1796 to 1807 inclusive.

It is said that the entry in the printed copy of the engrossment of 4s. against the name of Jane Bowie was a mere printer's mistake. It may be so, but this is pure conjecture. Assuming it to be so, it is remarkable that, though the engrossment still hung in the Vestry, the payment of 4s. should have been regularly made, as it was, from 1796 to 1807. It at least shows that there was no certainty as to the amount of the alleged customary tithe.

The next date of importance is 1822. In that year there is a payment of 19s., and in that year also the tithes were sold by Mr. Cook, the impropriator, to one Alexander Macdougall.

The conditions of sale contained the following statements: —

"The tithes being payable under the statute of Henry VIII. which allows the impropriator to claim to the extent of 2s. 9d. in the £ on the rack rents of the houses and the tithes which are not customary payments will be capable of very considerable increase. . . .

"The following are claimed to be customary payments . . . but are not all admitted to be such by the vendor."

There follows a list of houses and names including: —

"Great St. Helen's
"Bottom
"House—Mr. Tottie—19s."

It is common ground that Tottie was tenant of No. 15.

There was also put in evidence a list in Mr. Cook's handwriting of uncertain date, but at all events of a date after that of the printed particulars, which are referred to therein. This list includes, in reference to No. 15, the name of Jane Bowie as the old occupier paying 4s. a quarter, and that of Mr. Vaile as the then occupier paying 19s. a year.

The particulars of sale are important only as containing mention of a claim to a customary payment of 19s. It contains no admission of the claim; on the other hand it does not state specifically that the claim was disputed.

The list does contain a statement that the sums mentioned were paid by the then present and former occupiers respectively, but the sums so paid are different in amount. It is another example of the uncertainty surrounding the present claim of the respondents.

After 1822 there is no evidence of any payment until 1834. From that date to 1870 there was paid a uniform sum of £2 per annum. This would appear from the records to have been the result of an agreement between the impropriator and the occupier. Assuming this to have been the fact, it shows that the impropriator did not admit, and the tithepayer did not insist on his claim; the matter was treated as a question in dispute.

From 1876 to 1918 there was a uniform payment of £7 10s. per annum in respect of No. 15 and £4 17s. 1d. in respect of No. 10, making £12 7s. 1d. in respect of the two together, and for the years 1918 to 1921 this sum was increased to £15. For the present purpose no importance attaches to these payments inasmuch as they were made not by the occupiers but by the owners of the houses and were the result of an arrangement between them and the then impropriators, who were relatives or connexions.

As already pointed out, the 19s. claimed to be accustomed to be paid in and before 1545 is not traced back farther than 1705 except as part of a larger sum, and no evidence is given of its separate existence prior to that date. But independently of this point, which would, in my opinion, be fatal to the respondents' claim, the respondents have in my judgment failed to prove the regular payments of a fixed certain sum from which alone a custom can be inferred.

In the view which I take of the evidence on the main question it is unnecessary to decide whether the respondents have proved that the 19s. a year was less than 2s. 9d. in the £ of rent. There is evidence that between 1789 and 1810 the rent was £50, but there is no further direct evidence of rent. The Land Tax records are not of much service, for at the best they only lead to a conclusion as to the assessed annual value and not as to the amount of the actual rent, and, even to arrive at the assessed annual value, there are unknown circumstances to be taken into account before a satisfactory conclusion can be arrived at from the sum actually paid for tax. If, however, it had been necessary to decide the case on this point I think I should agree with the view of the Court of Appeal upon it.

On the whole, in my judgment, the order of the Court of Appeal should be reversed and that of Mr. Justice Tomlin restored. The respondents must pay the costs here and below.

LORD ATKIN.—My Lords: The plaintiffs, claiming as owners of the rectorial tithe payable in respect of No. 15, Great St. Helen's, in the City of London, seek to recover from the defendants, the occupiers of those premises, the payments enacted by 37 Henry VIII., c. 12, the London Tithes Act of 1545. There is no question as to their title. The nature of the rights conferred by the Act has been frequently discussed in the Courts. Though the payments prescribed by the Act are called tithes, the term is a misnomer. The statute imposed the obligation upon occupiers of houses in the city to pay a sum based upon a rental in substitution for payments previously made by the citizens either voluntarily or in obedience to ecclesiastical decrees for the maintenance of the clergy. Possibly before the Act or its immediate predecessor, 27 Henry VIII., c. 21, such payments were civil obligations. They had existed for a long time. They took their source apparently in customary payments of ½d. for Sundays and feast days, and were patiently paid by city inhabitants until 13 Richard II., when the then Archbishop of Canterbury made an explanation of the constitution and obtruded upon the citizens of London 22 days more than were usual, which caused a constant struggle on the part of the citizens and a perpetual agitation between the ministers and citizens of London, the Court of Rome and in ecclesiastical courts. See the argument of Sir Thomas Coventry

in *Dunn v. Burrell and Goffe* (Western, 44, at p. 77). It was to allay this agitation that the Act in question was passed. But, as Selden says, Tithes, Preface (ed. 1618), page viii., the previous payments "could not properly be reputed among tithes neither in regard of their value nor in respect of their nature." He points out that in value they are more than tithe and in nature they are not gifts of increase, and concludes: "What is called Tithes of Houses in London is rather called so only than is at all so." We have only to deal with the statute and the decree made under it, and the reference to previous payments is only of historical interest except in so far as it throws some light on the exception which is contained in the decree made under the statute and upon which the defendants rely. The exception is contained in clause 18: "Provided also and it is decreed that where less sum than after 16½d. in the ten shilling rent or less sum than 2s. 9d. in the twenty shilling rent hath been accustomed to be paid for tithes that then in such places the said citizens and inhabitants shall pay but only after such rate as hath been accustomed." Two points may be mentioned that have been the subject of decision on this clause.

(1) An accustomed payment does not mean a payment made in accordance with a custom that goes back to the time of legal memory. In *Bennet v. Trepass* (Western, 125) the Court of Exchequer held that if there were tithes by custom or agreement for eight years past they are within section 18 of that decree, and ordered an issue to be tried at law as to whether any sums less than 2s. 9d. in the 20s. rent had been accustomably paid by the defendants. This decision was upheld on appeal in the House of Lords (Western, 133). On the other hand, Lord Eldon, in *Warden, &c., of St. Paul's v. Kettle* (Western, 191, at p. 204) lays down that the construction is not that it must be a payment time out of mind, but if that payment has been usually made during such time as to have acquired in the ecclesiastical courts the character of a customary payment the statute operates upon it. This would require payment for 40 years in order to become customary. It is unnecessary to decide which of the two opinions is right, for no proof is forthcoming in this case or in any other case as to actual payments before the statute. The question is whether from facts proved to exist after the statute a customary payment before the statute should be inferred.

(2) The second point is that, though the clause appears to deal with customary payments in relation to places rather than individuals, yet the clause exists for the benefit of individuals who can prove such payments. Lord Eldon so holds in the passage above referred to. "If these individuals can prove that before this statute a sum of money was raised upon each house, so long before as to have acquired the character of a customary payment, to so many houses as it can be applied to it is in law applicable, though there is no such general custom through the place or parish." It is not irrelevant to this case to notice that the proof of a general usage in the parish will assist an individual parishioner to prove his own exemption.

The question in this case is whether the defendants show that they are within the exception in clause 18 of the decree, for I agree with the view expressed by Mr. Justice Tomlin and the members of the Court of Appeal that the onus is on them. There is, however, no special privilege attached to the position of a titheowner that exacts a higher standard of proof from persons resisting his claims than in other cases. The question is whether there is evidence that reasonably satisfies the tribunal that the defendants' allegations are true. It may be conceded that the mere fact that payments have not been demanded at all on analogy to cases of claims to tithes proper does not of itself afford a defence. And proof of payments less than the full statutory sum is in itself insufficient if the sums paid are so fluctuating in amount that they cannot lead to the inference that they were paid in pursuance of an obligation to pay what was before the statute a customary payment. I doubt whether in all cases it would be necessary to prove that the customary payment was a definite fixed sum. It would appear from the authorities that the customary payment might be a fixed rate or poundage less than the statutory poundage. But it is for the defendants to aver and prove the customary sum upon which they rely. In the present case the defendants aver a customary payment of 19s. per annum, and that certain sum they have to prove. It is evident that the exemption would be of little value if it only applied to the occupiers of houses actually in existence at the date of the statute in 1545. It is now well established that houses built on the site of houses which enjoyed the statutory exception are entitled to the exception. In *Williamson v. Gosling* (Western, 152), the defendants had owned several old houses for which customary payments had been made, had pulled them down and built two new houses on the site. On a bill for tithes by the lay impropriator claiming the full statutory payment upon both houses, the Court decreed payment according to three of the customary payments, and decreed payment of the full amount on the ground where the house called the "Gentleman and Porter" alehouse once stood. On the latter site, it is reasonably plain, no customary payments had been applied, and the case so understood is approved by Lord Eldon in *Warden, &c., of St. Paul's v. Kettle* (*supra*). See also the judgment of Sir William Grant, M.R., in *Antrobus v. East India Company* (Western, 225, at p. 227).

The defendants therefore will succeed if they prove that for the premises which they now occupy, or for the premises formerly occupying the same site, a customary payment of 19s. per annum was payable at the date of the statute. They can, of course, only prove this by showing facts in existence since that date which lead to the inference that such payments were made before that date. There is a volume of evidence in the case adduced by the defendants, and in my opinion it leads irresistibly to the inference required by the defendants. I will proceed to deal with it in chronological order.

In 1632 there is produced a list of payments for tithe of 46 parishioners who had paid five years' tithe in advance. It includes the name of Thomas Jennings, through whom the defendants trace occupation, who is recorded as paying a tithe of 35s. per annum. It may be remarked that payment of a sum five years in advance perhaps points rather to a fixed sum than a sum based on a rental which might increase in the course of five years, but the period is so short that I do not think the fact is entitled to much weight. Of more importance is the fact that of the 46 payments recorded only five appear to be a multiple of 1s. 4½d. or 2s. 9d., the statutory rates, and these are for sums of 11s., which may equally well be a customary payment. Jennings's 35s. cannot be arrived at by the statutory rate or the nearest round figure to it either to a shilling or sixpence, and several of the sums are expressed in shillings and pence. Moreover, such of the names as

can be traced appear continuously afterwards in the documents hereafter to be mentioned recording customary payments of exactly the same amounts. As instances I refer to Backhouse at £3 a year (15s. a quarter) and Timothie Cruso at 30s. a year (7s. 6d. a quarter).

In the years 1658-62 there is evidence of litigation by the then lay impropriator, Sir John Langham, against the parishioners of St. Helen's, to the effect of which I venture to think sufficient importance has not yet been attached. In those years it appears that Sir John Langham sought by litigation to enforce the payment of tithes against what appears to be substantially the whole of the parishioners.

In 1659 there was a decree, dated April 21, 1659, (Record, p. 63) made in a suit in the Exchequer reciting that Sir John Langham filed his bill this term 12 months against Spurstowe and the other named defendants and others for the statutory tithes reciting that the defendants pleaded customary payments, which are set out, and directing an issue by a jury of the County of Hertford, at which some of the defendants are to insist only upon the custom set forth in their answer and directing that as to four of the defendants against whom the plaintiff did not proceed they should be dismissed without costs and without prejudice.

On December 6, 1660, the issue not having been tried, it was ordered that the issue should be tried next Hilary term before a Kent jury. There is no further record of any further proceedings.

On February 9, 1662, a decree was made in the Exchequer by consent which recites that Sir John Langham had filed his bill in Michaelmas term in the fourteenth year (1661) of the King against Sir John Lawrence and 58 named defendants "and several other defendants" for discovery of their true rents and alleged rents, and recites that each defendant had in his answer set up payment by custom time out of mind used of the certain or customary payment of named sums, and it decreed by consent that the defendants should pay to the plaintiff the several and respective sums of money according to the several rates and customary payments by them set forth so long as the plaintiff should be impropriator and the defendants should be inhabitants of their respective "houses, parts of houses, shops or warehouses." Before considering the effect of these proceedings it is desirable to mention two other documents.

On December 19, 1705, the vestry minutes record a resolution "That the decree relating to the tithes payable by the inhabitants of this Parish, dated February 9, 1662, and the rate now settled for the tithes shall be both entered in the book of Memorials and Bequests of this Parish and a note of reference to the same shall be set up in the Vestry."

And in a register book, dated April, 1705, there is to be found the document set out at page 76 of the record entitled "A Tithe book for St. Helen's Parish reduced to a settlement made by a Decree in the Court of Exchequer, 9th February, in the year 1662, in a cause between Sir John Langham, Plaintiff, and the Parishioners of the said parish, Defendants, as the same appears by tithe books bearing date 1653 and 1654, which were made exhibits in the said cause on behalf of the said Parishioners." The book then sets out the names of the parishioners with the amounts paid by them quarterly in 1654, and in a parallel column sets out the amounts payable for the same houses or substituted houses in 1705. In the former year there are about 98 names, in the latter about 114.

The list shows that where the houses remain the same, the same amounts are recorded as payable in both years. They are for sums ranging from 6d. to 15s. per quarter, and in only two of them can I trace a sum which is a multiple of 1s. 4½d. per annum.

The list further shows that the sums which the plaintiff admitted for his lifetime and for the tenancy of the defendants to be customary payments were being paid in 1654, eight years before the decree, and were being paid in 1705, 43 years after the decree, by persons who were successors to the defendants. It further shows that in the interval between 1654 and 1705 considerable changes had taken place in the actual houses affected. There are seven or eight cases of one house being converted into two, one case of one into four, four or five of two being converted into one, one case of four into six, another of five into two. The case with which we are concerned is one in which five houses are converted into six; one of the five being the house of Thomas Jennings referred to above as having paid five years in advance in 1632 at 35s., *i.e.*, 8s. 9d. a quarter. He is recorded in 1654 as paying the same sum of 8s. 9d. a quarter.

In every case where there has been a change in the nature of the houses the same payment is recorded as due for the new houses as for the old, for which they are substituted. Thus the first entry is of:—

Four houses paying	Now six houses paying
s. d.	s. d.
8 6	2 6
15 0	2 6
1 0	3 4
6 8	3 4
	15 0
	4 6
31 2	31 2

One house at 4s. 3d. is now two houses, each paying 2s. 1½d.

Two houses paying 2s. and 3s. are now one house paying 5s.

In the case of the group of houses of which Jennings was one the figures are:—

	Five houses paying s. d.		Now six houses paying. s. d.
Halsey	4 0	Stert	4 6
Thorney	2 0	Somaster ..	2 0
Wild	2 0	Deane	2 0
Jennings ..	8 9	Crew	3 6
Mandevill ..	3 9	Henry Durley	4 9
		Boteler ..	3 9
	20 6		20 6

Durley, who pays 4s. 9d. a quarter, *i.e.*, 19s. a year, is the predecessor in occupancy of the defendants. It appears to me that this list affords evidence that Durley was recorded as paying a fixed sum of 4s. 9d. as a customary sum: an apportioned sum of a larger customary sum paid by the occupiers of a group of five houses on part of the site of which Durley's house is built. That this was the legal consequence of building on the site of a formerly excepted house I have shown is established by authority. How the apportionment was made we do

not know in this case, or in the other apportioned cases which appear in the list. It happens that if you compare the six new houses with the five old three (2s., 2s., and 3s. 9d.) pay the same, while two (4s. and 8s. 9d.) (Jennings) become 4s. 6d., 3s. 6d., and 4s. 9d. (Durley). Why they are so divided seems to me, with respect, to be quite irrelevant when it is found that the titheowner in fact was paid and received the sum of 4s. 9d., for it is admitted that such sum was paid from 1705 to 1714.

Either Durley was entitled to pay only 19s. per annum or he was bound to pay 2s. 9d. in the £ on his rent. The fact that the titheowner accepted 19s. seems to me to be conclusive that he accepted the position that Durley was not bound to pay 2s. 9d. in the £ and that there was only a customary sum due. Nineteen shillings does not represent 2s. 9d. or 1s. 4½d. or any multiple of £1 or 10s. The nearest approximate rent would be about £7 ; and if there were any doubt that the rent of this house in St. Helen's in 1705 would be more than that, it is fortunately conclusively dispelled by the evidence of assessments to land tax which will be considered later.

It appears to me that the reasonable conclusion to be drawn from the above facts so far is that the titheowner, who himself owned an important property in the parish, Crosby-square, knew of his rights under the statute, sought to enforce them by proceedings which included apparently nearly every member of this parish, failed to recover the statutory sum, was content to agree to the customary sums during his lifetime, and that the whole matter was put to rest on this footing, and, indeed, never disturbed at all until 1834, when for 36 years a sum of £2 was paid.

But the evidence of this claim to pay only a fixed sum of 19s. acquiesced in by the titheowner becomes still stronger as time progresses.

On December 16, 1714, the Vestry resolved, that the modes or accounts of tithes payable quarterly to the impropriator by the inhabitants of this parish be transcribed and hung up in the Vestry, that the said inhabitants at any time may have recourse thereto.

Accordingly a schedule entitled "A rental of the tithes in St. Helen's Parish, London, December 16th, 1714," was prepared and the original is produced. It has a note at the bottom, "This engrossment agrees as to the rates with the rental entered in the old Register Book among the records of the Parish," which is the list in double columns for 1654 and 1705 which I have described. The items number about 112. In the interval between 1705 and 1714 many of the occupiers have changed ; amongst them Henry Durley has been succeeded by Jane Bowie, but she is recorded as being due to pay 4s. 9d. a quarter just as Durley did. Several names are the same as in the list of 1705, and the amounts are the same. The list shows small sums payable quarterly, a very small proportion being multiples of 1s. 4½d. or 2s. 9d. It appears to me that the only explanation of this list is that it purports to show fixed customary payments as due from the parishioners. If they were bound to pay at the statutory rate on a rental, what conceivable use would it be to the parishioners to know what their predecessors paid in 1705 or they themselves were paying in 1714 ? The amount would then depend on the rent for the time being. But if there were fixed payments it would be a great convenience to have a public record "that the inhabitants at any time might have recourse thereto."

There is no direct evidence of the precise sum, if any, paid between 1714 and 1795. In the absence of such evidence, in view of the failure of the titheowner in the previous century to recover the statutory sum, and of the parish records above referred to, I should have drawn the inference that any sum paid did not exceed the sum expressed in the published parish schedule. But I think that there is the strongest evidence that those sums were in fact paid. In November, 1795, the tithes were sold, and in October, 1795, no doubt in view of the sale, a Vestry minute of October 8 records a resolution "That one hundred copies of the Table of the Tythes payable by the inhabitants of this parish be printed and distributed among such inhabitants." Accordingly 100 copies were printed, one of which is reproduced in the record. It is noteworthy that the resolution treats the table of tithes of 1714 as being a table of tithes payable by the inhabitants, by which I think is meant payable in 1795 as well as in 1714, and the only object of reprinting a list of the names of occupiers at the earlier date with the sums payable by them can be to enable their successors to know the precise sums payable now by them. In other words, it is only consistent with a certain sum being payable annually, and not with a sum varying with the rental. On November 12, 1795, the tithes were sold. We have the particulars of sale, "Particulars of the Freehold Tythes of St. Helen's, Bishopsgate Street, producing £64 18s. 6d. per annum." "The tythes are freehold and produce £64 10s. 6d. per annum, out of which is paid to the rector per annum, £20 ; land tax, £4. Net income, £40 10s. 6d."

Now the parish record published in the Vestry in 1714 and reprinted just before the sale in 1795 shows an annual total of about £64 12s. 6d. Can there be any doubt that the vendor was representing that he was actually receiving in gross income the amount of the scheduled payments and out of them paying the rector £20 and land tax £4, and was enjoying a net income of £40 10s. 6d. I infer therefore that between 1714 and 1795 the inhabitants were actually paying the customary sums and were paying no more. If any statutory payments were being asked for or made, it is to my mind impossible that such would not have been stated by the vendor. It seems to me, therefore, that we have convincing proof that in the period before 1795, as admittedly in the period 1705 to 1714, the defendants' predecessors in this house were paying the same fixed sum of 19s. per annum and were not paying a rate on the rental.

We now come to the evidence afforded by the land tax assessments. In 1705 Durley, who as we know was recorded as liable to pay and did in fact pay 19s. for tithes, was assessed to land tax for £11. In 1714, Jane Bowie, who succeeded Durley and is recorded as having to pay 19s. for tithe, is assessed at £5 10s., Thomas and Abraham Gooding being bracketed with him as being assessed at £6 for personal estate. In 1793 John Page, who is now the occupier, is assessed for land tax at £8 15s., and his rental valuation is given as £50. We know from a deed of release of November 1, 1793, that this was the true rental, for Page was occupying under a lease for 21 years from Christmas, 1789, at £50 per annum. It is well known that the assessments for land tax were low, but it is known that the amounts never exceeded 4s. in the £. In 1746 they were reported not to exceed 3s. in the £ in London on the true value : see pamphlet quoted in Bourdin on Land Tax (4th ed.), page 16. It is reasonably certain, therefore, that if one finds in 1705 and 1714 an actual levy of £11 or £5 10s. for the year it must be based upon a rental far in excess of those sums, and therefore far more

than the £7 which would realize 19s. at the statutory rate. But the matter is made clear in 1793 when we know that the rent and the land tax valuation are £50, and the payment for land tax is £8 15s., which is 3s. 6d. in the £. If the titheowner had been collecting the tithes on the statutory basis he would have been entitled to £6 17s. from Page alone ; more than 10 per cent. of the whole income which he derived from tithe. It seems to me incredible that in these circumstances he would have sold on the footing of a gross income of £64 18s. 6d., if from one occupier alone he had a right to collect a further £6 per annum. The only explanation can be that both parties knew that the amounts exigible in law were the fixed payments recorded in the parish schedule. The facts above stated as to land tax assessments and the rental fixed by law in 1789 seem to show that Mr. Justice Tomlin understated the defendants' case when he held that there was nothing against which he could measure the rate of the annual payments actually proved.

I must now deal with a point which arises upon the printed copy in 1795 of the list of tithes of 1714. In the print Jane Bowie, the occupier of the house in question in 1714, is printed as paying 4s. per quarter and not 4s. 9d. After 1795 and up to 1807, Page, the then occupier of the premises, paid at the rate of 16s. per annum to the new titheowner. This fact is strongly relied upon by the plaintiffs as showing a deviation from the alleged fixed sum of 19s. and as being destructive of the continuous chain of proof on which the defendants seek to rely. My Lords, the facts appear to me to afford the strongest support to the defendants' case. I think that the only inference that can be drawn is that the difference between the print and the original is due to a misprint. The resolution of the Vestry which resulted in the print was that " Copies of the table should be printed and published." The print itself by a note on it states : " This is a copy of the engrossment hanging in the Vestry," and is signed by the two churchwardens. It does not purport to be a statement of the names and amounts as of 1795 but of 1714, 81 years before. What possible reason could anybody have for altering the amount which had appeared in the engrossment of 1714 against Jane Bowie's name, 4s. 9d., and which we know corresponded with the amount appearing in the double column list of April, 1705, into an amount of 4s. as paid by her in 1714 ? The idea of some deliberate change seems to me to be fantastic. It is reasonably plain that the print is made from a copy of the engrossment ; there is some slight correction of methods of spelling. There is one other instance of a mistake where " Phillip Sandford 3s." is printed " Philip Sandford 3s. 3d." Every other sum of money is identical. The mistakes are precisely what might be expected in copying a list of some 112 items, and as deliberate alterations they are unintelligible and contradict the known object of the document and its own express purport. I have not the least doubt myself that the difference is due to a mistake. But two important facts emerge. The first is that till 1805 Page paid, and the titheowner received, the 16s. The only explanation of this as it appears to me is that they paid and received on the footing that the printed copy purporting to be a copy of the engrossment represented the true legal relation, a fixed sum, and not a rate or the rental. No other explanation of a payment of 16s. can be suggested. Mr. Page's rental as we know was £50. The second important point is that when the payment of 16s. ceased, the occupier reverted to what ? A rental rate ? No ; but the original fixed rate of 19s. This fact seems to me to be of the greatest significance, for in 1805 the tithes were sold to the Rev. Ed. Cook, who we are told boasted that he knew the law of tithes as well as any Chief Baron of the Exchequer, and had set to work successfully to raise the tithe rental. But when he sold, as he did, in 1822, the conditions of sale represent the then occupier of the premises in question, Mr. Tottie, as still paying 19s. This seems to me to afford the strongest corroboration of the view that the payment of 16s. was a mistake and not deliberate, and that the Rev. Mr. Cook, a second Sir John Langham so far as his will to exact the limit from the tithepayer was concerned, was impelled to accept the position that 19s. was the fixed sum actually due.

The conditions of sale of 1822 are themselves significant. The sale is of the rectory and freehold tithes of the parish of St. Helen's payable for the whole of Crosby-square, the East India Company's St. Helen's Warehouses, St. Helen's-place, and for several houses on part of the east and west sides of Bishopsgate, now producing the annual sum of £404 6s. 6d. The conditions state : " The tythes being payable under the Statute of H. VIII., which allow the impropriator to claim to the extent of 2s. 9d. in the pound on the Rack Rents of the houses, all the tythes which are not customary payments will be capable of very considerable increase." The particulars then proceed to give a list of 33 houses in St. Helen's-place and Crosby-square amounting to £355 11s., and then give a list of further premises and payments under the heading, " The following are claimed to be customary payments amounting to about £50 per annum but are not all admitted to such by the vendor." Then follows a list of houses in 54 items amounting to £48 15s. 6d. and a note that " The tythes of such houses and warehouses in the Parish as are not included in this Particular are vested in the owners of the respective Premises." In the list making up £48 15s. 6d., Mr. Tottie is recorded as paying the now familiar 19s. and the remainder of such list conforms to the printed list and parish records so often referred to. It is significant, (*a*) that the reverend and learned vendor admits that there are some customary payments ; (*b*) that the sale is of the whole of the tithes of the parish now in existence, and that he has not succeeded in recovering any payments other than the alleged customary payments except for houses in St. Helen's-place and Crosby-square. The reason for the exception is not without interest. The houses in Crosby-square were built upon the land owned by the former impropriator, in respect of which no tithe, customary or other, had been paid. The houses in St. Helen's-place were recently built upon the site of the old Leathersellers' Hall (see Brayley and Britton's Beauties of England and Wales, Part III., London, Middlesex, by Rev. J. Nightingale, 1815, p. 167), which had been exempt from tithe by the exemption in Clause 16 of the decree of 1545, and such houses therefore had no claim to the benefit of customary tithe.

Having now brought the history of the tithe in relation to the premises in question down to 1822, and having shown a continuous record in public and other documents of a proved customary payment of 19s. from a period before 1705, up to 1822, it becomes possible to deal shortly with the subsequent period. From 1822 to 1834 though there appear to be accounts of the tithe collectors in existence there is no entry of a payment in respect of this house. From 1834 to 1871 a sum of £2 was paid not by the occupier but by the owner, and the entry is,

"This is a composition with Chapman." Who Chapman was does not appear. What we do know is that in 1837 the premises were assessed to poor rate at a valuation if £70 per annum, and in 1870 at £140. Thus in 1837 the statutory rate at 2s. 9d. would be £9 12s. 6d., and in 1870, £19 5s. per annum. After 1870 payments were made to a trustee for the owner of the property by his *cestuis que trustent* representing interest on the purchase price of the tithes which had been bought by the trustee apparently for his own account. The payments are called tithes but are obviously not, and apparently have nothing to do with the occupiers. As far as one can see no occupier has in fact made a payment for tithe since 1822. I can draw no inference from the payment of £2 instead of 19s. for the 37 years from 1834-71 which impairs the effect of the continuous payments of 19s. for over a century before. It is probably sufficient to say that £2 is so little more than 19s. and so much less than the statutory rate, as to support the defendants' view rather than the plaintiffs'. It certainly is not an admission that no customary tithe was payable.

What then is the legal conclusion from the facts above stated? My Lords, I should have thought that if there was one legal doctrine more firmly established than another it is that from long continued user of a right you are to infer a legal origin if possible. It is a doctrine upon which numerous titles depend. It is indeed the doctrine upon which the plaintiffs' right in this action probably depends, for it has been a moot question whether the decree annexed to the Act of 1845 was ever enrolled as was required by the statute. The point was not finally settled till the decision of the House of Lords in *Macdougall v. Purrier* (2 Dow and Clark, 135, at p. 165). Lord Eldon said: "What are we to say to the fact, that in the memory of all living men the citizens of London have paid the tithes under this Act? Are the citizens of London so fond of paying tithes, and so liberal as not to take advantage of their non-liability? Do they differ from all other persons in that respect? The fact of payment for two or three centuries is enough to justify your Lordships in presuming an enrolment, though it cannot now be produced. Many cases have occurred, and in some of them I have been professionally engaged, in which the rights of the clergy under this Act have been the subject of discussion, and yet this objection to the non-production of the enrolment has never before been taken, Judges and counsel being equally satisfied, from the long train of decisions, and from long existing usage, that the Courts must at the end of two or three centuries act upon the presumption that all things, which the Act rendered necessary to be done, had been rightly done at the time. If your Lordships were not to act upon such a presumption, you would shake the foundation of every title to property in the kingdom."

I will refer to one other well-known authority, the decision in *Shephard v. Payne* in the Exchequer Chamber (16 C.B., N.S., 132). It was an action to recover fees alleged to have been improperly demanded by the defendants as Registrars of the Archdeaconry Court of Colchester for attending the Archdeacon's visitation. The decision was given on a special case in which the question was whether the fees were legally payable and recoverable in amount. The Court had power to draw inferences of fact.

Mr. Justice Blackburn, delivering the judgment of the Court, said: "The facts stated in the case show, that from 1727 to 1801 visitation fees of the unvarying amount of 7s. 6d. and 4s. 6d. were uniformly received. From 1801 to 1857 (when the present dispute originated) fees of a varying amount, but always slightly in excess of 7s. 6d. and 4s. 6d., were received. The amount in excess of 7s. 6d. and 4s. 6d. is not now claimed; and, if it were, the uniform receipt for 71 (*sic*) years (from 1727 to 1801) of the amounts of 7s. 6d. and 4s. 6d. would be overwhelming evidence that the excess was a usurpation. But the modern usurpation of an excess does not affect the title to the original fees of 7s. 6d. and 4s. 6d. These have been received from 1801 to 1857 as much as from 1727 to 1801: so that the title to them depends on an unbroken perception as of right for 130 years. That does not in itself give any title: but, in favour of vested interests, and for the quieting of titles, the rule of evidence has been established, that, where there has been long-continued modern user of a right capable of a legal origin, the existence of that legal origin should be presumed, unless the contrary be proved. This presumption is not one *juris et de jure*, which cannot be rebutted; but neither is it one purely of fact, and only to be drawn when the jury really entertain the opinion that in fact the legal origin existed."

My Lords, the rule of evidence referred to cannot be confined to cases where the person setting up the right is seeking to enforce it in the litigation. It must be equally applicable where the defendant being sued on an alleged right of the plaintiff is setting up a right on his part to make a reduced or a different payment. In both cases the question for the decision is what is the legal right, and the rule is a rule of evidence to determine that question. I can hardly doubt that if the plaintiffs here were claiming only a customary payment of 19s. and adduced the evidence given in this case, they would have established their case. *Shephard v. Payne* (*supra*) seems conclusively to fit the facts of this very case, and in my opinion the same inference should be drawn in favour of the defendants.

There is, I think, authority for drawing the inference required by the defendants in cases involving the right to London tithes. In *Warden, &c., of St. Paul's, London v. Morris* (Western, 169, at p. 184) Lord Eldon said: "I admit, that where it is clear, that something, not 2s. 9d. in the £, has been paid, you are to endeavour to apply it, so as to fix the accustomed payment." As in that case the evidence was that there had been records of rates in 1672, 1676 and 1681 which varied, and a jury had decided against a customary payment, it is not surprising that Lord Eldon refused a new trial on the ground that evidence of a former decree had been rejected, which in his view would throw no new light on the matter. So in *Warden, &c., of St. Paul's v. Kettle* (Western, 191, at p. 205): "Whatever may be the probability that 2s. 9d. in the pound never was paid in this parish [St. Gregory] . . . yet I cannot regard that fact as more than negative evidence, strong negative evidence, if connected with material positive evidence, that there must have been some other payment due from the parishioners." He goes on to say that the onus is on the parishioners to show what that customary payment is. But he refused a new trial, as he says at page 209, "after two trials at bar, when it was admitted that through centuries there has been no customary payment, and no man has been able to say what it was."

I think that the observations of Lord Eldon indicate that if he had such evidence of a customary payment as is given in this case he would have

found the customary payments proved. There is one further authority which appears to me to be of great weight, the decision of Lord Wrenbury, then Mr. Justice Buckley, in *Foster v. Plumbers' Company* (unreported), in January, 1900, which is set out in the record. It is a case on this very title to the tithes in this parish. The learned Judge found that the customary payment had been established. I have looked carefully at the judgment and I cannot see that the learned Judge had any evidence of actual payment of the alleged customary 19s. other than some of the very documents in this case except that Nottingham was a party to the suit of *Langham v. Lawrence,* where he set up a customary payment of 1s. 8d., which the Judge traced into the 19s. in question. The learned Judge (Record, p. 114), after discussing *Lee Conservancy Board v. Button* (12 Ch.D., 383), where the Court of Appeal had refused to presume one legal origin where another was possible, says : "I do not think that applies at all to a case, where as here you have got to choose between the liability to 2s. 9d. in the £ or a liability to the 19s. There might have been a perfectly good legal origin for 19s. It may have been a customary payment. You have not got to presume anything as regards that. It is simply a question of fact to be investigated whether the facts given in evidence lead the mind to the conclusion that the 19s. having been paid for so many years must have been paid and received because it was the sum payable, and if so you are entitled to carry that back to the earlier date, and say that you are satisfied that that was so before the statute was passed. Now the evidence does satisfy my mind that these payments which have been received during so many years are the proper payments, and that the 19s. is the sum payable."

My Lords, I entirely agree with that train of reasoning, and it appears to me that from before 1705 to 1822 19s. was paid and received, because it was the sum payable. Applying Lord Eldon's test, I would ask, Are lay impropriators in the City of London so fond of remitting tithes and so liberal as not to take advantage of their rights ? In this particular case we have two known owners, Sir John Langham and Mr. Cook at intervals of 150 years, both obviously prepared to exercise their rights to the full. The one has to admit customary rights in at least half the parish, and never appears to have collected the statutory rate at all. The other finding a payment by mistake of 16s. restores the payment to 19s., where the statutory rate would, as we know, produce at least £6 17s. Finding then that 19s. was paid and received because it was the sum payable I necessarily conclude that it was a customary payment. And, if so, Jennings's payment of 35s. must equally certainly have been a customary payment ; and so of each occupier back to a period before the statute of 1545.

In my opinion, therefore, my Lords, the defendants have established their defence, and I agree with the unanimous decision of the Court of Appeal. The contrary conclusion leads to the remarkable position that for the first time in 350 years the titheowner will receive the statutory rate. Fortunately it will also be the last, for the tithe has now been commuted under the Act of 1871.

In my judgment the titheowner has no legal right to the good fortune that has befallen him, and I would dismiss this appeal with costs.

[Solicitors—Messrs. Peacock and Goddard ; Messrs. Waterhouse and Co.]

Court of Appeal.
(Lord Hanworth, M.R., Sankey and Russell, L.JJ.)
1928. May 10.

GARDNER v. VICKERS, LIMITED.*

Master and Servant — Compensation for injury by accident—Basis—Average earnings for 12 months—Break in employment—Workmen's Compensation Act, 1925 (15 and 16 Geo. V., c. 84), s. 9 (2).

The appellant, who was employed by the respondents as a riveter on piecework, received notice, on September 3, 1926, owing to the coal strike of that year, that there was no more work available for him. He accordingly ceased to work till December 8, when he was re-employed by the respondents. On January 11, 1927, he met with an accident causing total incapacity. On an application for compensation, the county court Judge held that the interruption was a normal incident and that there was no break in the employment, and he awarded compensation on the basis of the appellant's earnings for the 12 months prior to the accident.

Held, that on the facts the interval was not one of the incidents of a discontinuous employment, and there was therefore a break in the employment, and the case must go back to the Judge to assess compensation on this basis.

This was an appeal by the applicant from an award of the Lancashire County Court Judge sitting as arbitrator under the Workmen's Compensation Act, 1925. The question was whether an interruption in the employment of the applicant by the respondents, Vickers, Limited, due to lack of work, resulted in a "break" in the employment. The decision affected the rate of compensation to be paid to the workman. The lack of work was caused by the coal strike of 1926.

The applicant was a riveter employed on piecework by the respondents, and he had been in their employment for about eight years. On September 3, 1926, he was informed that there was no more work available for him. He ceased to work for the respondents until December 8, and during this time he was unemployed and he received unemployment benefit. On December 8 he was re-employed on somewhat different work and earned higher wages. On January 11, 1927, he met with an accident arising out of and in the course of the employment.

It was admitted that compensation was payable on the footing of total incapacity, and the only question was the basis on which his compensation should be computed. Evidence was given that, out of 176 riveters in the respondents' employment, only five were continuously employed during the whole of 1926 without suspension.

For the applicant it was contended that his average earnings for the purpose of assessing compensation must be ascertained during the period between December 8, 1926, and January 11, 1927. For the respondents it was said that the employment was continuous and that his average earnings must be ascertained for the period January 11, 1926, to January 11, 1927.

* Reported by H. C. Garsia, Esq., Barrister-at-Law.

The county court Judge held that there was no break in the employment and awarded compensation on the latter basis. He held that an interruption in the employment was a normal incident of the employment although, in this particular case, it had been long in duration.

The workman appealed.

Sir Henry Slesser, K.C., and Mr. Arthur Henderson appeared for the appellant ; Sir Walter Greaves-Lord, K.C., and Mr. Derbyshire, K.C., for the respondents.

The COURT allowed the appeal and remitted the case to be re-heard by the county court Judge.

The MASTER OF THE ROLLS, in giving judgment, said that the question which arose was as to the rate of compensation to be paid to the workman. That was to be estimated in accordance with sections 9 and 10 of the Workmen's Compensation Act, 1925. Section 9 (2) provided that :—

"The rules for calculating the weekly payment in the case of total incapacity shall be—(i) The weekly payment shall . . . be a sum not exceeding 50 per cent. of the workman's average weekly earnings during the previous 12 months, if he has been so long employed by the same employer, but if not, then for any less period during which he has been in the employment of the same employer. . . ."

That at once raised the question how long the workman had been employed. Had he been employed by the respondents for 12 months ? It was plain that he was not in receipt of any earnings from September 3 to December 8. Was he during that time in the employment of Vickers, Limited ? He thought that the right test to apply was that laid down by Lord Justice Vaughan Williams in *Jones v. Ocean Coal Company, Limited* (15 *The Times* L.R., 339 ; [1899] 2 Q.B., 124), when he said :—"If there is a period of time during which that"—*i.e.*, that the workman if called upon to work will do so or that the employer, if asked to give employment, will allow the man to work—"could not be truly assumed, then the relation of master and servant will have to come to an end. . . ."

What was the relation between the workman and Vickers, Limited ? The man was free to engage himself to another employer. The county court Judge found that the man had the option of getting employment elsewhere and then, if he were offered a better job at Vickers, to give up his existing job and return to Vickers. Did that connote that the relationship of employer and workman still remained ? He could not think so. It was impossible to say that the employment was continued during a time when the man had complete freedom and was neither working for nor receiving earnings from Vickers.

Then it was argued that this was a question of fact for the county court Judge. It was true that there might be employments which were discontinuous in their nature. There might be employments in which this discontinuity was incidental to the employment. But here the county court Judge had said that, while he recognized that in the case of a man on piecework there might be intervals when there was no work available, here the period was considerably beyond the normal. He (his Lordship) thought that that finding negatived the view that the interval was one of the incidents of a discontinuous employment. There was therefore a break in the employment and the case must go back to the county court Judge for re-hearing.

The judgments in the group of cases reported under the name of *Perry v. Wright* (24 *The Times* L.R., 186 ; [1908] 1 K.B., 441) really dealt fully with the problems which the county court Judge would have to consider. The appeal must be allowed and the award set aside.

LORD JUSTICE SANKEY said that the only question to be determined by the county court Judge had been the amount of compensation to be awarded for total incapacity. For this purpose section 9, subsection 2 (i), of the Workmen's Compensation Act, 1925, applied, and section 10 prescribed rules for determining the average earnings. The question here was whether the workman had been continuously employed by the respondents during the preceding 12 months or whether there had been a break in the employment from September 3 to December 8 so that the man's employment from December 8 must be treated as a new employment. The question whether there was a break was in most cases a question of fact, so that if it was sought to disturb the county court Judge's award it must be on the ground either of misdirection or of absence of evidence to support the award. Here the appellant succeeded on both grounds. He (his Lordship) did not propose to lay down any general rule, but he thought the passage read by the Master of the Rolls from *Jones v. Ocean Coal Company, Limited* (15 *The Times* L.R., 339 ; [1899] 2 Q.B., 124), was helpful. He was not prepared to say that in a case of a day to day contract, such as that in the present case, a workman's employment ended from the moment when his work ceased. That point had been dealt with by Lord Atkinson in *Price v. Guest, Keen and Nettlefolds, Limited* (34 *The Times* L.R., 494 ; [1918] A.C., 760, at p. 771), when he said : "In some cases, such as that of dock labourers, the man is, I believe, employed for the day and paid off at night. There is a new contract of service entered into each morning ; but a continuous and unbroken succession of such contracts as these for three years might form the basis of an employment for three years." So, too, as pointed out by Lord Justice Fletcher Moulton in *Perry v. Wright* (24 *The Times* L.R., 186 ; [1908] 1 K.B., 441, at p. 461), periods of enforced idleness might be an incident of the particular employment.

In this case, however, there was, in his view, a break in the workman's employment from September 3 to December 8. That period of absence from work was not a normal incident of the employment, in view of the county court Judge's own finding that it was due to the coal strike and considerably longer than usual. It followed that the case must go back to the county court Judge to determine the compensation, having regard to the fact that there had been this break in the employment. It would be for the county court Judge to say whether he could properly arrive at the average earnings by reference to the short period of employment from December 8 to January 11, or whether he must resort to the mode of ascertaining the average earnings from the earnings of some other man in the same employment provided by section 10.

LORD JUSTICE RUSSELL said that he agreed that the case must go back to the county court Judge for a new trial. The learned Judge had dealt with the case as one falling within the first part of section 9 (2) (i) on the ground that there had been no break in the employment. In his (his Lordship's) opinion, that finding of fact was not justified by the evidence, nor did it accord with another finding of the learned Judge that the period during which the man was unemployed was longer than usual. He (his Lord-

ship) would have been surprised by any other finding. It was hard to see how it could be said that it was a normal incident in a man's employment that he should be without work for a quarter of the year owing to a strike in another trade. In his opinion, there had been a break in the employment. He could understand that it might be said that a man's work continued if the contractual obligation continued ; or he could understand that there might be continuous employment without a continuous contractual obligation, if there was continuous work. But he was unable to see how there could be continuous employment without either continuous work or continuous contractual obligation. It followed that there had been a break in the employment in this case and that it fell within the second part of section 9 (2) (i). The case must go back to the county court Judge to compute the average earnings as best he could, having regard to section 10.

[Solicitors—Messrs. Bell, Brodrick, and Gray, for Mr. Joseph Pickavance, Barrow-in-Furness ; Messrs. Barton and Hanning, for Messrs. Hart Jackson and Sons, Barrow-in-Furness.]

K.B. Div. (Salter and Talbot, JJ.) 1928. Apr. 27.

WEST WALES JOINT BOARD FOR THE MENTALLY DEFECTIVE v. EVANS AND ANOTHER.*

Landlord and Tenant—Restrictions—Non-occupation by tenant—Whole premises sub-let by tenant—Claim for order for possession against tenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 5 (1) (5).

Where there has been no default by a tenant within section 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 [as re-enacted by section 4 of the Rent and Mortgage Interest Restrictions Act, 1923], no order for possession or ejectment can be made in respect of premises protected by the Act, so long as they are lawfully occupied; and, therefore, the fact that a tenant, who has sub-let the whole of the premises and is not in occupation of any part thereof himself, has received notice to quit is not a ground for an order for possession being made against the tenant.

Gidden v. Mills ([1925] 2 K.B., 713) explained and followed.

This was an appeal by the plaintiffs from a decision of his Honour Judge Davies, sitting at the Llandilo County Court, who had given judgment in favour of the defendants in an action for possession of a dwelling-house known as North Lodge, Pantglas, Carmarthenshire. The case raised the question of the effect of non-occupation by a tenant on his right to be protected under the Rent Restriction Acts against an order for possession.

The plaintiffs, the West Wales Joint Board for the Mentally Defective, were a local authority consisting of representatives from the counties of Carmarthen, Pembroke, and Cardigan. Their duties were to provide for the mentally defective, and in order to carry out their duties they had acquired a mansion and stables, with living accommodation over them, at Pantglas, and also the premises known as North Lodge. North Lodge was let to the defendant, Colonel Delme Davies Evans, before the plaintiffs were constituted as a Board and while the mansion was empty, on a yearly tenancy at a rent of £2 10s. per annum.

Colonel Evans interested himself in the breeding of horses and required North Lodge to house a stud-groom. The groom, who was the second defendant, was Mr. Dan Phillips, and it was a condition of his service that he should live at North Lodge and pay a rent for the premises, the rent being deducted from his wages. At the time of the action the plaintiffs received only female patients, and their indoor staff was female. The plaintiffs desired, however, to obtain possession of North Lodge in order to have a man available near the mansion to deal with emergencies that might arise which could not be adequately dealt with by the female staff. They had such a man in their employment at the time living in the village of Llanfynydd, but he lived too far away to perform his services adequately.

The plaintiffs, accordingly, served a notice to quit, expiring September 29, 1925, and subsequently brought an action against Colonel Evans and his groom, Mr. Phillips, for the possession of North Lodge. They contended that the defendants were not entitled to the protection of the Rent Restriction Acts; but that if either of them were so protected the cottage in the village of Llanfynydd occupied by the plaintiffs' male employee was "alternative accommodation" available for the defendant Mr. Phillips. The County Court Judge found as a fact that the cottage in question was not "alternative accommodation," and he held that Mr. Phillips was protected by the Acts as a sub-tenant lawfully in occupation ; and that it would not be reasonable to make an order for possession against Colonel Evans while granting protection to his servant. He further held that, if the Rent Restriction Acts did not apply, the plaintiffs had waived their notice to quit by accepting rent afterwards. He gave judgment for the defendants.

The plaintiffs appealed.

Mr. C. J. Farwell, K.C., and Mr. Edgar Dale appeared for the appellants; Mr. Humphrey Edmunds for the respondents.

Mr. Farwell admitted that the order of the County Court Judge, in so far as it related to the defendant Phillips, could not be disputed ; but he contended that an order for possession should have been made against Colonel Evans, inasmuch as he was not himself in occupation of the premises at all. The general object of the Rent Restriction Acts was to prevent persons living in a house from being evicted. By expressly affording protection to a sub-tenant in occupation, the Acts must have contemplated an order for possession being made against a non-occupying tenant. [He referred to *Hicks v. Scarsdale Brewery Company* ([1924] W.N., 189), *Keeves v. Dean* (40 *The Times* L.R., 211 ; [1924] 1 K.B., 685), *Prout v. Hunter* (40 *The Times* L.R., 868 ; [1924] 2 K.B., 736), and *Ebner v. Lascelles* (44 *The Times* L.R., 460)].

Mr. Edmunds contended that no order should have been made against Colonel Evans. For the purpose of section 5 of the Act of 1920 the Acts did not apply to persons, but *in rem*. When once the Act applied to premises, no order for possession could be

* Reported by T. R. F. Butler, Esq., Barrister-at-Law.

made, unless one of the conditions laid down in section 5 was fulfilled. This was the basis of the decision in *Gidden v. Mills* ([1925] 2 K.B., 713). In *Prout v. Hunter* (*supra*) the Court refrained from making an order on the ground of non-occupation by the tenant, and made it on the ground that the *de facto* use of the house brought it outside the Acts altogether. In making an order for possession against the tenant a Court would be ordering him to get rid of his sub-tenant, which he had no right to do.

Mr. DALE replied.

MR. JUSTICE SALTER.—This is an appeal from a judgment of the learned Judge of the Llandilo County Court. The matter arises under the Rent Restriction Acts. The action was one by landlords for possession of a cottage, which was required in fact for a stud-groom. The premises in question had been let to the defendant Colonel Evans. Colonel Evans used them as a dwelling for his stud-groom, the defendant Phillips. Phillips paid Colonel Evans a rent for the premises, which was deducted from his wages, and it must be taken that Phillips was a tenant from Colonel Evans of this cottage. I will refer to the plaintiffs as the landlords, Colonel Evans as the tenant, and Phillips as the sub-tenant.

The landlords, having duly determined the tenant's tenancy by a notice to quit, took these proceedings in the County Court. They were obviously framed under section 138 of the County Courts Act, 1888, as proceedings by an ex-landlord against an ex-tenant, whose tenancy had expired, and persons claiming under him. The learned Judge entered judgment in favour of both defendants. The plaintiffs appeal.

So far as this Court is concerned, the plaintiffs do not challenge the judgment in favour of the defendant Phillips, but they say that they are entitled to judgment for possession as against the defendant Colonel Evans. The case appears to me to be governed by the case of *Gidden v. Mills* ([1925] 2 K.B., 713). The facts are precisely the same. A dwelling-house to which the Acts apply has been let by landlords to a tenant, and sub-let as a whole by the tenant to a sub-tenant. The tenant is not in occupation of any part, and the sub-tenant is in possession of the whole. The tenancy having been duly determined, the landlords take proceedings against the tenant and the sub-tenant, and the question is whether they are entitled to an order for possession against either.

I think myself that the short answer in this case, and the correct way to deal with it, is the way in which the matter was dealt with in my judgment in *Gidden v. Mills* (*supra*). Reference should be made to section 12 (2) and section 5 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The latter has been re-enacted by section 4 (1) of the Rent and Mortgage Interest Restrictions Act, 1923. Section 12 (2) shows that the premises now in question are a house to which the Acts apply, if let for purposes of habitation, and it is admitted that they are a dwelling-house. Then section 5 (1) imposes what has been called a fetter. It is in the following terms : "No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless," &c. The administration of the Rent Restriction Acts is confided to the County Court, and this last section is obviously framed on the County Courts Act, 1888. The material sections are section 138 and section 59. Section 138 gives a remedy to an ex-landlord where the term has been duly determined, and enables him to proceed against an ex-tenant and persons claiming under him. Section 59 deals with the action of ejectment, by which proceedings may be taken either against an ex-tenant or against a mere trespasser. With reference to actions under section 138, they are forbidden altogether by section 5 of the Act of 1920. With reference to actions under section 59, such actions are thereby forbidden against a tenant, but not against a mere trespasser. I think it is sufficient to say that since the premises in question are a dwelling-house to which the Act of 1920 applies, no order such as is sought in this case can be made so long as the premises are lawfully occupied.

There has been much discussion of the judgment in *Gidden v. Mills* (*supra*) delivered by Mr. Justice Greer, as he then was, and particularly of the following sentence, on page 725 : "I agree with Mr. Justice Swift"—(that is a reference to the decision in *Hicks v. Scarsdale Brewery Company* ([1924] W.N., 189)—"that a tenant who has sub-let the whole of the premises let to him is outside the protection of the Act, but I do not think a judgment for possession can be given so long as the premises are in the occupation of any person who is entitled by the Act to remain in occupation." Now with regard to the first part of that sentence and the reference to *Hicks v. Scarsdale Brewery Company* (*supra*), I am not sure that Mr. Justice Greer would have expressed himself quite in that way if the attention of the Court had been called to section 5 (5) of the Act. That subsection provides : "An order or judgment against a tenant for the recovery of possession of any dwelling-house or ejectment therefrom under this section shall not affect the right of any sub-tenant to whom the premises or any part thereof have been lawfully sub-let before proceedings for recovery of possession or ejectment were commenced, to retain possession under this section, or be in any way operative against any such sub-tenant." I take that to mean this : suppose there has been default under section 5 by a tenant, for example, in regard to non-payment of rent, and the landlord takes proceedings against the tenant, claiming an order of ejectment against him, then if this default is proved and if the County Court Judge thinks it reasonable, the landlord would be entitled to an order against the tenant ; but this subsection provides that the order shall not be operative against the sub-tenant. The subsection deals with cases where there is a sub-tenant of part or of the whole of the premises, and therefore contemplates a case where an order is made against the tenant under this section and where, the whole premises having been sub-let, the tenant is not in occupation of any part. In such a case an order is made under the section, although the premises are lawfully occupied by the person entitled under the Act to be there, and I think the words in the second part of the sentence of the judgment of Mr. Justice Greer to which I have referred, though perhaps right in regard to that particular case and to the present one, would be too wide in a case where default under section 5 had been made by a tenant. I think section 5 (1) means that, where no default is made under section 5, the dwelling-house cannot be the subject of any order for possession or ejectment so long as it is occupied by a person lawfully entitled to be there. With regard to the reason given by Mr. Justice Greer for the decision that no order should be made—namely, that it would be useless, having regard to the position of the sub-tenant—I am not quite sure whether his attention had been called to section 5 (5).

In my view this is a very simple case and falls

within the principle laid down in *Gidden v. Mills* (*supra*). In a case where there has been no default under the Act, no order for possession can be made so long as the sub-tenant Phillips is lawfully there.

I desire to add two further observations. The first is that I doubt whether proceedings under section 138 of the County Courts Act, 1888, could in any case succeed on these facts. So far as they were proceedings against Phillips, they were not proceedings against a person claiming under a tenant. Phillips was claiming his statutory right to be protected. So far as they were proceedings against Colonel Evans, I doubt whether he could be said to be a person who had refused to give up possession. He had no lawful right to claim possession himself, and therefore could not give it.

Secondly, a point was discussed with regard to acceptance of rent by the plaintiffs after giving notice to quit. That discussion proceeded on the footing that the Rent Restriction Acts did not apply to the premises, and that the whole matter was under the common law. In view of my decision that the Acts apply, it is not necessary to discuss that point at all. In the result, therefore, this appeal fails and must be dismissed.

Mr. Justice Talbot.—I am of the same opinion. We have no alternative here but to follow the decision in *Gidden v. Mills* ([1925] 2 K.B., 713). There is, certainly, some little obscurity in one or two passages in the judgment of Mr. Justice Greer in that case, which, no doubt, arises from the fact that section 5 (5) and section 15 (3) of the Act of 1920 do not appear to have been brought to the notice of the Court.

[Solicitors—Messrs. T. D. Jones and Co., for Mr. Hugh Williams, Llandilo; Messrs. Lambert and Hale, for Messrs. George Williams and Hurley, Llandilo.]

K.B. Div. (Wright, J.) 1928. May 14.

CLAN LINE STEAMERS, LIMITED v. BOARD OF TRADE.*

Ship—Collision—War or marine risk—Meaning of "warlike operation."

A steamer belonging to the claimants was requisitioned by the British Government during the War on the terms of a charterparty by which the Government undertook responsibility for loss of the vessel owing to a warlike operation, while the claimants remained responsible for loss by ordinary marine risks. In May, 1918, the claimants' vessel was in a convoy and was carrying from the United States to France steel billets for making shells, but the bulk of her cargo consisted of cereals for the French civilian population. Owing to a defect in her steering gear she collided with an American vessel, which was also in the convoy and was carrying war stores exclusively and was admittedly engaged in a warlike operation. The result of the collision was that the claimants' vessel sank. There was no negligence on the part of either vessel. The Government refused to pay for the loss on the ground that it had not been caused by a warlike operation.

Held, that the claimants' vessel was not engaged in a warlike operation, and, as the collision was caused by her sudden departure from her proper course, the American vessel being merely the instrument and not the cause of the loss, the loss was not caused by a warlike operation, and the British Government was not liable.

This was a special case which raised again the question whether the loss of a vessel during the War was due to a warlike operation. The Clan Line Steamers, Limited, were the owners of a steamship, the Clan Matheson, which was requisitioned by the British Government during the War on the terms of the well-known charter, T.99. Under clause 19 thereof the Government, in effect, undertook responsibility for loss of the vessel owing to a warlike operation, while the shipowners remained responsible for loss by ordinary marine risks.

In May, 1918, the Clan Matheson was one of 35 vessels sent in a convoy from the United States to France. On the night of May 22-23, 1918, the weather was fine and there was a bright moon. The Clan Matheson, owing to some defect in her steering gear which had never been explained, suddenly swung out of line and came into collision with a steamer, the Western Front, which was also in the convoy, with the result that the Clan Matheson sank.

The Clan Line claimed the value of the steamer, which was agreed at £265,000 at the time of the loss, but the Government refused to pay on the ground that the loss had not been caused by a warlike operation. The dispute was referred to arbitration, as required by the terms of T.99, and the arbitrator awarded that the claim succeeded, subject to a decision of the Court on a special case, because the loss was the result of a warlike operation.

Mr. Raeburn, K.C., and Mr. Russell Davies appeared for the Crown; and Mr. Langton, K.C., Mr. A. T. James, K.C., and Mr. J. MacMillan appeared for the shipowners.

Mr. Raeburn, in opening, said that the convoy was proceeding from New York to two French ports, St. Nazaire and Nantes. The Western Front, an American steamer, was carrying exclusively war stores, and, on the authorities, he could not dispute that she was engaged in a warlike operation. The Clan Matheson was carrying some steel billets which would have been made into shells, but the rest of her cargo consisted of cereals, part of which was intended for the civil population and only a small part of which was going to the troops in France. The arbitrator, in view of the fact that 84 per cent. of her cargo was going to be used for civilian purposes, held that she was not engaged on a warlike operation; the question in this case, therefore, was what was the result where a vessel, not engaged in a warlike operation, was sunk in collision with a vessel which was engaged in such an operation.

The arbitrator found as a fact that the Clan Matheson was not guilty of negligence, and it was admitted that the Western Front was not in any way negligent. To succeed here the claimants would have to show that a collision between a warship and a merchant ship, resulting in the loss of the merchant ship, caused that loss to be a loss by a warlike

* Reported by W. B. Thompson, Esq., Barrister-at-Law.

operation whatever the merchant ship might have been doing at the time. If, for instance, a warship was lying at anchor and a merchant ship was driven by the weather down on to her bow and was sunk, the claimants would have to show that the loss was due to a warlike operation. But the mere fact that one ship concerned in a collision was a warship did not make the collision a result of a warlike operation.

Mr. Raeburn referred to the St. Oswald case, *British and Foreign Steamship Company, Limited v. The King* (34 *The Times* L.R., 546; [1918] 2 K.B., 879); the Petersham case, *Britain Steamship Company, Limited v. The King* (36 *The Times* L.R., 791; [1921] 1 A.C., 99); *Attorney-General v. Ard Coasters, Limited* (37 *The Times* L.R., 692; [1921] 2 A.C., 141); the Warilda case, *Attorney-General v. Adelaide Steamship Company, Limited* (39 *The Times* L.R., 333; [1923] A.C., 292); *Charente Steamship Company, Limited v. Director of Transports* (38 *The Times* L.R., 148, 434). The real point in this case, said counsel, turned on the fifth and sixth findings of fact of the arbitrator, which were as follows:—

"(v.) The sinking of the Clan Matheson was proximately caused by the impact of the Western Front moving in the course of a warlike operation which she was then carrying out.

"(vi.) The sheering of the Clan Matheson to port was not the real or proximate cause of her loss within the meaning of Clause 19 of the said charterparty."

Mr. Justice Wright referred to *Ionides v. Universal Marine Insurance Company* (14 C.B.N.S., 259, at p. 286), and said that the case turned on the meaning to be given to the words "proximate cause." Suppose that the circumstances had been exactly the same, but that the Western Front had sunk instead of the Clan Matheson, would the loss have been due to a warlike operation?

Mr. Raeburn submitted that it would not. The mere fact that the damage was caused by the impact of a vessel engaged in a warlike operation did not make the damage to be caused by a warlike operation.

Mr. Langton, for the shipowners, submitted that the Warilda case (*supra*) relied on by the Crown was distinguishable because one of the vessels in that case was negligent. The closest authority for the present case was the *Ard Coasters* case (*supra*). If two vessels were in collision, one of them on a warlike operation and neither of them negligent, the damage to either ship must, on the authorities, be the result of a warlike operation. The Clan Matheson was carrying 1,200 tons of war material to a war base. If the proportion of war material on board was to decide whether a ship was on a warlike operation or not, at what proportion must the line be drawn?

Mr. Justice Wright delivered the following considered judgment:—This is a claim by the Clan Line Steamers, Limited (herein referred to as the shipowners), against the Board of Trade (herein referred to as the Government) for the sum of £265,000 as the value of the steamship Clan Matheson, of which they were owners, on the ground that the Clan Matheson was lost as a consequence of warlike operations within the meaning of the *pro forma* charterparty under the terms of which she had been requisitioned by the Government in September, 1917. The Clan Matheson sank after collision with an American steamship, the Western Front, on May 23, 1918, while under the requisition. The *pro forma* charterparty contained an arbitration clause, under which the question was submitted to the arbitrator, Mr. H. Claughton Scott, K.C., who has made his award in the form of a special case for the opinion of the Court, which now comes before me.

The clauses of T.99 which are material for this case are clauses 18 and 19, which are in the following terms. Clause 18: "The Admiralty shall not be held liable if the steamer shall be lost, wrecked . . . . by or in consequence of dangers of the sea or tempest, collision . . . . or any other cause arising as a sea risk." Clause 19: "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following but not more extensive clause:—Warranted free of capture, seizure or detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after the declaration of war. Such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost, at the time of such loss." These clauses must obviously be construed in accordance with the principles of marine insurance. The arbitrator has found that the loss of the Clan Matheson was a consequence of warlike operations within these clauses, but subject to the opinion of the Court on the question whether in law on the facts the loss was so caused and did not arise as a sea risk.

At the time of the casualty the Clan Matheson was sailing in convoy; the convoy consisted of 35 to 40 vessels in columns; the Clan Matheson was the third ship from the front in the second column from the port side; the Western Front was in the corresponding position on the port column, the regulation distance between them being 800 yards; the convoy was under the escort of cruisers, and each ship was required to keep in line and maintain her proper distance. The Clan Matheson was carrying a cargo of about 7,500 tons, including 363 tons of steel for shells, and about 919 tons of oats intended for the military authorities; the rest of her cargo was intended for the civil commissariat—that is, about 84 per cent. by weight of the cargo was for the civil commissariat and about 16 per cent. for the military authorities: she was bound for Nantes, which was admitted by the pleadings to be a war base, but was also, as the arbitrator finds, an ordinary commercial port. The arbitrator finds that the Clan Matheson was not at any material time engaged upon or carrying out a warlike operation within clause 19 of the charterparty. Mr. Langton has asked me to say that this finding is wrong in law. I have considered the relevant authorities, in particular the case of the Geelong, *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service* (39 *The Times* L.R., 133; [1923] A.C., 191), but I can see no ground to justify me in holding that on the facts stated the arbitrator is wrong in law in so finding. The cargo destined for the military authorities was a comparatively small portion of the whole and was of a character not directly referable to use or immediate use in war; the steel would need to go to a munition factory to be made into shells, and the oats intended for the military authorities might be used for feeding horses or mules far from the lines; the term "warlike operations" is not capable of precise definition, and "does not include all operations in war or even all operations for the purpose of war" (*per* Lord Cave, Lord Chancellor, in the case cited, at page 198). In any case the character of the cargo and the port of destination were predominantly civil. Questions such as this must mainly be questions of fact and

degree. I accept the arbitrator's finding on this point (if indeed it is left to me on the case), and I proceed on his finding that the Clan Matheson was not engaged on a warlike operation.

On the other hand, it is both admitted in the pleadings and found that the Western Front was engaged upon and carrying out a warlike operation within clause 19 at all material times. No question arises on the point.

On the night of the collision the convoy was proceeding at about 9 to 9½ knots ; the wind was about force 5 ; the sea was rough with a considerable swell ; the convoy was sailing without lights, but it was a moonlight night, visibility was good, and other vessels in the convoy could easily have been seen. About 1 a.m. the Clan Matheson was found to be sheering to port, and, though the wheel was put hard-a-port, the sheer continued. Every effort was made on the Clan Matheson in the brief moments available to correct her course, but she swung seven points off her course, across the bows of the Western Front, by which she was struck about amidships approximately at right angles ; she sank in about two hours and became a total loss. It seems clear that some defect had developed in the patent hydraulic steering telemotor gear with which she was fitted ; the steering gear was of a well-known and widely used make, and it does not appear that there was any reason to suspect any defect in it. The arbitrator finds that there was no breach of any warranty of seaworthiness on the part of the shipowners in respect of the Clan Matheson, and no negligence on their part or on the part of those in charge of her. He does not find whether there was any negligence on the part of those in charge of the Western Front in not avoiding the collision when the Clan Matheson swung across her bows. I should have sent the case back to the arbitrator for a finding on this point, but both counsel said that negligence on the part of the Western Front had not been and was not suggested ; that is to say, the Western Front could not avoid striking the Clan Matheson as she did when the Clan Matheson swung out of her course and across the bows of the Western Front.

At first sight there could not well appear to be a clearer case of damage by a collision arising simply as a sea risk, and as such recoverable under an ordinary marine policy. Sailing in convoy is not in itself a warlike operation *quoad* the convoyed steamers such as the two in question, the Matiana case, *Green and Others v. British India Steam Navigation Company, Limited* (36 *The Times* L.R., 791 ; [1921] 1 A.C., 99), where Lord Sumner thus summed up the decision of the House of Lords at page 129 : "In brief, sailing with convoy is only sailing in company and is no more a warlike operation than sailing alone." Sailing without lights in war time is not in itself a warlike operation, the Petersham case, *Britain Steamship Company, Limited v. The King* (36 *The Times* L.R., 791 ; [1921] 1 A.C., 99), but, even if it had been, the fact would have been irrelevant because the steamers were in easy sight of each other. The weather was not bad, the speed was moderate, there was abundant sea room ; the casualty simply occurred because the Clan Matheson instead of keeping line and position suddenly swung out across the bows of the Western Front, thus rendering collision inevitable by reason of the sudden developing of a latent defect in her steering gear. The shipowners' case, however, is that the collision was caused in consequence of warlike operations because one of the colliding steamers, the Western Front, was admitted and held to be engaged on a warlike operation in the somewhat artificial sense that she was carrying for the United States Government under charter to that Government a full cargo of war supplies to St. Nazaire, then being used by that Government as a war base. The Western Front was accordingly, for the purposes of this case, engaged upon a warlike operation ; the question remains whether the loss of the Clan Matheson was caused by that warlike operation, in the sense appropriate in marine insurance law. Overwhelming by the sea is *prima facie* a sea loss, recoverable as a loss by perils of the sea under an ordinary marine policy. Where, however, there is an excluding clause such as is set out in Clause 19 of T.99—which is usually known as the f. c. and s. clause—questions may arise whether a loss *prima facie* within the policy is not taken out of it by the f. c. and s. clause ; the onus of establishing that it is thus taken out is on those who so allege ; for this purpose it is necessary to look beyond the cause immediate to the loss in time. In such a case as the present this cause immediate in time is the fortuitous incursion of sea water into the ship, causing her to sink, and it is necessary then to ascertain how the misfortune occurred that was the cause of it. As Lord Dunedin said in *Leyland Shipping Company, Limited v. Norwich Union Fire Insurance Society, Limited* (34 *The Times* L.R., 221 ; [1918] A.C., 350, at p. 363), "This class of competition between causes can only truly arise when you have to deal with an exception." Lord Shaw in the same case (at page 368) said : "But the idea of the cause of an occurence or the production of an event or the bringing about of a result is an idea perfectly familiar to the mind and to the law, and it is in connexion with that that the notion of *proxima causa* is introduced. . . . What was it which brought about the loss, the event, the calamity, the accident ? And this not in an artificial sense, but in that real sense which parties to a contract must have had in their minds when they spoke of cause at all. To treat *proxima causa* as the cause which is nearest in time is out of the question." Indeed it is clear that where there is a competition of causes, which involves a choice between them in order to determine whether the loss falls within the general body of the policy or within the f. c. and s. clause, the difficulty can only be solved by deciding which is the dominant cause, according to what "the common sense of mankind would assert in such a case," to use Lord Haldane's words in the same case at page 361. To the same effect, Lord Sumner in *Becker, Gray and Co. v. London Assurance Corporation* (34 *The Times* L.R., 36 ; [1918] A.C., 101, at p. 112), speaking of the rule of proximate cause as truly applied in marine insurance cases, says : "Cause and effect are the same for underwriters as for other people. Proximate cause is not a device to avoid the trouble of discovering the real cause or the 'common sense cause.'" If then it is necessary, as it must be in the present case, to go behind the bare fact of the Clan Matheson being sunk by the inrush of water through a casualty and to consider the whole event and the totality of circumstances under which the accident occurred, the dominant fact is, in my judgment, that the Western Front came into contact with the Clan Matheson only because of the sudden departure of the Clan Matheson from her proper line and position, and because by an extraordinary and unanticipated motion the Clan Matheson put herself directly in the way of the Western Front. Collision

was thereby inevitable. If ships can be personified, as in language they always tend to be, the collision was in no sense the voluntary act of the Western Front, but was simply and solely the act of the Clan Matheson, and her loss was "due to her own fault," to use the expression of Lord Sumner in the Warilda case, *Attorney-General v. Adelaide Steamship Company, Limited* (39 *The Times* L.R., 333; [1923] A.C., 292, at p. 304), in a passage to which I shall refer more fully later. On the facts of the case the collision followed directly and by necessary sequence because of the sheer taken by the Clan Matheson, and that event was in my judgment, in marine insurance law and according to the true construction of clauses 18 and 19 of T.99, the cause of the loss of the Clan Matheson. But that cause was in no sense connected with warlike operations. No doubt the Western Front was engaged in a warlike operation, and, if her stem had not run into the Clan Matheson, the Clan Matheson would not have sunk, but that was, to use a convenient if inelegant expression, the *causa sine qua non*, the necessary condition of the loss occurring, not the real or dominant or efficient cause. In my judgment the loss was accordingly not due to the warlike operation of the Western Front, namely, in proceeding on her voyage which was the warlike operation, but to the fortuitous motion of the Clan Matheson, which was in no sense a warlike operation. The Western Front in my judgment was the instrument but not the cause of the loss.

This conclusion does not depend on whether there was (or there was not) any negligence on the side of the Clan Matheson, either in fitting her out or in navigating her. The question is simply what courses, as a matter of fact, did the vessels take? The extraordinary manœuvre of the Clan Matheson in throwing herself across the bows of the Western Front might be due, for instance, to carelessness of the helmsman, but equally to a sudden physical seizure, disabling him and putting the vessel off her course before help could come; it might be due to a mechanical defect due to bad design or workmanship, or a mechanical defect purely latent. In any such case, for the purposes of this question, the result would be the same, the objective motions of the ship being the only relevant consideration; these constitute the event on which the shipowners' rights depend. Negligence and kindred questions are in this and similar cases of marine insurance only material as explaining how the eccentric departure from the ship's proper course occurred. In certain cases so far decided, where collisions have occurred between merchant vessels and vessels engaged on a warlike operation, the question of a collision caused by negligent navigation of the merchant vessel has been discussed by way of observation, the real object of the discussion being to determine whether the loss was due to the act of the merchant vessel. I rely on these observations as supporting my conclusion in this case. The whole matter is fully discussed by Lord Sumner in the case of the Warilda, *Attorney-General v. Adelaide Steamship Co., Limited* (*supra*, at pp. 304 and 305). He quotes Mr. Justice Bailhache as saying in the Ardgantock case, *Ard Coasters, Limited v. The King* (35 *The Times* L.R., 604, at p. 605), that "if negligence on the part of the Ardgantock [the merchant vessel] was the effective cause of the loss, the case would be one of loss by marine risk." Lord Sumner adds: "Literally this was right, though it is not easy to see what is meant by negligence, as such, being the cause; but no doubt what was meant was that if the loss of the Ardgantock was proved affirmatively to be due to her own fault, it would not be caused by the warship and its warlike operations." He further quotes, and, as I read it, with approval, the view of Mr. Justice Roche in *Charente Steamship Company, Limited v. Director of Transports* (38 *The Times* L.R., 148), that in a collision between a merchantman and a ship engaged in warlike operations, during the war, but showing no lights, if the merchantman was solely to blame the collision would not be the result of the other ship's warlike operation. Lord Sumner thus sums up the matter: "When damage is done by two ships coming into collision, one being engaged in a warlike operation and the other on an ordinary commercial voyage, the collision is a risk falling on the marine policy, unless it is taken out of it by being proved to be caused by warlike operations, and this proof fails when it is shown to be caused by the action of the officer in charge of the commercial operation, all the more so if his action is negligent and blameworthy; but I think the result would be the same if his action was only an error of judgment or wrong but excusable in what is called the agony of the moment, so long as it is his action that causes the collision effectively and proximately, for the ship engaged in the warlike operation may play a minor part, since it takes two to make a collision." I think these observations in effect cover the case, when it is borne in mind that the action of the ship's officer is only natural when the question arises in connexion with some movement in so far as it changes the course of the ship, a change which may be equally caused with the same fatal result by a mechanical breakdown of the ship's steering gear.

The essential conclusions of the learned arbitrator, for whose opinion I have the greatest respect, though in this case it differs from my own, are embodied in paragraph 16 (iv., v., and vi.) of his award, of which (v.) is the most vital and is in these terms:—

"16 (v.). That the sinking of the Clan Matheson was proximately caused by the impact of the Western Front moving in the course of a warlike operation which she was then carrying out." The language appears to be almost literally repeated from a passage in the judgment of Lord Justice Atkin in *Ard Coasters, Limited v. The King* (36 *The Times* L.R., 555) quoted by Lord Finlay from the Appendix in that case in the House of Lords, *Attorney-General v. Ard Coasters, Limited* (37 *The Times* L.R., 692; [1921] 2 A.C., 141, at p. 148). The language was aptly used in reference to the facts of that case, where a destroyer on patrol duty swung at full speed in the dark in the course of its duty and ran into the merchant vessel, which was, without negligence on her part, navigating without lights in such a fashion that the destroyer executing her warlike operation without negligence must run into her. For the reasons which I have given, I do not think the language can be correctly applied to the facts of the present case. Indeed, in all these cases up to the present, there has been no ground for ascribing the loss to the act of the merchant vessel rather than to the vessel engaged on warlike operations. In the Warilda case, *Attorney-General v. Adelaide Steamship Co., Limited* (*supra*), where the vessel engaged in warlike operations had caused the collision by her faulty navigation, it was held that a warlike operation was still a warlike operation if negligently conducted; in the other cases, while no blame attached to either vessel, the vessel engaged in the warlike operation ran into the merchant vessel because the warlike operation compelled her

to proceed at speed in the dark without lights, and the merchant vessel was similarly unlighted. In none of these cases could it be said with truth, as it can in my judgment be said here, that, to use Lord Sumner's phrase, the vessel engaged in warlike operation "played a minor part" or, to put it differently, was an instrument and not a cause. This can be said, I think truly, in this case, because it was the merchant vessel which acted individually outside the course of correct navigation so as to render the collision unavoidable: whether that action was due to negligent navigation or mechanical breakdown appears to me to be irrelevant; it is the actual behaviour of the vessels which is to decide the issue.

The present case, coming for decision so many years after the war, though no doubt the delay can be well explained, is the first in which the question to be determined has been directly raised for decision. For the reasons given I hold that the arbitrator's award is not right, but should take effect in the alternative form of clause 18 of the award.

[Solicitors—The Solicitor to the Board of Trade; Messrs. Ince, Colt, Ince, and Roscoe.]

Court of Appeal.
(Lord Hanworth, M.R., Lawrence and Russell, L.JJ.)
1928.
May 8.

WAY v. BISHOP.*

Solicitors—Partnership—Covenant not to practise within defined area after termination—Acting as solicitor's managing clerk—Whether breach of covenant.

The Court held that a solicitor who had covenanted, upon termination of a partnership, not to practise within a certain borough for 10 years, did not commit a breach of the covenant by acting as managing clerk to another solicitor within the prohibited area.

This was an appeal from a decision of Mr. Justice Clauson.

The plaintiff and defendant had practised as solicitors at Portsmouth, and the plaintiff, who had admitted the defendant to partnership after a long term of service as an employee, gave notice to determine the partnership on December 31, 1927. The defendant then entered the service of Mr. Wadeson, a solicitor practising at Portsmouth and Gloucester, as managing clerk, and the plaintiff brought this action to restrain him from doing so, under a covenant in the deed of partnership by which the defendant covenanted "not to practise in the Borough of Portsmouth or within five miles thereof for a period of ten years from the date of the termination of the partnership." The defendant contended that acting as managing clerk to another solicitor was not "practising" within the purview of the covenant.

Mr. Justice Clauson decided in favour of the plaintiff and granted an injunction to restrain the defendant from acting for Mr. Wadeson. The defendant appealed.

The Court of Appeal decided, as a preliminary point, that the partnership had been determined upon reasonable grounds, and then dealt with the main issue.

Mr. F. K. Archer, K.C., and Mr. Wynn Parry appeared for the appellant; Mr. Gavin Simonds, K.C., and Mr. van den Berg for the respondent.

* Reported by G. T. Whitfield-Hayes, Esq., Barrister-at-Law.

Mr. Archer contended that any covenant which might in any way prevent a man making his living ought to be construed strictly against the covenantee. In *Palmer v. Mallet* (3 *The Times* L.R., 760: 36 Ch.D., 411) a person in the position of the appellant had been restrained under a similar covenant from practising, but that was the case of a surgeon, and a surgeon or doctor could not practise in a subordinate capacity in the same way as an admitted solicitor employed by another solicitor as clerk. A solicitor's managing clerk would not come into contact with the clients in the same personal way. He was not "a solicitor . . . in the action or matter," *Reg. v. Oxfordshire County Court Judge* (10 *The Times* L.R., 547; [1894] 2 Q.B., 440).

Mr. van den Berg for the respondent relied upon *Palmer v. Mallet* (*supra*) and *Robertson v. Willmott* (25 *The Times* L.R., 681).

The Master of the Rolls said that in the partnership deed the appellant and respondent had agreed to carry on "the business of solicitors," and that if the partnership were determined the respondent would have the option of continuing "the business." The appellant, on the other hand, was not "to practise." Mr. van den Berg had contended that the word "practise," should be interpreted in a broad sense, in order to preserve the business into which the respondent had admitted the appellant, but the Court now could hardly go into the grounds which had induced the partnership, and must confine itself to the construction of the covenant. The words in the covenant were few, and there were no words such as "either directly or indirectly be engaged in the business of a solicitor or as a managing clerk," or other words not uncommon in partnership agreements of the sort. The only words here were that the appellant was not "to practise." It was, however, worthy of note that the parties had used a word significant in the solicitor's profession, for in the Stamp Act, 1891, section 43, there were penalties imposed upon a person who "directly or indirectly acts or practises as a solicitor," and, further, the right to practise was limited to those who had taken out a practising certificate. It seemed to him (the Master of the Rolls) that if Mr. Way, the respondent, had wished to safeguard himself in the manner asserted by Mr. van den Berg, he ought to have done so in plain terms. Mr. van den Berg's contention really amounted to this, that the Court ought to re-write the agreement between the parties, and embrace within the single word "practise" a number of operations which were not necessarily included within it. *Palmer v. Mallet* (3 *The Times* L.R., 760; 36 Ch.D., 411) did not really seem germane to the present case, for there were words there which did not appear in the present covenant. If it were really necessary for the appellant to resign his position, on account of the covenant, then it would mean that every managing clerk to a solicitor ought to be qualified, and ought to take out a certificate, because he would be "practising" as a solicitor.

He (Lord Hanworth) thought that there was a substantial difference between practising as a solicitor and acting as a clerk to a solicitor. The covenant did not justify the restriction sought to be placed upon the appellant, Mr. Bishop, and the appeal must be allowed, with costs.

Lord Justice Lawrence, in agreeing, said that the profession of a solicitor differed from all other professions in this: that a practising solicitor had to take out an annual certificate; and so the term "practise as a solicitor" had acquired a well-known, but somewhat technical and limited meaning, and

it seemed to him (the Lord Justice) that the parties, in framing their agreement, must have had that meaning in mind. It was not for the Court to extend their language, or to seek to enlarge the expressions used. It might be quite true that the appellant's action would injure the respondent's business, but that had nothing to do with the Court, whose only duty was to construe the covenant as the parties themselves had framed it. In his (Lord Justice Lawrence's) opinion, the mere employment of a managing clerk, although he might be a solicitor and in a position to practise as a solicitor, did not constitute the clerk himself "practising as a solicitor." If he held a certificate which entitled him to practise, it might be difficult to say in certain cases whether he was himself practising as a solicitor, but probably the test there would be whether the relationship of solicitor and client was constituted between him and the person for whom he was acting. Counsel for the respondent had relied upon two cases. In *Mallet's* case (3 *The Times* L.R., 760; 36 Ch.D., 411), however, the words used were wider than in the present case, and in *Robertson v. Willmott* (25 *The Times* L.R., 681), the case of an architect, the terms of the agreement were held to be similar to those in *Mallet's* case (*supra*). Whether those decisions were right or wrong, he (Lord Justice Lawrence) thought that the word "practise" had a narrow effect or meaning in the present case, because of the peculiar position of the profession of a solicitor.

Lord Justice Russell said that the covenant being *prima facie* in restraint of trade, ought not to be unduly stretched in favour of the covenantee. In his view, "practising as a solicitor" meant that the appellant would not act as a solicitor in such circumstances that the relationship of solicitor and client would arise as between himself and the persons whose affairs he was transacting. "Practising as a solicitor" connoted a person who was a principal, who had clients, who had a practice. The words were not applicable to describe the position of a person who was acting as the servant of another. He (Lord Justice Russell) thought that the decision in *Robertson v. Willmott* (25 *The Times* L.R., 681) could be distinguished from the present case, and he agreed that the appeal should be allowed.

[Solicitors—Messrs. Samuel Price, Sons, and Co., for Mr. R. H. Wadeson, Portsmouth; Mr. H. F. Strouts, for Mr. L. B. Way, Portsmouth.]

K.B. Div. } 1928.
(Acton and Finlay, JJ.) } May 15.

BARTRAM v. BROWN AND OTHERS.*

Landlord and Tenant—Restrictions—Decontrol—Grant of lease to the tenant—Meaning of "the tenant"—Rent and Mortgage Interest Restrictions Act, 1923 (13 and 14 Geo. V., c. 32), s. 2 (2).

The words "the tenant" in s. 2 (2) of the Rent and Mortgage Interest Restrictions Act, 1923, refer to the particular person who is the tenant at the time when the lease referred to in the subsection is granted and to no other person.

This was an appeal by the defendants from a decision of his Honour Judge Bairstow, sitting at the Clerkenwell County Court, in favour of the plaintiff. The case involved the interpretation of section 2 (2) of the Rent and Mortgage Interest Restrictions Act, 1923, which provides:—

"Where, at any time after the passing of this Act, the landlord of a dwelling-house to which the principal Act applies grants to the tenant a valid lease of the dwelling-house for a term ending at some date after the 24th day of June, 1926, being a term of not less than two years, or enters into a valid agreement with the tenant for a tenancy for such a term, the principal Act shall, as from the commencement of the term, cease to apply to the dwelling-house. . . ." This Act was passed on July 31, 1923.

In March, 1922, the defendant, Mr. Cecil Brown (now deceased), and his wife took over the residue of a long lease of premises known as 32, Stroud Green-road, Finsbury Park, N. In May, 1923, the Browns sublet the whole premises to a Mr. Griss for a period of 22 years from March 25, 1923, on terms by which Mr. Griss was prohibited from subletting without his lessor's consent. Without obtaining that consent, Mr. Griss, in May, 1923, sublet two rooms on the top floor to a Mrs. Simpson. Mr. Griss never paid any rent, and, shortly after subletting, disappeared from the premises, Mrs. Simpson remaining in possession of her two rooms.

In September, 1923, the Browns sublet the whole of the premises to a Mr. Redman for a period of 21¼ years at a rent rising from £150 to £160 per annum. Mr. Redman took over Mrs. Simpson as his sub-tenant.

Early in 1926, Mr. Redman vacated possession, and on June 14, 1926, the Browns sublet the whole premises to the plaintiff, Mr. Frank Bartram, on a yearly tenancy at a rent of £160 a year. Mr. Bartram subsequently got into arrear with his rent, and on August 16, 1927, Mr. Brown caused a distress to be levied on the premises. Mr. Bartram entered into an agreement with the sheriff's officers, who withdrew, but he was unable to abide by the terms of that agreement, and the distress was renewed on September 7. No leave had been obtained from the Court for the levying of that distress, and Mr. Bartram subsequently brought an action against Mr. Brown and Messrs. Odell, Hibbard, and Co. (the sheriff's officers) for damages for illegal distress.

In the County Court the plaintiff contended that the distress was illegal in that the premises were protected by the Rent Restriction Acts, and that no leave for the levying had been obtained from the Court, as required by section 6 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

The defendants contended, *inter alia*, that the premises had been decontrolled under section 2 (2) of the Rent and Mortgage Interest Restrictions Act, 1923, by virtue of the long lease granted by Mr. Brown to Mr. Redman in September, 1923.

The County Court Judge held that the words "grants to the tenant a valid lease" in section 2 (2) must be construed as "grants to the sitting tenant a valid lease," that a lease to a person who was not already tenant of the premises could not effect decontrol, and that therefore the premises continued to be protected under the Acts. He gave judgment for the plaintiff for £35, the agreed amount of the damages.

The defendants appealed.

Mr. J. H. Critchley appeared for the appellants; Mr. Phineas Quass for the respondent.

Mr. Critchley submitted that the defendant, Mr. Brown, had come into "actual possession" of

* Reported by T. R. F. Butler, Esq., Barrister-at-Law.

the premises within the meaning of section 2 (1) and (3) of the Act of 1923, despite the fact that he had not turned Mrs. Simpson out of the rooms which she occupied, as he might have done. Secondly, decontrol of the premises had been effected by section 2 (2) of the Act. Any lease beyond the period prescribed by that section was sufficient to cause decontrol, and the words "the tenant" in that section meant "any tenant," and were not to be construed as referring only to "the sitting tenant."

Mr. Quass was not called upon to argue.

MR. JUSTICE ACTON.—This is an appeal from a decision of his Honour Judge Bairstow, by which he gave judgment for the plaintiff for an agreed sum of £35 damages and costs in an action brought to recover damages for what was alleged to have been an illegal distress. The ground on which it was contended for the plaintiff and on which it was ultimately decided by the Judge that distress had been illegally levied was that the premises in question were premises to which the Rent Restriction Acts applied and, that being so, the necessary leave had not been obtained for the distress.

The facts are not in dispute, and were stated by Mr. Critchley in his very clear and careful opening. On June 16, 1921, a lease of the premises in question had been granted by a Mr. Pitts to a Mr. Hunter for a term of 24 years commencing from December 25, 1920, at a rent commencing at £70 and rising to £80 per annum. On July 18, 1921, Mr. Hunter assigned the remainder of the term to Messrs. Robinson and Fox. On January 23, 1922, Messrs. Robinson and Fox, in their turn, assigned to a Mr. Goring. On March 6, 1922, Mr. Goring assigned to Mr. and Mrs. Brown, who paid £800 for the remainder of the term. The premises were then vacant, and Mr. and Mrs. Brown went into occupation in March, 1922. They used the premises for a butcher's business till March 24, 1923, and no one but the manager of the shop lived and slept there. On May 25, 1923, they sublet the whole premises to a Mr. Griss for a term of 22 years from March 25, 1923, on the condition that he was to be prohibited from subletting without their consent. He occupied the premises both as business premises and as a dwelling-house. A short time afterwards Mr. Griss, without asking for or obtaining the consent of his lessors, sublet two rooms on the top floor to a Mrs. Simpson. Mr. Griss paid no rent at all; he occupied the premises for about three months, and then abandoned possession, so that he thenceforth disappears from this case, but left Mrs. Simpson in occupation of the two rooms on the top floor. Mr. and Mrs. Brown, as the lessors of Mr. Griss, found the two rooms on the top floor in the occupation and possession of Mrs. Simpson, and there seems to have been an interview terminating in nothing definite, though apparently a statement was made by Mr. Brown to Mrs. Simpson to the effect that Mrs. Simpson had no right to be there. No definite steps were, however, taken to remove her. In September, 1923, Mr. and Mrs. Brown sublet the whole premises to Mr. Redman, who took over Mrs. Simpson as his sub-tenant and recognized her as such. Rent had been accepted by the Browns from Mrs. Simpson. The lease to Mr. Redman was for 21¼ years from September, 1923. Mr. Redman remained until early in 1926, when he too abandoned the premises, and on June 14, 1926, Mr. and Mrs. Brown sublet the whole premises, including the two rooms on the top floor, which were still in the occupation and possession of Mrs. Simpson, to the plaintiff Mr. Bartram on a yearly tenancy at a rent of £160 per annum. Mr. Bartram used the premises both for the purposes of his business and as a dwelling-house, and it is a fact, though no importance seems to attach to it, that Mr. Bartram took in other sub-tenants in addition to Mrs. Simpson. He got into arrears with his rent, and on August 16, 1927, a distress was put in by Mr. Brown, which the plaintiff contrived to get rid of by entering into an agreement with the sheriff's officers, but he was unable to perform the terms of that agreement, with the result that the sheriff's officers again came into the premises on September 7. Thereupon this action was launched by the plaintiff for damages for illegal distress, and the distress was alleged to be illegal on the ground that it had been levied without the leave of the Court, which was necessary if these were premises to which the Rent Restriction Acts applied.

The question before the County Court Judge was whether such leave was necessary, and behind that lay the fundamental question whether these were premises to which the Rent Restriction Acts applied. The Judge decided that they were, and that the leave of the Court was necessary for the distress, and that therefore the plaintiff was entitled to succeed. This appeal raises two points. The first point, taken on behalf of the appellant, was that in September, 1923, when Mr. Griss had left, Mr. Brown had come into possession of the premises, and that the fact of his not turning out Mrs. Simpson did not prevent him from having come into possession of the whole premises within section 2 (1) of the Rent and Mortgage Interest Restrictions Act, 1923. The second point taken was that, by virtue of the grant of a lease of the whole premises to Mr. Redman for a period beyond the period of expiry required by the Act—namely, June 24, 1926—the principal Act had ceased to apply to the whole premises. Although Mr. Critchley formulated his points in that order, the point which he argued and relied on with the greatest insistence and confidence was the second one. It involves a very simple question. [His Lordship read section 2 (2) of the Rent and Mortgage Interest Restrictions Act, 1923, and continued]: According to the judgment of the County Court Judge and the argument addressed to this Court, there is no question that these premises are premises to which the principal Act did originally apply, and the real question now raised is whether the words "grants to the tenant a valid lease," &c., mean "grants to the person who is then the tenant, and that particular person only," or whether they may be construed sufficiently widely to relate to "a tenant" or "any tenant to whom such a letting may be made," quite apart from the question whether such person is the sitting tenant.

If the meaning contended for by Mr. Critchley be the true meaning, it is almost impossible to imagine more inapt words than the words used by the draftsman of this section, for, as Mr. Critchley says, the apt and appropriate words would be "grants to a tenant" or "to any tenant" or, indeed, the meaning might well be expressed by leaving out altogether the words "to the tenant" or "to a tenant" or "to any tenant," and allowing the sub-section to read "grants a valid lease of the dwelling-house," &c.

In my opinion, the use of the definite article "the" indicates, as clearly as anything under these Acts can be indicated, that the person intended by these words is the particular tenant who is the tenant of the landlord at the time when the lease therein mentioned is granted to him, and no other person whatsoever. I cannot conceive that any other meaning can be attributed to the use of the definite

article "the" as opposed to the indefinite article "an" or the indefinite adjective "any" or the entire omission of the word "tenant." On that point I think the County Court Judge came to a correct conclusion, and one with which it is impossible for us to interfere.

The other point, which was argued less confidently, seems to me to have no substance in it. The County Court Judge in his judgment said: "I cannot find that at any time after the letting to Griss, which was prior to the passing of the 1923 Act, the landlord was in actual possession of any part of these premises. As to the whole it is clear beyond question that Mrs. Simpson went into possession of the two rooms referred to in May, 1923, and continued in possession thereof until some time after this distress was levied. Her possession was at no time the possession of the Browns. It is contended that Mrs. Simpson was originally a person to whom the premises were not lawfully sublet, but it is clear that each of the lessees of the house in turn regarded her as a person lawfully there and received rent from her, and before the lease to the present plaintiff the Browns themselves had received rent from her. But the question as to the nature of her possession does not seem to me to be material. She was in fact in possession and such possession makes it impossible that the landlord, as landlord, could be in actual possession of that part of the premises, and he clearly, therefore, could not be in possession of the whole of the premises in question." I apprehend that the question is primarily one of fact, subject to the Judge not misdirecting himself on any point of law applicable to it. However the matter may be regarded, I think that the conclusion at which the Judge arrived was perfectly correct, and that there is no reason for interfering with it.

For these reasons I am of opinion that this appeal should be dismissed.

MR. JUSTICE FINLAY.—I agree, and have nothing to add.

[Solicitors—Messrs. Alfred Double and Sons; Messrs. Henneker Rance and Co.]

Court of Appeal. (Scrutton, Lawrence, and Greer, L.JJ.) 1928. May 15.

SINANIDE v. LA MAISON COSMEO.*

Copyright — Original literary work—Phrase in advertisement—Beauty "a social necessity" —Copyright Act 1911 (1 and 2 Geo. V., c. 46), s. 1.

The plaintiff, an electro-therapist, used in his advertisements of face treatment a phrase which he claimed to have invented—namely, that beauty was "a social necessity, not a luxury." The defendant, who carried on the business of a beauty specialist and was in the habit of advertising his beauty treatment, then began to use in his advertisements the words, "A youthful appearance is a social necessity." In an action for breach of copyright,

Held, that the plaintiff's phrase was not an "original literary work" within s. 1 of the Copyright Act, 1911, and the action failed.

Decision of Humphreys, J. (44 *The Times* L.R., 371), reversed.

This was an appeal by the defendant from the decision of Mr. Justice Humphreys (44 *The Times* L.R., 371) in an action tried by him without a jury, which raised the question of an alleged infringement of copyright.

The plaintiff, Dr. Oreste Sinanide, of 53, Sloane-street, an electro-therapist, contended that the defendant, Mr. Charles Francis Medlicott Abbott Brown, trading as La Maison Cosmeo, of 49, South Molton-street, W., who carried on the business of a plastic and cosmetic surgeon, had adopted in his advertisements a phrase which he (the plaintiff) had invented as a slogan for various advertisements connected with his work.

Since 1925 the plaintiff, who had obtained diplomas in medicine and higher clinical training in the Universities of Athens and Paris, had dealt mainly with the treatment of the human face, and it had been necessary for him to advertise to a considerable extent in connexion with that treatment. He claimed to have invented a slogan in regard to those advertisements. The phrase was: "Beauty is a social necessity, not a luxury," and it was in respect of the words "a social necessity, not a luxury" that copyright was claimed.

The defendant had also been advertising his beauty treatment for some time, but had not adopted a phrase similar to that used by the plaintiff before May 29, 1926, when he inserted in the *Illustrated Sporting and Dramatic News* an advertisement in these words: "A youthful appearance is a social necessity." Before that date his usual slogan had been "Beauty is the best letter of introduction." The plaintiff's contention was that the defendant's phrase was taken from that adopted by the plaintiff, and therefore constituted a breach of copyright.

Mr. Justice Humphreys held that the plaintiff's phrase was an "original literary work" within section 1 of the Copyright Act, 1911, and was a good subject of copyright, and that, as the defendant had unconsciously taken the phrase from some advertisement of the plaintiff, the latter was entitled to an injunction and nominal damages.

The defendant appealed.

Mr. Cartwright Sharp appeared for the appellant; Mr. H. St. John Field for the respondent.

MR. CARTWRIGHT SHARP, in opening the appeal, said that both the plaintiff and the defendant were engaged in the practice of improving the human face, and were sometimes styled "beauty doctors." Their methods, however, were quite distinct. While the plaintiff carried out his improvements by ointments, lotions, &c., the defendant was more concerned in removing ugliness in features, and he relied on delicate surgical operations. The defendant had been in business since 1905, and he adopted various advertisements. His method was not to repeat the advertisements each week but to have a series of advertisements. On May 29, 1926, he added to his series the following advertisement, which appeared in the *Illustrated Sporting and Dramatic News*: "A youthful appearance is a social necessity." That advertisement was repeated in August, 1926, and it was that repetition which first attracted the attention of the plaintiff.

MR. SHARP asked leave to call fresh evidence, which was not available at the trial, of advertisements by another advertiser in the *Tatler* and other journals

* Reported by E. J. M. CHAPLIN and T. W. MORGAN, Esqrs., Barristers-at-Law.

from 1917 to 1921, which contained words similar to those in question in this case.

Mr. FIELD contended that the evidence was not admissible. The different phrase used in the earlier advertisements did not assist the Court in the present case. Moreover, it would be wrong to admit that evidence because the defendant, by the simplest inquiry, could have discovered the facts before the trial. He referred to *Brown v. Dean* ([1910] A.C., 373); *Hip Foong Hong v. Neotia and Co.* ([1918] A.C., 888); *Shedden v. Patrick* (L.R., 1 H.L.Sc., 470).

The COURT admitted the new evidence.

Mr. SHARP referred to *Dicks v. Yates* (18 Ch. D., 76) and said that, the new evidence having been admitted, the case was conclusive against the plaintiff. Even apart from that evidence there could be no copyright in one single sentence. The language of the Copyright Act, 1911, was plain. The true test of infringement was that there must be a substantial part of the literary work reproduced; that is, substantial not as meaning merely "quantity" but as meaning something "distinctive"—some distinctive feature.

Mr. FIELD contended that there was copyright in the phrase in question and that it was not lost merely because someone else had already used a somewhat similar phrase. The defendant had taken a substantial part and the really distinctive feature of the plaintiff's advertisement. He referred to *Maple and Co. v. Junior Army and Navy Stores* (21 Ch. D., 369); *Lamb v. Evans* ([1892] 3 Ch., 462; 9 *The Times* L.R., 87; [1893] 1 Ch., 218); and *Harold Drabble, Limited, and Another v. Hycolite Manufacturing Company and Others* (44 *The Times* L.R., 264).

LORD JUSTICE SCRUTTON, in giving judgment, said that the dispute was one between two beauty specialists whom he did not propose to advertise by mentioning their names, and who traded upon the knowledge that there were people who had plenty of money and no brains who were prepared to spend that money in improving the faces that Providence had given them.

The plaintiff claimed to have the sole right to use the phrase "Beauty is a social necessity, not a luxury," or anything substantially like it. There might be certain ways in which a plaintiff might succeed in preventing other people from using what counsel called "his slogan" or some catchphrase used in connexion with his goods. He might bring a passing-off action. It was admitted that there was no possibility of succeeding in a passing-off action in this case. Another way in which a catchphrase might conceivably be protected was by a trade mark action, but that, again, was hopeless in the present case. The plaintiff was, therefore, driven to say that the defendant's advertisement was an infringement of his copyright.

The additional evidence which had been admitted on the appeal had rendered it perfectly hopeless to contend that there was an original literary work in the words used by the plaintiff, because it appeared from that evidence that another man had previously said that "a youthful appearance was a modern necessity." Consequently, the only originality, if any, in the plaintiff's phrase was the substitution of the word "social" for the word "modern." The plaintiff's phrase, therefore, was not an original composition and no injunction should have been granted in respect of it.

Even if the new evidence had not been admitted it would have been impossible to support the judgment appealed from. There might be a copyright in an advertisement. *Maple's* case (21 Ch.D., 369) had shown that. But to quote a bit of a sentence from a literary work was too small a matter to afford ground for an action for infringement of copyright. This case was similar to *Dicks v. Yates* (18 Ch. D., 76). Therefore, on two grounds, (1) that on the new evidence it was perfectly hopeless to say that the plaintiff had any copyright, and (2) that apart from the new evidence the matter in which the copyright was claimed was too small for the Court to attach any value to it, the appeal must be allowed and judgment entered for the defendant, with costs.

LORD JUSTICE LAWRENCE and LORD JUSTICE GREER concurred.

[Solicitors—Messrs. Beardall and Co.; Messrs. H. S. Wright and Webb.]

Court of Appeal.
(Lord Hanworth, M.R., Sankey and Russell, L.JJ.)

1928. May 16.

SKIDMORE v. BULLOCK, LADE, AND CO., LIMITED.*

Master and Servant—Compensation for injury by accident—"Workman"—Exception—Employment in non-manual labour—Remuneration exceeding £350 a year—Part of salary agreed to be for expenses—Workmen's Compensation Act, 1925 (15 and 16 Geo. V., c. 84), ss. 3 (2), 10 (iv.).

The appellant, a traveller employed by the respondents, who were distillers, had been engaged at a salary of £450 a year, but subsequently the respondents by a letter agreed at his request to show his remuneration as being £150 salary and £300 for expenses. The appellant met with an accident and applied for compensation under the Workmen's Compensation Act, 1925. The County Court Judge found that the agreement in the letter was a thing done for income-tax purposes and that the appellant's earnings must be treated as £450 a year, and that therefore he was not a workman within the meaning of the Act.

Held, that as there was no evidence as to what the appellant's expenses in fact were, the County Court Judge's decision was right.

This was an appeal by the applicant from a decision of the City of London Court, and it raised the question whether the applicant, who was employed by the respondents as a commercial traveller, was a workman within the meaning of the Workmen's Compensation Act, 1925.

The respondents were distillers, and in December, 1925, they employed the applicant as a traveller. By the terms of the letter of December 7 engaging him, he was employed at a salary of £450 a year, and the employers agreed to provide him with a small two-seater motor-car, the applicant to be responsible for its upkeep.

Subsequently the employers wrote a letter, dated April 28, 1926, saying that they agreed to show his remuneration as £150 salary and £300 for expenses.

* Reported by H. C. GARSIA, Esq., Barrister-at-Law.

That was done at the request of the applicant, and, as the County Court Judge found, for income-tax purposes.

The applicant met with an accident in getting out of his car and broke his leg. He applied for compensation under the Workmen's Compensation Act, 1925. Section 3 (2) of that Act excepts from the definition of a workman "any person employed otherwise than by way of manual labour whose remuneration exceeds £350 a year"; and section 10 provides that:—

"For the purposes of the provisions of this Act relating to 'earnings' . . . the following rules shall be observed:—

"(iv.) Where the employer has been accustomed to pay to the workman a sum to cover any special expenses entailed on him by the nature of his employment, the sum so paid shall not be reckoned as part of the earnings. . . ."

The County Court Judge held that the applicant's earnings must be treated as £450, and that he was not, therefore, a workman within the meaning of the Act.

The applicant appealed.

Mr. C. T. Williams and Mr. I. F. Reuben appeared for the appellant; and Mr. Eastham, K.C., and Mr. Geoffrey C. Hutchinson for the respondents.

The MASTER OF THE ROLLS (Lord Hanworth), in giving judgment, said that the appeal must be dismissed. The question had been raised whether section 10 (iv.) applied in determining the "remuneration" for the purpose of section 3 (2). It appeared to him that the provision in section 10 (iv.) rightly found its way into rules for determining the earnings of a workman for the purpose of assessing compensation. But it was another matter to say that the same principle applied when considering the remuneration under section 3 (2). There was no provision splitting up remuneration in section 3 (2) corresponding to that relating to earnings in section 10 (iv.).

He did not, however, think that it was necessary to determine what was or was not remuneration for the purpose of section 3 (2). The evidence before the County Court Judge was that the applicant's remuneration was £450 a year, as shown by the letter of December 7, 1925, setting out the terms of his remuneration.

There were items which might be taken as deductions from that sum, such as hotel expenses while the applicant was travelling round his area. But the applicant had given no evidence of the expenses that he actually incurred. Instead of giving that evidence he relied on a document dated April 28, 1926, in which the employers agreed to show his remuneration in their books at £150 a year and £300 as being paid for expenses. The County Court Judge said of that document, and no doubt quite rightly, that it was prepared at the request of the applicant and at a time of year when it would be useful to the applicant for revenue purposes. In it it was not intended to express the actual relation between employer and employed nor to give the true measure of expenses. What the employers did was to agree to return those figures in that way to give the applicant material to put before the income-tax authorities. If the result had been that the employers had been held liable under the Workmen's Compensation Act, 1925, they would have only had themselves to thank for it.

He (his Lordship) desired to call the attention of the revenue authorities to that letter of the employers. He hoped that in future some means would be found to defeat such modes of reducing the apparent earnings for income-tax purposes. For the purpose of the case it was necessary to deal with the true facts, and not those speciously put forward. There being no evidence of what the expenses in fact were, the County Court Judge was right in holding that the applicant was not a workman within the meaning of the Act. The appeal must be dismissed, with costs.

LORD JUSTICE SANKEY and LORD JUSTICE RUSSELL gave judgment to the same effect.

[Solicitors—Messrs. Berry Tompkins and Co.; Messrs. William Easton and Sons.]

Court of Appeal.
(Lord Hanworth, M.R., Sankey and Russell, L.JJ.)

1928. May 15.

WATSON v. BIRMINGHAM GOVERNMENT INSTRUCTIONAL CENTRE.*

Master and Servant—Compensation for injury by accident — "Trainee" at instructional centre—Whether a "workman."

The Court held that a "trainee" at a Government Instructional Centre was not a workman within the Workmen's Compensation Acts.

This was an appeal by the Government Instructional Centre, Birmingham, from the Birmingham County Court, and it raised an interesting question whether an unemployed person receiving instruction at a Government training centre could claim to be a "workman" so as to be entitled to compensation under the Workmen's Compensation Acts.

In April, 1927, Wilfred Watson, a miner, 19 years old, was unemployed and was receiving unemployment benefit at 18s. a week. He applied for training at the Government Instructional Centre, Birmingham, and, after filling up and signing two forms, was accepted and put to do metal work of various kinds. He performed the work to the satisfaction of the instructors who were put over him. He and others who were training were called "trainees." They were "clocked in" in the morning, but they could give up their training at any time they chose and the instructional authorities could dismiss them at any time without giving a reason. Some of the articles made by the trainees during their training were sold by the centre.

During his training Watson was paid 18s., his unemployment benefit, plus a personal allowance of 2s. 6d. a week, and a travelling allowance of 3s. a week. He was also given a midday dinner.

On August 19, 1927, his hand was caught in an emery grinding machine and the top of his left thumb was torn off. He afterwards obtained work at £2 15s. per week, but he brought arbitration proceedings, claiming that as a partially incapacitated man he was entitled to a declaration of liability. The Instructional Centre accepted liability (if any) on behalf of the Minister of Labour, but contended that the applicant was not a "workman" under the Workmen's Compensation Act at all and not entitled to make any claim.

The County Court Judge stated in his judgment: "The inference which I draw, and the fact which I find, is that, notwithstanding that the dominant idea or aim of those relations was that the applicant should be instructed and trained as an industrial

* Reported by G. T. WHITFIELD-HAYES, Esq., Barrister-at-Law.

worker, the relations between the applicant and the respondents were those of workman and employers, and that there was here a contract of service." He therefore made the declaration of liability.

The Instructional Centre appealed.

The SOLICITOR-GENERAL (Sir Boyd Merriman, K.C.) and Mr. T. S. SANDERSON, for the appellants, contended that the relations between the parties were not consistent with those of employer and workman. They referred to *Broome v. Minister of Labour* (43 *The Times* L.R., 133); *Gilroy v. Mackie and Others* (2 B.W.C.C., 269); and *Porton v. Central (Unemployed) Body for London* (25 *The Times* L.R., 102; [1909] 1 K.B., 173.

Mr. D. L. FINNEMORE, for the respondent, contended that the respondent was a trainee and a workman at the same time. The two important factors here were—first, that the respondent was remunerated; secondly, that there was a sale of, or a right to sell, the articles he had made.

The MASTER OF THE ROLLS (Lord Hanworth), in giving judgment, said that it was impossible to give a general precise definition of "workman" or "service," but it was not impossible to come to a conclusion as to a particular case. In the present case it was true that the man was employed on work which had some economic value, and that he sometimes made things which could be sold, and it was said that as the fruits of his labour had an economic value he was in employment. Reference, too, was made to the regular habits enforced and to the discipline. But those facts might equally apply to educational establishments, where control and discipline were equally enforced.

A test which was useful, if not exhaustive, was that which he had himself suggested in *Broome v. Minister of Labour* (43 *The Times* L.R., 133)—namely, was there, or was there not, a contract of service? In applying that test, he looked at the conditions in regard to the present appeal. On the very face of the forms which the respondent had signed there were statements inconsistent with a contract of service. That the man was available for employment elsewhere whenever he could obtain it, and that he was still receiving his unemployment benefit of 18s. a week, were conditions which seemed to negative the contention that he was a "workman" employed by the appellants. The appeal must be allowed with costs.

LORD JUSTICE SANKEY said that the learned County Court Judge had been influenced in his decision by certain cases, *Gilroy v. Mackie and Others* (2 B.W.C.C., 269) and *Porton v. Central (Unemployed) Body for London* (25 *The Times* L.R., 102; [1909] 1 K.B., 173) which really did not apply. To him (Lord Justice Sankey) it seemed that the object of the appellants was not to provide work, but to equip for work; not to employ men, but to render them fit for employment.

It was a significant fact that the respondent here was still receiving his unemployment benefit, and, as regards the personal allowance, that did not seem to have much to do with the contract of service. Perhaps it was an inducement to young men to take up the course. The appeal must be allowed.

LORD JUSTICE RUSSELL said that, in his opinion, the relationship was not that of employer and workman, but rather that of teacher and pupil.

[Solicitors—The Solicitor to the Ministry of Labour; Messrs. Herbert Oppenheimer, Nathan and Co., for Messrs. Rabnett, Conway and Co., Birmingham.]

Chan. Div. (Romer, J.) 1928. May 24.

IN RE WILTS AND SOMERSET FARMERS, LIMITED.*

Industrial Society — Rules — Amendment — Validity.

A rule of a society registered under the Industrial and Provident Societies Act, 1893, originally provided: "Individual members shall hold at least one share for every 20 acres or fraction of 20 acres farmed by them up to 500 acres, and at least one share for every 40 acres or fraction of 40 acres above 500. . . ."

By successive amendments the words "one share" were altered to "shares of the nominal value of £5." The respondents had become members of the society before the date of the last amendment, and they took no steps for the purpose of dissenting from it. On the society going into liquidation a summons was taken out by the liquidator for the determination of the question whether, in settling the list of contributories, the amended rule was to be taken as binding on the respondents.

Held, applying *Biddulph and District Agricultural Society, Limited v. Agricultural Wholesale Society, Limited* (42 *The Times* L.R., 761; [1927] A.C., 76), that the rule as amended was binding on the respondents.

His LORDSHIP delivered a considered judgment in this summons, which was taken out by the liquidator of the Wilts and Somerset Farmers, Limited (a society registered on March 23, 1910, under the Industrial and Provident Societies Act, 1893), for the determination by the Court of certain questions which had arisen on the settling of the list of contrubutories of the society.

The substantial question was whether certain changes in the rules of the society by which existing members came under a liability to acquire further shares were binding on members who did nothing after the alterations, and whose assent, it was alleged, could be inferred.

Rule 12 of the society provided as follows:—

"Shares to be held by members.—Individual members shall hold at least one share for every 20 acres or fraction of 20 acres farmed by them up to 500 acres, and at least one share for every 40 acres or fraction of 40 acres above 500. . . . Milk retailers shall hold at least six shares for every churn of 17 gallons retailed daily by them."

Rule 12, as amended on November 14, 1921, stated:—

"Rule 12.—Rescind the whole rule and substitute therefor:—Individual members shall hold at least five shares for every 20 acres or fraction of 20 acres farmed by them up to 500 acres, and at least three shares for every 40 acres or fraction of 40 acres above 500. . . . Milk producers shall hold shares on the above acreage basis, or shall hold at least five shares for every dairy cow owned by them, whichever shall be the greater number of shares."

* Reported by J. L. DENISON, Esq., Barrister-at-Law.

Rule 12, further amended on March 25, 1922, stated :—

"Strike out the words 'five shares' in the two places in which they occur and substitute therefor:—'Shares of the nominal value of £5.'"

Rule 23 provided :—

"Repayment on cessation of membership.—If by transfer or otherwise, the number of shares held by a member becomes less than the number required by Rule 12 to be held by him, the amount paid up on the shares shall be repaid and the shares cancelled, and the member shall cease to be a member."

Rule 23, as amended on November 14, 1921, provided :—

"Rule 23, line 4.—Strike out the word 'shall' and substitute 'may at the discretion of the Committee.'"

Mr. Wilfrid Greene, K.C., Mr. Rowland Thomas, and Mr. Renfield appeared for the liquidator ; Mr. Gavin Simonds, K.C., and Mr. A. Andrewes-Uthwatt, Mr. Vaisey, K.C., and Mr. H. S. G. Buckmaster, and Mr. Alan Ellis, for the various respondents.

Mr. Justice Romer, in the course of his judgment, said that the answer to be given to the main question depended on the validity of Rule 12 and certain amendments to that rule which had been made from time to time. In *Dibble v. Wilts and Somerset Farmers, Limited* (39 *The Times* L.R., 174 ; [1923] 1 Ch., 342)—an action in which the plaintiff was a member of the society—Mr. Justice P. O. Lawrence (as he then was) held that both the original Rule 12 and the amended Rule 12 were invalid. Having regard, however, to the fact that that decision had been, in terms, overruled by the Court of Appeal in *Agricultural Wholesale Society, Limited v. Biddulph and District Agricultural Society, Limited* (41 *The Times* L.R., 470 ; [1925] Ch., 769), though the matter was *res judicata* between Mr. Dibble and the society, the liquidator was advised that it was his duty, so far as regarded other members of the society, to treat them as bound by the amended rules. Hence the present summons, to which five contributories had been made respondents, all of whom joined the society before the amendment to Rule 12 was made in March, 1922.

The question was whether that amendment was binding on them. It was not contended, and, after the decision in *Biddulph and District Agricultural Society, Limited v. Agricultural Wholesale Society, Limited* (42 *The Times* L.R., 761 ; [1927] A.C., 76), it could not be contended that Rule 12 in its original form was invalid. He was of opinion that he was bound to hold that the alterations made to Rule 12 in the present case were binding on the respondents.

It only remained to deal with two comparatively minor points taken by the respondents. It was said that the liability to acquire further shares was incapable of enforcement, inasmuch as by Rule 23, as amended, they ceased to be members when they failed to acquire such shares within a reasonable time after the liability arose. He could not assent to the contention that a member to whom the rule applied ceased to be a member whether the committee did or did not repay the amount paid up on his shares and cancel them. If the committee decided that they should not be cancelled it could not have been intended that the member should nevertheless cease to be a member. It seemed to him to be the more natural construction of the rule to treat the words at the end of it as meaning "and shall in that case cease to be a member."

The respondents, finally, contended that Rule 12 and its amendments were void for uncertainty, but he could not accept that view.

In the circumstances he must hold that the respondents should be placed on the list of contributories in respect of the number of shares shown opposite their respective names in the schedule to the summons.

[Solicitors—Messrs. Stephenson, Harwood, and Tatham; Messrs. Farrer and Co.; Messrs. Ernest Bevir and Son, for Messrs. H. Bevir and Son, Wootton Bassett ; Messrs. Mead and Co., for Messrs. Frederic Wood and Son, Wrington.]

K.B. Div.
(Lord Hewart, C.J., Avory and Shearman, JJ.)
1928. May 8.

NEAL v. GUY.*

Hackney Carriages—Omnibus—Number of passengers — By-law — Whether applicable to motor-omnibuses.

This was a case stated by Durham justices. The respondent, Mr. Albert William Guy, was charged before a Court of summary jurisdiction at Bishop Auckland, at the instance of the appellant, Mr. Frederick Neal, a hackney-carriage inspector, with carrying 55 persons on an omnibus licensed to carry 39, contrary to by-law No. 14 of the by-laws of the Urban District Council of Bishop Auckland.

The by-laws in question were made in 1901, and were duly approved by the Local Government Board.

By-law 14 was as follows :—

"Every proprietor, driver, or conductor of an omnibus shall comply with the following provisions for regulating the number of persons to be carried by omnibuses. No greater number of persons shall be conveyed in any omnibus than will admit of the provision of adequate seating accommodation [of specified width and depth for each person].

The remaining paragraphs specified the number of persons who might be carried in an omnibus drawn by one, two, or three horses respectively.

The appellant contended that by-law No. 14 regulated in general the number of persons to be carried by omnibuses plying for hire in the area ; that the first paragraph applied to motor-omnibuses ; and that the fact that the subsequent paragraphs contained references to horses was immaterial. The respondent contended that the by-laws were obsolete, as they were obviously intended to apply only to horse-drawn vehicles and not to mechanically propelled vehicles.

The justices held that the by-laws were obsolete and did not apply to motor-omnibuses, and they dismissed the information.

Mr. Davenport appeared for the appellant ; the respondent was not represented.

The Lord Chief Justice (Lord Hewart), in giving judgment, said that it was a very clear case. The question was whether the justices were right in law in holding that the particular by-law was meant to apply to horse-drawn vehicles only and did not apply to motor-omnibuses. The case found as a fact that this omnibus was licensed to carry 39, and in fact carried 55. There was no reason at all for thinking that the first part of the by-law referred only to horse-drawn vehicles.

* Reported by J. W. Hall, Esq., Barrister-at-Law.

MR. JUSTICE AVORY agreed. The fact that some of the by-laws were not applicable to motor-vehicles was no reason for thinking that this one was not.

MR. JUSTICE SHEARMAN agreed.

[Solicitors—Messrs. Corbin, Greener, and Cook, for Messrs. J. T. Proud and Son, Bishop Auckland.]

Court of Appeal.
(Lord Hanworth, M.R., Sankey and Russell, L.JJ.)
1928. May 24.

IRONMONGER AND CO. v. DYNE.*

Execution — Evidence — Bankers' books — Account of person other than the debtor— Bankers' Books Evidence Act, 1879 (42 Vict., c. 11), s. 7.

Where, under s. 7 of the Bankers' Books Evidence Act, 1879, an order is made for the inspection of a judgment debtor's account with a banker, the Court has power to make the order extend to the banking account of a person other than the debtor if the account of that other person was controlled by the debtor and was used by the debtor for his or her own purposes.

This was an appeal by the plaintiffs, Messrs. Ironmonger and Co., from a decision of Mr. Justice Wright affirming the order of the Master giving them access to and inspection of the accounts from 1920 of Messrs. Coutts and Co. with Mrs. Bradley Dyne only. Messrs. Ironmonger and Co. claimed an order under the Bankers' Books Evidence Act, 1879, for inspection of the accounts of Messrs. Coutts and Co. with both Mr. and Mrs. Bradley Dyne as from 1909, the year they were married.

Mr. Clayton, K.C., and Mr. St. John Field appeared for the appellants; Mr. Blanco White for Mr. and Mrs. Bradley Dyne; and Mr. Monckton for Messrs. Coutts and Co.

MR. CLAYTON said that a judgment (affirmed by the Court of Appeal, 44 *The Times* L.R., 497) had been obtained against Mrs. Bradley Dyne for £38,938 in respect of dealings in foreign currency, and for costs, which were taxed at £1,503. No part of those amounts had been paid. On February 26, 1928, an order had been made for the examination of Mrs. Bradley Dyne as to means. A summons was then taken out by the plaintiffs for liberty to inspect the accounts of Messrs. Coutts and Co. with both Mr. and Mrs. Bradley Dyne from 1909. It was that order which the plaintiffs now sought to obtain on this appeal.

There was clearly jurisdiction to make the order asked for against a person not a party to the action in which the judgment had been obtained: *Howard v. Beall* (23 Q.B.D., 1) and *South Staffordshire Tramways Company v. Ebbsmith* (12 *The Times* L.R., 32; [1895] 2 Q.B., 669). But it was laid down that that jurisdiction should be exercised with great caution, and that a *prima facie* case of a mixture of the two accounts must be made out.

Mrs. Bradley Dyne had speculated with Messrs. Ironmonger and Co. for many years, and had during one year made as much as £40,558. Having thereafter lost £38,938 to them, she failed to pay. There was grave suspicion that that £40,558 had passed into her husband's account. The affidavits showed grounds for grave suspicion that she had transferred to him £35,704 in cash, and securities to the value of £25,154, making an aggregate of £60,858. At the trial of the action the defendant had herself admitted that she had paid sums of money and transferred securities to her husband, but she said that that was done in payment of debts owing to him.

The reason why an order against Mr. Bradley Dyne had been refused was because it was thought that *Hood Barrs v. Heriot* ([1896] 2 Q.B., 338) was directly in point. But that was a case dealing with an application under Order XLII., Rule 32, and related to an application for examination as to means. The plaintiffs were not seeking to examine Mr. Bradley Dyne as to means, but only to obtain inspection of his banking account.

Counsel suggested that the sums transferred to Mr. Bradley Dyne by his wife were really held on trust for her. The special facts of each case had to be considered. Here the evidence showed that securities to the value of over £20,000 were transferred to her husband just before she was becoming liable to the plaintiffs for large losses.

Counsel was stopped.

Mr. BLANCO WHITE contended that the application, so far as it related to Mr. Bradley Dyne's accounts, was properly not granted, because the inspection of the books was asked for with regard to an examination of Mrs. Bradley Dyne (the debtor) before the Master as to means, and before the Master the only admissible evidence was that of the debtor. Section 7 of the Bankers' Books Evidence Act, 1879, was passed in substitution for the old procedure of *subpœna duces tecum*, and it followed that an order could be made under section 7 only in a case where the *subpœna duces tecum* would have been issued (*In re Marshfield*, 32 Ch.D., 499). A *subpœna duces tecum* could not be issued for the purpose of an inquiry as to means before the Master: *Hood Barrs v. Heriot* (*supra*).

But whatever the legal position was, an order ought not to be made on the facts of the present case. It was true that over one period Mrs. Bradley Dyne had made about £40,000, but before that she had lost £35,000, which her husband had paid, and in making a transfer to him she was repaying him. Further, securities belonging to her husband had got into her name, as she was the business person and he was an artist. After matters had been nearly squared up he forbade her speculating further, and when she disobeyed and he returned to this country he required her to transfer those securities into his name.

An order under the Bankers' Books Evidence Act, 1879, could be made against a third party only when the third party's account was really that of the litigant: *Pollock v. Garle* (14 *The Times* L.R., 16; [1898] 1 Ch., 1). Here nothing of the kind had been shown. Further, the plaintiffs could ascertain from the husband's account no relevant fact that they had not already ascertained from the wife's account.

The MASTER OF THE ROLLS (Lord Hanworth), in giving judgment, said that the appeal must be allowed. While it was determined in *Howard v. Beall* (23 Q.B.D., 1) that there was power to order inspection of the account of a third party, yet it was said in *South Staffordshire Tramways Company v. Ebbsmith* (12 *The Times* L.R., 32; [1895] 2 Q.B., 669) that it was of great importance that the power should be exercised with great caution lest it might

* Reported by H. C. GARSIA, Esq., Barrister-at-Law.

be a cause of great hardship. It was then pointed out by Lord Esher that :—

"If the Court were satisfied that in truth the account which purported to be that of a third person was the account of the party to the action against whom the order was applied for, or that, though not his account, it was one with which he was so much concerned that items in it would be evidence against him at the trial . . . then they might order the inspection."

The only point which they had to decide was whether there was evidence which ought to make the Court exercise its power. In his judgment there was. They had been told that before her marriage Mrs. Bradley Dyne was a woman of little or no means, and there was evidence that Mr. Bradley Dyne was a man of only moderate means. What had to be considered was whether the husband's account which the plaintiffs desired to inspect was one over which Mrs. Bradley Dyne had control and which she used for her own purposes.

The facts established that in the account of Mrs. Bradley Dyne with the plaintiffs for the year 1926 the first debit item against her for £3,530 13s. occurred on December 16, 1926. On December 9 Mrs. Bradley Dyne transferred to her husband's account £3,586 13s. 1d. It also appeared that on December 15 she transferred to her husband's credit a number of securities, some of which were bearer securities. Then on January 21, 1927, there appeared an entry against her with Messrs. Coutts : "Fee for valuation of securities account herself and Mr. B. Dyne" ; and finality was reached on April 4, 1927, when she transferred £2,215 14s. 9d. to her husband's account and closed her own account.

Thereafter Mrs. Bradley Dyne, who was described as the "man of business" rather than her husband, had no further banking account. It appeared to him (his Lordship) that this was a case exactly falling within the test laid down by Lord Esher. It followed that the appeal must be allowed and an order made varying the Master's order by including in the order the account of Mr. Bradley Dyne. But inspection against that account as against Mrs. Bradley Dyne would be limited to the period specified by the Master—namely, 1920 and onwards.

LORD JUSTICE SANKEY gave judgment to the same effect, and LORD JUSTICE RUSSELL concurred.

[Solicitors—Messrs. H. S. Wright and Webb ; Messrs, Kenneth Brown, Baker, Baker ; Messrs. Farrer and Co.]

Court of Appeal. } 1928.
(Scrutton, Greer, and Sankey, L.JJ.) } May 8.

FRENKEL v. MAC ANDREWS AND CO., LIMITED.*

Ship—Bill of lading—Deviation clause—Loss by perils of the sea—Exceptions clause—Loss on usual route—Shipowners protected.

The plaintiff at Malaga shipped, on a steamer of the defendants, goods to be carried from Malaga to Liverpool. The bill of lading contained clauses excepting the shipowners from responsibility for (*inter alia*) loss, damage, or injury by perils and risks of seas or for any risk which might be an insurable one. It also contained a deviation clause : "with liberty to touch at any ports whatsoever although they may be outside the route without it being considered a deviation." For some years the defendants had been taking, from Malaga to Liverpool or other ports of this country, two distinct routes for the vessels of their line, one "*via* Levante," which meant going north-east up the coast of Spain with calls at various ports, and then coming back from the farthermost port down the Mediterranean and through the Straits to this country, and the other, "Directo," coming directly from Malaga to ports of this country. The plaintiff knew, when he delivered to the ship the goods to be carried under the bill of lading in this case, that the route for that particular ship would be "*via* Levante." In this case the ship on leaving Malaga went north-eastward with the intention of picking up cargo at Cartagena before going to Liverpool. Between Malaga and Cartagena the ship met with bad weather, and some of the plaintiff's goods were lost. The plaintiff claimed damages, but the defendants relied on the exceptions clauses in the bill of lading. The plaintiff answered that the steamer had deviated from the contract voyage and that therefore the exceptions clauses did not apply.

Held, that no question of deviation arose, because at the time of the loss the ship was on one of the known and usual routes, and therefore on an agreed route, towards Liverpool. Accordingly, the defendants were protected by the exceptions clauses in the bill of lading.

Decision of Rowlatt, J. (44 *The Times* L.R., 329), reversed.

This was an appeal from a decision of Mr. Justice Rowlatt (44 *The Times* L.R., 329).

The plaintiff claimed a sum of £2,293 in respect of the loss of olive oil sent from Malaga to Liverpool on a steamship, the Cervantes, belonging to the defendants.

The plaintiff was the owner of 134 barrels of olive oil shipped on the defendants' ship Cervantes at Malaga under two bills of lading dated April 11, 1927, one for 110 barrels for delivery *via* Liverpool to Bradford and the other for 24 barrels for delivery at Liverpool.

The defendants' ship Cervantes, after sailing from Malaga on April 11, 1927, with the barrels of oil on board, met a gale on April 12 and owing to the violent motion of the vessel the barrels broke loose and could not be secured and some of the oil was lost, and the defendants pleaded *inter alia* that the damage, if any, which was not admitted, was caused by perils of the sea and that they were protected by the exceptions clause in the bills of lading. The plaintiff, however, pleaded that after loading the plaintiff's cargo the Cervantes, without justification, deviated from the contract voyage and the perils of the sea were met with after the unauthorized deviation, and therefore the defendants could not rely on the provisions of the bills of lading.

The facts are fully stated in the judgments.

* Reported by T. W. MORGAN, Esq., Barrister-at-Law.

Mr. Justice Rowlatt held, following a decision of Mr. Justice Hill in *T. M. Duché and Sons v. Owners of Steamship Maria* (3 Ll.L., 184), that the loss occurred after an unauthorized deviation on the part of the defendants' ship and that therefore the defendants were not protected. He accordingly gave judgment for the plaintiff.

The defendants appealed.

Mr. G. P. Langton, K.C., and Mr. Cyril Miller appeared for the appellants; and Mr. Dunlop, K.C., Mr. Harold Stranger, and Mr. Geoffrey Hutchinson for the respondent.

Lord Justice Scrutton.—This case raises an interesting question with regard to the effect of the knowledge by a shipper of the route by which it is intended to convey his goods on a ship. Mr. Frenkel, a merchant carrying on business in London and in Malaga, sues the MacAndrews Line, a very well known line which has carried on a trade between the British Isles and Spain and Portugal for over 50 years, for the loss of some oil which he shipped on a vessel of the line at Malaga. It appears that the MacAndrews Line has for years run its out-and-home voyage in this way. It does not call at every port out and home. In the slack season, if it has cargo for a small port it may go in, and if there is cargo there to be taken it may take it for England, but by the route that it will go on, on its outward voyage as far as it goes, and then return, not calling at the port at which it has picked up the cargo for England. On the other hand, the ship may sometimes not call at the port on the outward half of the round voyage, but call at it as she comes home. There appears to be a perfectly well recognized way of advertising in the local papers and describing the voyage in the shipping card according to whether the cargo is taken on board on the outward half of the round voyage or on the inward half. If the steamer is then on the outward half of its round voyage and takes cargo for England, the route will be described as "*via* Levante," by the east coast of Spain, meaning that it is on its outward voyage and will turn round and bring the cargo home when it has got to the end of its outward half of the round voyage. On the other hand, if it picks up the cargo on the second half of the round voyage, the inward half of the round voyage, it will be said to be taking the cargo for England "Directo," and in the present case the cargo was put on board at Malaga by Mr. Frenkel's representatives, his son, his shipping clerk and his chief clerk, after a series of daily advertisements that the Cervantes was proceeding homewards "*via* Levante," meaning that it was going on up the east coast of Spain before turning round and coming back. Sometimes in the same paper there were advertisements—the particular one that I have in mind I think is as to Bristol—that such and such a boat was going to Bristol "Directo."

The Malaga representative and the manager of the line were called and proved these facts, and proved that in Malaga, unlike many other ports, the representatives of the shipping firms called round on the regular shippers every day and left their shipping cards (with which one is very familiar) with them, stating the same thing as was stated in the advertisements, that in this case the Cervantes would take a cargo for England "*via* Levante."

Nobody from the Malaga shipping office was called, and I unhesitatingly draw the inference that the facts stated by the Malaga representative of the MacAndrews Line were well known to the persons in the Malaga shipping office, who knew perfectly well that the goods that they put on board were going "*via* Levante," and they were quite content that they should do so. Mr. Frenkel, who has been shipping goods on the MacAndrews Line for 15 years, has somehow remained during the whole of that time in a state of blissful ignorance of the fact that the MacAndrews Line does pursue this course of business. The learned Judge has not made any finding as to whether he believes him or not. I did not see him, and make no similar finding; but if he has been ignorant during the 15 years that he has been shipping of the course of business of the MacAndrews Line he must have been doing his business with his eyes tightly shut.

What happened was that the Cervantes taking on board this non-perishable goods, that is to say, oil, proceeded on its ordinary voyage north; but before it got to its next port it met with a very heavy gale. I see that the records of some of the ships in that gale are that the wind was Force 11, the highest force in the Beaufort Scale being 12, and there appears to have been undoubtedly a very heavy gale; and in that very heavy gale the casks of oil, or one or more of them, broke loose, and were so strained that the oil ran out and perished.

Thereupon, Mr. Frenkel brings an action against the MacAndrews Line, alleging, first, that the ship was unseaworthy, as to which he failed, because the learned Judge has found that there is no evidence that the ship was unseaworthy either by itself or in stowing. Secondly, the plaintiff says: "You were not on the route. You had deviated, because you were bound by your bill of lading to proceed direct homeward from Malaga to England, and you, in fact, were going the opposite way; you were going north along the east coast of Spain when you should have been going south to Gibraltar." The learned Judge has not himself expressed any opinion on the law, but he says that he is referred to a decision of Mr. Justice Hill in *T. M. Duché and Sons v. Owners of Steamship Maria* (3 Ll. L., 184), which is very shortly reported, upon a bill of lading which is said to be the same bill of lading, and Mr. Justice Rowlatt thinks that in that case on similar facts Mr. Justice Hill gave a decision which would be in favour of the plaintiff in this case, and he thinks himself bound by judicial comity to follow that decision.

Now, first of all, I think that the decision of Mr. Justice Hill in *T. M. Duché and Sons v. Owners of Steamship Maria* (*supra*), so far as we can gather it from the report, and from the statement made by Mr. Langton, who was counsel in the case, and has with him his old brief, is on facts quite dissimilar from this case. What appears to have happened in the case which Mr. Justice Hill decided, and upon which Mr. Justice Rowlatt relied, was this: Some goods were shipped on the Paulina at Tarragona, which is well to the north on the east coast of Spain, under a bill of lading which gave liberty to trans-ship at Valencia to a steamer of the same company. The goods were trans-shipped at Valencia and put on board a ship called the Maria, and the Maria then proceeded north instead of going south. On that, Mr. Justice Hill held that Burriana, which was the port to which the Maria went, was not on the route from Valencia to London, and that, therefore, there was a deviation, because, though there was a clause giving leave to call at ports, the port was not on the route.

Now there are a number of differences between that case and this case, and the most marked one is this: The plaintiffs in *T. M. Duché and Sons v. Owners of Steamship Maria* (*supra*) were not the shippers, but were indorsees, and consequently under

the decision in the case of *Leduc and Co. v. Ward* (4 *The Times* L.R., 313 ; 20 Q.B.D., 475) they were not bound by any knowledge which the shipper had which was not contained in the bill of lading, because the indorsee of a bill of lading only has the contract contained in the bill of lading, and has not any contract contained in an agreement with the shipper outside the bill of lading. In this case, the plaintiff is not an indorsee, but he is the original shipper. That alone is sufficient to make the case inapplicable ; but further, it was not a case where there was any proof as to the ordinary route, neither the Paulina nor the Maria had anything to do with the MacAndrews Line, and there was no evidence of the ordinary route from Tarragona or of the ordinary route from Tarragona when there was trans-shipment at Valencia ; and in those circumstances it is not necessary for us to express any opinion on the validity of the judgment of Mr. Justice Hill in *T. M. Duché and Sons v. Owners of Steamship Maria* (*supra*), because the facts are entirely different from the facts of this case.

This case is a case where the shipper, when he puts goods on board, knows that he is shipping by a line which from Malaga has two ordinary routes. He may be shipping on a vessel which is going to England "*via* Levante," or he may be shipping on a vessel which is going from Malaga direct, and he is told before he ships, by advertisements and by shipping cards left at his office, that the vessel is going "*via* Levante," and she goes "*via* Levante," and a loss occurs while she is on her voyage "*via* Levante." That appears to me to be the simplest case of a vessel with a bill of lading destination going by one of the ordinary routes by which that line goes to that destination, and going when the shipper has been told before he ships that she is going by that one of the ordinary routes.

It does not seem to me to be a question of deviation at all, but a case of evidence of the ordinary routes of the well-known line by which the shipper ships with full knowledge of the ordinary routes and the method in which this particular contract is to be performed.

For these reasons I think that the learned Judge, who had not such full information as to Mr. Justice Hill's judgment in *T. M. Duché and Sons v. Owners of Steamship Maria* (*supra*) as we have, was in error in thinking that he was bound by the decision of Mr. Justice Hill. He did not address his mind to what the result would be if he was not bound by the decision of Mr. Justice Hill in that case. We, addressing our mind to the evidence, come to the conclusion that the plaintiff fails in this case, the defendants being protected by the exception of perils of the sea. Therefore, the appeal will be allowed with costs.

LORD JUSTICE GREER.—I agree. The plaintiff's claim in this action was for damages for loss of a parcel of oil shipped at Malaga under a bill of lading which describes the shipment as a shipment in the ss. Cervantes with the destination Liverpool, with liberty to touch at any ports whatsoever, though it may be outside the route, without its being considered a deviation. The defendants, the shipowners, contended, and successfully contended, that if the bills of lading applied they were protected by the exception in the bills of lading. The plaintiff said: "No, you are not protected by the exception in the bills of lading, because when the loss occurred you were not carrying goods on the bills of lading voyage, but were carrying them by means of an unauthorized deviation ; and what the learned Judge had to decide was whether that contention was right on the facts of this case.

Now the material facts appear to me to be these:—For a considerable time—some years—the defendants have been adopting from Malaga to Liverpool or other ports of this country, or to Hamburg, two distinct routes for the vessels of their line—one "*via* Levante," which means going north-east up the coast of Spain, calling at various ports, and then coming back from the furthermost port down the Mediterranean and through the Straits to this country, and the other coming from Malaga, after calling at the higher ports, direct to ports in this country. Both these routes were well-known to the representatives of the plaintiff at Malaga. They knew that sometimes the route of the vessel would be "*via* Levante," and sometimes it would be "Directo" ; and I think one is entitled to conclude that in this particular case, when they delivered their goods to the ship to be carried under these bills of lading, they knew that the route of that ship, the route for that particular ship, would be "*via* Levante." Yet it is said that because of the technical interpretation of the words of the bills of lading, the vessel was deviating, and was not on the agreed route.

We are not here concerned with an action by a holder of a bill of lading, whose rights are to be determined solely by looking at the bill of lading ; we are only dealing with a case where a claim is made by the shipper who had the knowledge, through his agents, that I have mentioned. It seems to me that it is possible, certainly as between these parties, to read these bills of lading as meaning that the goods were destined for Liverpool by one or other of the usual routes, and even if the plaintiff had not known which way the vessel was going on this occasion, still, inasmuch as the vessel was taking one of those known and usual routes towards Liverpool, it was not deviating at the time of the loss. We have not got to consider the effect of the deviation clause until we have found out, first, what the route was. Then you may have to ask yourself the question whether from that agreed route there was a deviation. But I am satisfied here that the question of deviation never arose, because at the time of the loss the vessel was on the agreed route as between the plaintiff and the defendants, and I think that that is supported by the decision in the case of *Evans, Sons and Co. v. Cunard Steamship Co., Limited* (18 *The Times* L.R., 374), which has been referred to in the course of the argument. I should like only to add that I congratulate myself and my brothers sitting here upon the fact that we have not had to investigate that large library of authorities which the industry of counsel has prepared for our assistance.

LORD JUSTICE SANKEY.—I agree. The plaintiff was at all material times the owner of 134 barrels of olive oil which he shipped on the defendants' steamship Cervantes at Malaga under two bills of lading dated April 11, 1927, one for 110 barrels, with the destination Bradford *via* Liverpool, and the other for 24 barrels, with the destination Liverpool.

Now the vessel left Malaga and proceeded in an easterly direction on a voyage during which she encountered very severe weather, with the result that the barrels of oil were broached and the oil was spilt and lost. In those circumstances the plaintiff brings an action against the defendants for the loss which he has sustained. The defendants refer to the bills of lading and say: "We are excused. We are not liable to compensate you, because of the

perils of the sea referred to in the exceptions in the bills of lading." To that defence the plaintiff puts in a special plea: "After loading the plaintiff's cargo, the Cervantes, without justification, deviated from the bills of lading voyage and the defendants are therefore not entitled to rely on the terms and exceptions in the bills of lading," and the plaintiff says that the best particulars that he can give are, that after leaving Malaga the Cervantes did not go towards Liverpool, but proceeded in an easterly direction; she proceeded past Sabinal Point and towards Almeria Bay. In other words, what the plaintiff is saying is this: "You are not excused because your vessel did not proceed upon the agreed voyage."

Finally, the defendants put in a plea of rejoinder, in which they say that by proceeding, after leaving Malaga, towards Cartagena the said vessel was carrying out the voyage agreed upon in the bills of lading in a business sense, and/or was carrying out the said voyage by a natural and usual or customary route by which the same always has been and still is carried out by the said vessel at all material times, and these matters were well known and understood by the plaintiff.

The real question as presented before us, therefore, has nothing to do with the terms of the deviation clause, but is whether the vessel was proceeding upon the agreed voyage. Looking at the bills of lading —and I will take the Liverpool one, which was the first one put before us — the words are these: "Shipped by Leon Frenkel"—that is the plaintiff—"in the steamship Cervantes with destination to Liverpool"—now what is the true meaning of that? In my view the meaning of it is this, that it is "With destination to Liverpool by one or other of the usual routes."

In this case there was abundant evidence that the vessel proceeding in a northerly direction towards Cartagena was proceeding upon one of the usual routes. There was the evidence first of all of Mr. Owen, who was the defendants' manager at Malaga. There was also the evidence of Mr. Thomas Bartlett, who was the superintendent of the defendants' line, and he stated the fact that for 50 years this particular route had been one of the usual routes of the line. On the other hand, there was weak evidence given by the plaintiff, Mr. Frenkel, nobody being called from the Malaga office, and he was asked: "You spend most of your time in London?" and his answer was: "With the exception of that period last year when I was away in Malaga. (Q.) At this time, April, 1927, you were in London?—(A.) Yes, that is right." So on the first point there was really evidence all one way with regard to the route taken by the vessel being one of the usual routes, and therefore, in my view she was proceeding upon the agreed voyage. But the matter does not stop there, because there was evidence not only that this vessel was proceeding upon her usual route to Liverpool, but the plaintiff well knew that she was going "*via* Levante." Why do I say that? Again I point out that no evidence from the plaintiff's Malaga office on the spot was called, but we have evidence showing that this vessel was advertised in the local papers as going "*via* Levante." There was further evidence that the defendants' agents in Malaga called on the plaintiff's agents at Malaga and showed them voyage cards, explaining to them that the vessel was going "*via* Levante." Therefore there was evidence that it was the usual route, or a usual route, and that the plaintiff well knew it.

The learned Judge apparently did not exercise his own view upon the matter, but followed a rather imperfectly reported decision of Mr. Justice Hill to which our attention has been drawn, in the case of *T. M. Duché and Sons v. Owners of Steamship Maria* (3 Ll.L., 184). But with the fuller light that we have had shed upon the decision it appears to me to have nothing at all to do with the present facts. To begin with, there, it was an indorsee of the bill of lading who was the plaintiff and not the shipper, and the principles of *Leduc and Co. v. Ward* (4 *The Times* L.R., 313; 20 Q.B.D., 475), would apply. But over and above that, the facts there were of an entirely different character; the goods in question were transshipped, I think it was said, at Valencia, and when they had been trans-shipped and packed upon another boat, instead of the voyage being continued, the goods were sent out on a voyage in the reverse direction towards the port of Burriana, if I remember rightly, which would be in a northerly direction, the reverse direction from the homeward voyage upon which they had already started. Therefore, it appears to me that both in law and in fact, *T. M. Duché and Sons v. Owners of Steamship Maria* (*supra*) is entirely distinguishable, and really, with all deference, has nothing at all to do either in fact or in law with the present case.

I am of opinion that this appeal should be allowed.

[Solicitors—Messrs. Richards and Butler; Messrs. Middleton, Lewis and Clarke.]

Chan. Div. (Romer, J.) } 1928. May 23.

FIRST RUSSIAN INSURANCE COMPANY (IN LIQUIDATION) v. LONDON AND LANCASHIRE INSURANCE COMPANY, LIMITED.*

Contract—Company—Russian insurance company—Decree of Soviet Government—Confiscation—Effect on reinsurance treaties with English reinsurance company—Frustration.

By virtue of a Decree of the Soviet Government, which came into operation on December 1, 1918, and of certain subsequent decrees, insurance business in Russia was declared to be the monopoly of the State and financial transactions in Russia were regulated.

An action was commenced for the determination of the effect of the above decrees on certain treaties of reinsurance entered into between a Russian reinsurance company, having a branch office in London, and an English reinsurance company.

Held, that the above decrees did not prevent the Russian company from discharging their liabilities to the English company under one of the treaties by a payment in London out of their assets outside Russia or by means of a set off against the liabilities of the English company to them under the treaties.

His Lordship delivered a considered judgment in this action, which was begun by the plaintiffs, the First Russian Insurance Company, an insurance company incorporated in 1827 in accordance with the law of Russia, against the defendants, an English com-

* Reported by J. L. Denison, Esq., Barrister-at-Law.

pany, the London and Lancashire Insurance Company, Limited. The principal office of the plaintiffs was at Leningrad, and they had an important branch office in London.

The question to be determined was the effect of the confiscatory legislation of the Soviet Government of Russia on certain treaties of reinsurance entered into between the two companies. By one set of treaties, referred to in the proceedings as the Outward Treaties, the defendants reinsured with the plaintiffs fire risks undertaken by the defendants in Great Britain, Australia, and elsewhere outside the Russian Empire. By another of the treaties, referred to as the Inward Treaty, the plaintiffs reinsured with the defendants fire risks undertaken by the plaintiffs inside the Russian Empire. In the present action the plaintiffs sued on the Outward Treaties alone. The Inward Treaty was the subject matter of a counterclaim by the defendants.

Two wholly distinct questions arose in the action: (1) Whether the plaintiffs could recover in the English Courts debts due from the defendants on the balance of account in respect of reinsurance under the Outward Treaties, a considerable sum of money being alleged to be due from the defendants to the London branch of the plaintiff company; and (2) Whether the defendants could set off against that alleged liability debts which they said were due to them in Russia under the Inward Treaty.

On May 18, 1926, the plaintiff company was ordered to be wound up under the Companies (Consolidation) Act, 1908, and a liquidator was appointed. The plaintiffs through the liquidator demanded payment of the balance in question, but were met by a refusal based on the contention that, by virtue of a Soviet decree dated November 18, 1918, the plaintiff company ceased to function on December 1, 1918, and that accordingly its treaties ceased to be operative.

In consequence of that refusal the plaintiffs issued the writ in this action. They based their claim on the ground that these Outward Treaties continued down to December 31, 1919, the date from which they had given notice to determine them. The defendants, on the other hand, contended that the accounts between the parties under those treaties ought to be taken on the footing that the treaties came to an end on December 1, 1918, and that, in any case, they were entitled to set off against any sum due to the plaintiffs under the Outward Treaties the balance that was due from the plaintiffs to the defendants on that date under the Inward Treaty.

Mr. Maugham, K.C., Mr. Archer, K.C., and Mr. W. F. Waite appeared for the plaintiffs; Mr. Wilfrid Greene, K.C., Mr. S. L. Porter, K.C., Mr. A. Andrewes-Uthwatt, and Mr. T. W. C. Carthew for the defendants.

Mr. Justice Romer.—The plaintiffs in this action are an insurance company incorporated in accordance with the laws of Russia in the year 1827. The defendants are an English company. The question that I have to determine is as to the effect of the confiscatory legislation of the Soviet Government of Russia upon certain treaties of reinsurance entered into between the two companies. By one set of treaties, referred to in the proceedings as the Outward Treaties, the defendants reinsured with the plaintiffs fire risks undertaken by the defendants. By another of the treaties, referred to as the Inward Treaty, the plaintiffs reinsured with the defendants fire risks undertaken by the plaintiffs. In the action the plaintiffs are suing upon the Outward Treaties alone. The Inward Treaty is the subject-matter of a counterclaim by the defendants. For the present, therefore, I will confine my attention to the Outward Treaties. These treaties are three in number, all dated February 5, 1907, and made between the defendants of the one part and the plaintiffs of the other part. They are known as "The Home Treaty," "The General Foreign Treaty," and "The Australian Treaty" respectively, according to the locality of the risks that were being thereby reinsured. But they are substantially in the same terms, and it is sufficient for the present purpose to refer to the Home Treaty alone. By that treaty the defendants agreed to reinsure with the plaintiffs, and the plaintiffs agreed obligatorily to accept, a specified proportion of the risks undertaken by the defendants within the limits of the United Kingdom, including the Isle of Man and the Channel Islands. Bordereaux were to be forwarded by the defendants to the plaintiffs showing the risks from time to time ceded under the treaty, together with the amount of the premiums due to the plaintiffs, which were to be a *pro rata* share of the net premiums received by the defendants from the insured. It was also provided that the defendants should give to the plaintiffs early intimation of any losses occurring under any policies, and that, after the defendants should have made any payment in respect of any loss, the plaintiffs should reimburse the proper proportion to the defendants without delay and at latest within 10 days after application, unless such reimbursement amounted to less than £100, when the same should be carried into the current account between the parties. It was further provided that the plaintiffs should allow to the defendants a specified commission upon the net premiums payable to them by the defendants and upon the net profits accruing to the plaintiffs under the treaty, such profits to be ascertained in manner set forth in the treaty. Quarterly accounts were to be furnished by the defendants to the plaintiffs within four months after the respective quarter days, and the balance by whomsoever due was to be paid within two weeks after the rendering of the account. Finally it was provided that a firm then bearing the name of Hollitscher and Middleton (but subsequently known as and referred to throughout these proceedings as Middleton and Cater), of No. 15, George-street, in the City of London, were the attorneys or agents appointed by the plaintiffs to act for and represent them in respect of all communications, despatch of documents, and all formalities accruing thereunder, and that their acts and signatures to all documents relating thereto or to the treaty should be binding upon the plaintiffs. The treaty was expressed to be determinable by six months' previous notice in writing on either side. Messrs. Middleton and Cater had, in fact, already been appointed the attorneys of the plaintiffs under a power of attorney dated June 16, 1906. For the plaintiffs did not confine their reinsurance business to the defendants. They entered into Outward Treaties with at least six other British insurance companies; and Middleton and Cater, on behalf of the plaintiffs, conducted the business in connexion with all these treaties. The power of attorney which was in English form, though executed by the plaintiffs in Petrograd, began by stating that the plaintiffs, carrying on a branch business at their office, 15, George-street, Mansion House, London, having appointed Middleton and Cater managers of their said branch business, did thereby appoint the members of that firm the company's attorneys, and it then proceeded to give such attorneys power to effect such reinsurances as they might think proper with any companies carrying on the business of fire insurance in the United Kingdom

of any risks insured by such companies and other consequential powers.

The business relations between the plaintiffs and the defendants thus constituted under the Outward Treaties pursued their normal course down to the outbreak of War, though I shall have to consider later the method in which the business was so conducted. The difficulty of communicating with Russia occasioned by the War necessitated, however, an alteration in the course of business, by virtue of which alteration losses for which the plaintiffs were liable were debited to them in account and the defendants temporarily retained the balance due to the plaintiffs. This arrangement continued until March, 1916, when the defendants resumed payments to Middleton and Cater on behalf of the plaintiffs, Middleton and Cater undertaking to hold the balances so paid to them upon trust to pay any losses for which the plaintiffs might become liable under the treaties. In March, 1918, however, the practice of retaining the balances due to the plaintiffs was resumed by the defendants. With these exceptions the business under the treaties followed its normal course from the beginning of the War down to December 31, 1919, as from which day the Outward Treaties were determined by the defendants in the circumstances now to be stated.

On February 22, 1918, the defendants had given to Middleton and Cater formal six months' notices for the termination of the Outward Treaties. Their reasons for giving these notices are stated in a covering letter which was in these terms: "It is with profound regret that in consequence of the grave situation created in Russia by recent events we are compelled to give notice for the termination of all our Russian treaties. It is possible that circumstances may so alter as to warrant our extending the notices required by the treaties, and we sincerely hope that it may not be necessary to completely terminate relations. In this eventuality we shall, of course, advise you. Formal notices enclosed herewith. You will doubtless take the necessary steps to ensure that the company learns of this notification at the earliest possible moment." The grave events referred to in this letter were no doubt the overthrow of the Kerensky Government in the month of November, 1917, and the accession to power of the Soviet Government. Little appears to have been known by the defendants at this time as to what that Government was doing. The notices were merely given as a precautionary measure. From that time down to August, 1918, various rumours came to the knowledge of the defendants as to the acts done or threatened by the Soviet Government in connexion with insurance companies, but such rumours seemed to point to nothing worse than Government control of the companies, the defendants being advised that the Russian companies would be able to continue their work and maintain their relations with foreign companies, and that their capital would "probably" remain untouched. In these circumstances the defendants informed Middleton and Cater on August 16 that they were willing to allow the Outward Treaties to run along for the time being and pending further advices from Russia when they could "see the situation more clearly in order to come to a definite and final decision." This proposal was accepted by Middleton and Cater on behalf of the plaintiffs on August 19, and the treaties remained on foot notwithstanding the expiration a few days later of the six months' notice of February 22. It is agreed that thenceforward the treaties were determinable at will. It is clear that the defendants were anxious to maintain business relations with the plaintiffs, and were willing to continue making cessions to the plaintiffs notwithstanding the uncertainty that must have existed in their minds as to what was really being done in Russia. They no doubt considered themselves sufficiently protected by their ability to put an end to those relations at any time. On November 4, 1918, the defendants received a copy of a long letter that the Russian Insurance Company had received from Mr. Kaz, their assistant general manager in Copenhagen, dealing with the position of insurance companies in Russia. This letter clearly indicated that their position was precarious, though Mr. Kaz stated that there was "no reason to lose all hope and confidence in the Russian business because of the revolution." This was not very encouraging. The general manager of the defendants, indeed, could only find one welcome feature in it, which was that "so far as one can tell the insurance companies have suffered less than many others." On December 30 the defendants were informed by Messrs. Fester Fothergill and Company, who were acting on behalf of other Russian reinsurance companies with whom the defendants had relations, that all Russian insurance companies (with an immaterial exception) were to liquidate by April 1 as from which date fire insurance would "apparently" be carried on by the State under Bolshevist influence. In reply to this information the defendants' general manager stated that he was not at all surprised, as he feared things would be much worse before they were better, and that the defendants would consider the question of terminating the treaties with Messrs. Fester's principals. "It is too early yet, however," he added, "for us to formulate any definite decision, and on the whole the business is so good that we can afford to deliberate so that we may get full advantage from the placing of these treaties in such directions as may be to our reciprocal benefit." Notwithstanding this information, described by Messrs. Fester and Company as "disturbing," the defendants refrained from terminating the Outward Treaties. Nor did they take any steps in that direction when on January 1, 1919, they received what was a substantially accurate copy of the decree of December 1, 1918, hereinafter referred to, a decree that the defendants now allege finally frustrated those treaties. On the contrary, the defendants negotiated with Middleton and Cater, and ultimately concluded an addendum to the Home Treaty dated May 12, 1919, extending the nature of the risks to be conceded. It is true that at this time the defendants had seen a letter from Mr. Dobrynin, managing director of the plaintiff company, which, after setting out fairly accurately the effect of the decree of December 1, stated that the financial position of the private insurance concerns, notwithstanding the disastrous results of the Bolshevist rule, was not at all shaken. The reason he gave for this optimistic view was "that all the assets of the private insurance concerns are placed either in real property or in gilt-edged securities guaranteed by the State, which assets will not only resume their former value, but, as is the case with all real property and sound securities, they will in all probability increase in value as soon as order is re-established in Russia." Looking at his letter as a whole, it would appear that his optimism was solely due to his belief that the Bolshevist rule would not last for long. For in an earlier part of the letter he had referred to the fact that the Bolshevists had nationalized land, factories, and ships, which had become Government property. The truth is, I think, that the defendants were willing to run the risk of

what the Soviet Government might do to the Russian insurance companies. If things improved little harm would result from a continuation of the Outward Treaties. If things did not improve, the defendants would protect themselves by bringing those treaties to an end, as they were enabled to do at any time. Things, in fact, did not improve. The defendants accordingly on December 19, 1919, addressed the following letter to Middleton and Cater : "Dear Sirs,—Referring to the correspondence we had with you in February, 1918, when formal notice for the termination of the treaties was given by us, and which was subsequently extended in the hope that the Russian situation would improve, I beg to advise you that we propose to cease ceding business to the above company under the Home, General, Foreign and Australian Treaties, after the close of the present year. That is to say, cessions on all business taking effect up to midnight of December 31 will be for account of the company, but after that date no further business will be ceded. Nearly two years have now elapsed, and in view of the impossibility of communicating with our reinsurers or gauging the financial situation, either present or future, we feel that we can no longer leave the matter in suspense. We feel sure that, when the situation as regards Russian affairs is clearer, our friends will appreciate we have been patient and that we have done all in our power to maintain the connexion up to the last moment. Please acknowledge this communicaion on behalf of your company." As from December 31, 1919, therefore, cessions under the Outward Treaties ceased to be made. In respect of the cessions made up to that date the accounts rendered by the defendants show a balance of £42,421 19s. 11d. due to the plaintiffs, subject to some relatively small outstanding losses which have not yet been agreed. By an order dated May 18, 1926, it was ordered that the plaintiff company should be wound up under the provisions of the Companies (Consolidation) Act, 1908, Mr. James Tait being subsequently appointed liquidator. The plaintiffs through such liquidator thereupon demanded payment of the balance in question, but were met by a refusal based upon the contention that by virtue of the Soviet action and legislation the plaintiff company ceased to function on December 1, 1918, and that accordingly its treaties ceased to be operative from that date. In consequence of this refusal the plaintiffs issued the writ in this action on March 1, 1927. As already stated the plaintiffs are suing under the Outward Treaties only, claiming on the footing that these treaties continued down to December 31, 1919. The defendants, on the other hand, contend that the accounts between the parties under these treaties ought to be taken on the footing that the treaties came to an end on December 1, 1918, and that in any case they are entitled to set off against any sum due to the plaintiffs under the Outward Treaties the balance that was due from the plaintiffs to the defendants on that date under the Inward Treaty. The defendants do not now contend that the plaintiffs ceased to function on December 1, 1918, by reason of their having ceased to exist. Such a contention could not be maintained since the decision of the House of Lords in *Employers' Liability Assurance Corporation v. Sedgwick, Collins and Co.* (42 *The Times* L.R., 749 ; [1927] A.C., 95). They do, however, contend (1) that by virtue of the decree of the Soviet Government of December 1, 1918, the plaintiff company was disabled from carrying on any reinsurance business as from that date ; (2) that the authority of Middleton and Cater was determined at that date by the same decree, or, alternatively, had been determined in October, 1917, being the expiration of a period of three years from the last power of attorney given to them by the plaintiff company ; (3) that, by reason of the said decree and of the confiscatory acts or legislation of the Soviet Government that preceded it, the Outward Treaties came to an end on December 1, 1918, in accordance with the principles relating to "frustration of contracts." I will deal with these defences in the order in which I have stated them, postponing for the moment the defence of set-off based upon the Inward Treaty.

The first of these defences is based upon the decree of December 1, 1918, alone. That decree is in these words : "Decree of the Council of People's Commissaries. Article 904. On the organization of Insurance Business in the Russian Republic. 1. Insurance of all kinds and forms, such as insurance against fire, insurance of transport, life, against accidents, hail, epizooty, bad crops, &c., is declared to be the monopoly of the State. Note : Mutual insurance of movable property and goods by cooperative organizations is carried out on a special basis. 2. All private insurance companies and organizations (joint stock share and mutual) are subject to liquidation on the publication of the present decree ; former Zemstvo (Popular Soviets') and mutual-municipal insurance organizations, operating within the boundaries of the Russian Republic, are declared to be the property of the Russian Socialist Federative Soviet Republic. 3. For the immediate organization of the insurance business and for the liquidation of the parts of the insurance establishments which have become the property of the State a Commission is created at the Supreme Council of People's Economy consisting of representatives of the Supreme Council of People's Economy, People's Commissariats of Trade and Industry of Interior, Commissariat for Insurance and Combating Fire, of Finance, Labour and State Control and of Soviet Insurance organizations (Popular Soviets' and mutual-municipal). Note : The same Commission is also entrusted with liquidating private insurance organizations all the property whereof, which will appear to be there after their liquidation, becomes the property of the Russian Socialist Federative Republic. 4. The reorganization and liquidation mentioned in the foregoing articles of the existing insurance organizations and establishments must be completed not later than April 1, 1919. 5. The Commissariat for Insurance Business and Combating Fire together with the establishments existing thereat is reorganized into the Insurance Department of the Supreme Council of People's Economy. The task of combating fire is handed over to the Supreme Council of People's Economy. 6. All Soviet properties and enterprises are not liable to insurance. 7. Life insurance by the State Savings Banks is carried out on the former basis. 8. The present decree is carried into effect from the day of its promulgation." Experts in Russian law gave evidence before me as to the meaning and effect of this decree. On one thing they are unanimous. As from December 1, 1918, no insurance company could carry on insurance business in any part of Russia that was then subject to the jurisdiction of the Government that promulgated the decree. But Mr. Krougliakoff who gave evidence for the defendants went further than this. He said that the decree deprived Russian companies of the power of carrying on insurance business in any part of the world. I am unable to accept this view. A company incorporated under Russian law has, of course, such powers only as that law may give to it. But it is not doubted that, apart from the decree, the plaintiff company

had, according to Russian law, power to carry on insurance business both in Russia and abroad. Now the decree provides, in effect, that as from December 1, 1918, insurance of all kinds within the jurisdiction of the Soviet Government is the monopoly of the State. For the decree has no extra-territorial effect : see *The Jupiter* (43 *The Times* L.R., 741 ; [1927] P., 250). It is indeed headed with these words : "On the organization of insurance business in the Russian Republic." It does not purport to, nor, of course, could it, affect the power of foreign companies to carry on insurance business outside the Soviet territory, though it does prevent such companies from carrying on such business inside that territory. The decree, moreover, draws no distinction between Russian companies and foreign companies, and I fail to see why it should affect them differently in this respect. The truth is that the decree was not concerning itself with the powers of Russian corporations, but with the activities within the Soviet territory of insurance companies whether Russian or foreign. I come therefore to the conclusion that the effect of the decree was to deprive the plaintiffs of the power of carrying on an insurance business within Soviet territory, but that it did not affect their power of carrying on that business abroad.

In these circumstances it becomes necessary to consider whether the plaintiffs were carrying on the reinsurance business under the Outward Treaties in England or in Petrograd. For, with all respect to Dr. Idelson who holds a contrary view, the decree does, in my opinion, prohibit the plaintiffs from effecting in Russia policies of insurance on property situated outside. This, as pointed out by Mr. Krougliakoff, would involve issuing a policy in Petrograd, and would be a breach of the provisions of the decree, and this opinion of his would seem to be in accordance with the English law upon the subject : see *In re United General Commercial Insurance Corporation* ([1927] 2 Ch., 51). The question whether the plaintiffs carried on their reinsurance business in this country is not free from difficulty, but in my opinion the answer to it must be in the affirmative. When the business was first started it would certainly seem to have been the intention of the plaintiffs to institute a branch business at 15, George-street, which was Middleton and Cater's office, and to appoint that firm managers of such branch. That appears from the power of attorney to which I have already referred. Furthermore, the reinsurance business under the Outward Treaties with the defendants and similar treaties with other ceding companies was treated in practice as a branch business. Mr. Cater stated in evidence as follows : "We carried it on independently. We ourselves were entirely responsible for the management of this business, the negotiation of the contracts, the supervision of the business and all the work incidental to the carrying out of the reinsurance business." He also stated that they never consulted the head office in Petrograd as to whether they should undertake a particular risk or deal with the business in a particular way, though they would from time to time consult the head office upon any point of great importance as any branch manager would. The bordereaux provided for by the treaties were sent to Middleton and Cater and were checked by them. So too were the quarterly accounts. Balances due to the plaintiffs and losses payable by the plaintiffs were respectively received and paid by Middleton and Cater. The Outward Treaties were no doubt executed by the plaintiffs in Petrograd, as were the addenda subsequently made to these treaties, with the exception of the one of May, 1919. But a reinsurance business does not consist in executing reinsurance treaties. It consists in the performance of the manifold acts for which the treaties provide, the passing to and fro of the bordereaux and the accounts, the intimation, agreement and payment of losses, the correspondence and interviews which such matters demand. All this took place in London. In *Forsikringsaktieselskabet National (of Copenhagen) v. Attorney-General* (41 *The Times* L.R., 473 ; [1925] A.C.,639) Lord Cave observed in relation to a treaty similar to the Outward Treaties in this case : "It appears to me that there is much to be said for the view that a reinsurance treaty of the nature which I have described, when supplemented by a bordereau, is in effect a policy of insurance against loss by or incidental to fire." So far, therefore, as any policies of insurance in the present case may be deemed to have existed, they would seem to have been brought into effect in London where the bordereaux were from time to time issued. For these reasons I am of opinion that the decree of December 1, 1918, did not render illegal the continuance of the plaintiff's business under the Outward Treaties.

The next question that has to be considered is whether Middleton and Cater had any authority to continue that business, having regard to the decree of December 1, or, alternatively, to the Russian law applicable to powers of attorney. As to the decree, it is clear that it put the plaintiff company into liquidation. But there is a conflict of views among the experts in Russian law as to the effect that this liquidation had upon the authority of the company's agents. According to Dr. Idelson, the authority of the agents continued until revoked by the liquidators. Mr. Krougliakoff, on the other hand, considered that the liquidation put an end to the authority of every agent. But he seemed to base this opinion upon the principle that an agent's authority is determined by the death of his principal, or by such a change in circumstances as renders the further performance of the agent's duties impossible. Quoting apparently from a Russian text book, he instanced the case of an agent for the management of a house or an estate, and said that the agent's authority came to an end when the house was burned down or the estate was sold. He then added this : "If a company doing insurance business undergoes a fate which is really equivalent to death—that is the effect of what the Soviet Government did—no doubt that general principle would apply. The authority of every agent would come to an end." But the fate of the plaintiff company was not equivalent to death. All that happened was that so far as Soviet territory was concerned its affairs were liquidated. I cannot help thinking that Mr. Krougliakoff's evidence is really based upon the opinion which he still holds, and is of course entitled to hold, that notwithstanding the decision of the House of Lords in the *Sedgwick, Collins* case (*supra*) the plaintiff company has according to Russian law ceased to exist. I shall have occasion to refer to that case presently in connexion with the alternative defence based upon the power of attorney. I may, however, point out that if in the present case the authority of Middleton and Cater was determined by the decree of December 1, so must have been the authority of Collins in the case before the House of Lords. In the circumstances I propose to act upon the opinion of Dr. Idelson, and I hold that the authority of Middleton and Cater was not revoked by the decree, and, never having been revoked by the Russian liquidators, continued for all times material to the present case.

The alternative defence based upon the power of attorney is this. According to Russian law a commercial power of attorney given in Russia for the purpose of being acted upon there is only operative for three years from its date. Mr. Krougliakoff says that the same rule applies to a power of attorney given in Russia for the purpose of being acted upon abroad. Dr. Idelson, however, maintains that according to the law of Russia such a document is to be construed and takes effect according to the law of the country in which it is to be acted upon. Dr. Halpern was of the same opinion. "We have here," he said, "a contract which is given with reference to some English business which has to be performed entirely in the United Kingdom and of which no part has to be performed in Russia. In my opinion, if one applies the Russian rules of conflict of laws, the *lex loci solutionis* would be the proper law for the construction." Mr. Krougliakoff could find no authority in the old Russian law for such a principle. There were, he said, on the contrary numerous authorities for the opposite statement, namely, that the *lex loci contractus* applied in such cases. He agreed, however, that if the parties to a contract indicated an intention that it should be governed by another law, such as the law of England, such intention would be given effect to in Russian law, and that such an intention might be implied. He was then asked whether, in view of the fact that the document in question was given to an English firm to be acted on in England for the purposes of satisfying people in England that the firm had authority to act, the parties had not sufficiently indicated their intention that the English law should apply. His answer was : "It is very difficult for me to say. At any rate I would not take upon myself to say that this possibility is ruled out." This being so, there does not seem to be any serious conflict between the experts in relation to the power of attorney in the present case. Neither according to Russian law nor English law was the duration of the power limited to three years. In the *Sedgwick, Collins* case (*supra*) Lord Sumner, in referring to a similar power of attorney given by another Russian insurance company to one Collins, said : "I do not think it is proved that by Russian law, whether pre-revolutionary or post-revolutionary, he had no authority all this time to do on the company's behalf all that he ostensibly did for it, nor do I see any reason why the question of his authority to carry on in London the business established here by the company should not be determined by English law." I desire respectfully to make a similar observation with reference to the present case.

I must now consider the contention of the defendants that the Outward Treaties determined on December 1, 1918, on the principle of what is called frustration of contract. It will be convenient to see, first of all, what that principle is and then to ascertain whether it is applicable to the present case. The principle in its simplest form was enunciated by Mr. Justice Blackburn in *Taylor v. Caldwell* (3 B. and S., 826) in these words : "Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done ; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." But as pointed out by Lord Justice Vaughan Williams in *Krell v. Henry* (19 *The Times* L.R., 711 ; [1903] 2 K.B., 740), the principle applies not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things going to the root of the contract and essential to its performance. In *Horlock v. Beal* (32 *The Times* L.R., 251 ; [1916] 1 A.C., 486) the principle was stated by Lord Atkinson to apply not only to contracts in their executory stage, but when they have been in part performed. It will be observed, however, that the principle so stated only applies when the performance or further performance of a contract becomes impossible, which, as pointed out by Lord Loreburn in the case last mentioned, means "impracticable in a commercial sense." In the *Tamplin Steamship* case (32 *The Times* L.R., 677 ; [1916] 2 A.C., 397), the principle was stated by Lord Loreburn, at page 403, as follows : "A Court can and ought to examine the contract and the circumstances in which it was made, not, of course, to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract." But he added that in applying the rule it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract. Lord Parker in the same case referred to the principle as being that which underlies the cases in which a contract has been held to determine upon the happening of some event which renders its performance impossible or otherwise frustrates the objects which the parties to the contract have in view. In the case of *Bank Line, Limited v. Arthur Capel and Co.* (35 *The Times* L.R., 150 ; [1919] A.C., 435) Lord Sumner referred to the principle as the theory of dissolution of a contract by the frustration of its commercial object, and with reference to the application of the principle to a case of delay, he said : "For the time being the performance of the contract must have become altogether impossible." A little later he said : "I think also that the doctrine is one which ought not to be extended, though to cases that really fall within the decided rule it must be applied as a matter of course even under novel circumstances."

Such being the principle I must now turn to the facts in order to see whether it is applicable to the present case.

Before entering into the Outward Treaties the defendants, as was their invariable custom in similar cases, made a careful analysis of the balance-sheet of the plaintiff company. Before making a contract of insurance it is, of course, important for the insured to be satisfied that the insurers will be able to meet their engagements. In ordinary circumstances the premium income of a fire insurance company will be more than sufficient to meet the losses. It may not, however, be sufficient to meet them in exceptional cases such as a conflagration. In those cases the company will have to fall back upon its capital

reserves. For this reason it was of importance to the defendants to satisfy themselves as to the value of the plaintiffs' capital assets ; and this they did. Now it appears that, by reason of the confiscatory legislation and proceedings of the Soviet Government, practically every investment of the plaintiff company within the jurisdiction of that Government had by December 1, 1918, been annulled, destroyed, or confiscated. I have no means of ascertaining what proportion of the plaintiffs' assets in Russia was affected by these confiscatory measures, but I may, I think, assume that it was a large one. That being so, a state of affairs had arisen by December 1, 1918, that could not have been within the contemplation of the parties in 1907. They would not, of course, be justified in assuming that the financial position of the plaintiffs would continue at all times to be as sound as it then was. The possibility of a change for the worse, even a change resulting in insolvency, cannot be deemed to have been outside their contemplation. But it ought, I think, to be presumed that they contracted in 1907 on the footing that the financial position of the company would continue unaffected by any such confiscatory proceedings as those of the Soviet Government. But did the events of 1918, culminating in the decree of December 1, 1918, render the further performance of the contract commercially impracticable ? Now it is a feature of this case, not present in any other to which my attention has been called, that the contract in fact continued after the date of its alleged frustration and the commercial object of the contract was in fact attained. Risks continued to be ceded down to December 31, 1919, and all the losses under these risks payable by the plaintiffs have in fact been paid. The defendants are in no worse a position than they would have been had the Revolution in Russia of November, 1917, never taken place. But, say the defendants, it is immaterial to consider what took place after December 1, 1918. By that time events had happened putting an end to a state of affairs which both parties contemplated would continue to exist. You must therefore imply a condition bringing the contract to an end on that day. If the principle of frustration be that, whenever an event happens which could not have been in the contemplation of the parties at the date of the contract and which may or may not result in the frustration of the commercial purpose of the contract, the contract is determined, there is much to be said for the defendants' contention. But this is not the principle as I understand it. The event that determines the contract must be one that frustrates it in fact. If this be not so, I cannot understand why in *Horlock v. Beal* (*supra*) the House of Lords should have troubled to consider whether the contract of service in that case determined on the detention of the ship or on the imprisonment of the crew—nor, for the matter of that, why every commercial contract was not determined upon the outbreak of the Great War. Furthermore, if it be a material subject for consideration, I do not see why I am to assume that if the parties had foreseen the state of affairs that existed on December 1, 1918, they would have inserted a condition determining the treaties on that day. The plaintiff company's power of continuing the business of the Outward Treaties was unaffected. Its assets outside the jurisdiction of the Soviet Government were untouched. There were considerable assets belonging to it in the United States of America, and its premium income for 1918 under the Outward Treaties was £75,000. The position might, of course, take a turn for the worse at any time. But the defendants might, in these circumstances, well choose to continue what, with reasonably good fortune, would be profitable business for them, merely safeguarding themselves by a power to determine the contract at a moment's notice in preference to providing for its determination automatically on December 1, 1918. It will have been observed that this is precisely what they did in point of fact in August, 1918, and thereafter down to December, 1919. They did not know all that we know now. But they knew a good deal, as is shown by the correspondence, and I cannot help thinking that they must have suspected a good deal more. I did not, however, have the opportunity of seeing any of their directors in the witness box, though their assistant manager spoke as to his own state of knowledge. However this may be, I am not prepared to hold that the Outward Treaties were determined on December 1, 1918. In my opinion, they continued operative down to December 31, 1919. The plaintiffs are accordingly entitled to recover the balance shown due to them on taking the accounts upon that footing, subject only to the defendants' claim of set-off under the Inward Treaty. With that claim I must now deal. By the Inward Treaty which was entered into in the year 1892, it was agreed that the defendant company should reinsure a specified proportion of the risks undertaken by the plaintiffs in the parts of the Russian Empire therein mentioned in consideration of a proportionate amount of the premiums. Clause 7 provided for delivery from time to time of bordereaux to the defendants' representative, meaning no doubt the defendants' representative in Petrograd. Clause 12 provided that as soon as the amount of a loss had been established the share falling to the defendants should be notified to them as requiring payment. The same clause also provided that settlement of accounts between the two contracting parties should take place monthly in the following manner. During the first days of each month the premiums due to the defendants under the bordereaux for the past month were to be added together and the agreed commission of the plaintiffs was to be deducted from the total and the balance paid after the lapse of five months.

The losses payable for each month by the defendants were to be paid in silver roubles to the plaintiffs within the first 14 days of the following month at St. Petersburg. Clause 14 was in these terms : " The London and Lancashire " agrees through its appointed agents in St. Petersburg to settle all transactions having reference to this agreement such as the receipts of the bordereaux, notices of alterations, advices and settlement of losses, and acknowledgment of the monthly accounts, in fact all questions referring to this treaty. Clause 15 further emphasized the fact that the settlement of all matters under the treaty must be effected by the defendants in St. Petersburg so long as any reinsurance for which they might be liable remained in force. The treaty also contained an arbitration clause which provided that in all questions not specially mentioned in the agreement both companies declared themselves willing to submit to the principles and usages which are generally applied to reinsurance business, but that in case of any disputes arising under the agreement they were to be settled by arbitration consisting of two arbitrators and one umpire, all resident merchants of St. Petersburg. These arbitrators were charged to come to an amicable but final decision, and both parties renounced all ordinary and extraordinary legal remedies against such decision.

I cannot doubt that the proper law of this treaty, to use Professor Dicey's expression, is Russian and

that it is that law by which the parties intended the contract to be governed.

It is agreed on both sides that this treaty came to an end on December 1, 1918, by reason of the decree of that date. For as from that date the plaintiffs could effect in Soviet Russia no further insurances. Now, if this treaty had determined on that day in a normal manner, the accounts between the parties would have had to be taken as at that time with any adjustments necessitated by claims subsequently accruing under policies then current, and the balance (if any) due to the defendants ascertained. That balance would, as it seems to me, have been payable in Petrograd in roubles. It is alleged by the defendants that there was in fact such a balance, and that they are entitled to set off what is due to them in respect of such balance against the plaintiffs' claim under the Outward Treaties. It is, however, contended by the plaintiffs that by virtue of the decrees and regulations of the Soviet Government any liability of the plaintiffs in respect of the balance has been long since extinguished. Alternatively they rely upon the Statute of Limitations.

The questions involved in the first of these contentions of the plaintiffs are difficult of solution. The experts in Russian law have given me all the assistance they can; but they are hopelessly at variance on some crucial points, and all of them look at the questions from angles of view that are unfamiliar to an English lawyer. And this is only natural. For Soviet law is a thing *sui generis*, bearing no sort of relation to Russian law of the pre-revolutionary period, which affords no assistance in the search for the meaning and effect of the various decrees and regulations which are thought to have a bearing upon the questions in issue. Indeed, so far as I can understand the matter, those decrees and regulations would receive in the Courts of Soviet Russia whatever construction would appear to be most in accordance with the dictates of the revolutionary conscience. In these circumstances it will, I think, be safe to proceed upon the assumption that the debts owing by the plaintiffs in Russia have not been destroyed, unless the decrees and regulations do so in express terms or by implication necessarily drawn from the language of the decrees and regulations themselves. For when once the assets in Russia of the capitalists had been nationalized or otherwise expropriated for the benefit of what are in some of the decrees called the toiling masses, there seems no reason for thinking that the revolutionary conscience would trouble itself to free the capitalists from their liabilities. Turning now to the relevant decrees and regulations, it is to be observed that the decree of December 1, 1918, does not purport in any way to deal with the liabilities of the insurance companies. It deprives them of their power of carrying on the business of insurance in Soviet Russia, and practically all their assets within the Soviet jurisdiction had been confiscated previously. What was left was put into liquidation and all their property which would "appear to be there" after their liquidation became the property of the Soviet Republic. Inasmuch as the payment of the companies debts would diminish the amount of the funds in the hands of the liquidators which was to be the property of the Republic, it may safely be assumed that the liquidators would refuse to pay any debt owing to a foreign company, such as the defendants. But there was no object to be gained in relieving the insurance companies of their obligation to pay their debts out of any assets they might possess outside the Soviet jurisdiction, and the decree in no way purports to do so. The next decree to which reference must be made is that of the Council of People's Commissaries of March 4, 1919. I need not read it at length. It is sufficient for the present purpose to read clause 2, which is in these terms: "State enterprises are relieved of the obligation to pay to private persons and enterprises any debt incurred prior to the nationalization of the said enterprises, including payments in respect of debentures but excluding wages to their workers and employees. Note: The former State works transferred to the Workers' and Peasants' Government as a result of the October revolution are relieved of payment only of those debts which were incurred prior to October 25, 1917." Dr. Idelson is of opinion that this decree in no way refers to insurance companies, but to manufacturing companies only. Mr. Justice Greer, as he then was, came, however, to the opposite conclusion in *Sea Insurance Co. v. Rossia Insurance Company* (17 Ll. L., 316), accepting the evidence of Mr. Krougliakoff in this respect in preference to that of Dr. Idelson. I am not sure whether Dr. Halpern regards the decree as referring to insurance companies, or merely as affording an useful analogy. But he certainly regards it as supporting in one way or another his view that the debt under the Inward Treaty has been extinguished. Mr. Krougliakoff, as I have already indicated, regards the decree as referring in one sense to insurance companies as well as manufacturing companies; but he does not agree that it relieves the insurance companies of their liabilities. He points out, and in my opinion truly, that private insurance companies are not "State enterprises," because private insurance companies were liquidated, and new State enterprises of insurance were set up "on the ruins of private insurance companies." But the State enterprises of insurance had no intention of taking upon themselves the obligation of meeting the liabilities incurred by the private insurance companies, and section 2 of the decree does not, in his opinion, do more than make this clear. With this opinion I agree. It is true that the section by using the word "relieved" seems to contemplate that the obligation had been previously undertaken by the State enterprises. I cannot, however, find that in the case of the insurance companies this was so in fact, though it was so apparently in certain other cases. And even if the State had taken over the obligation to discharge the debts of the insurance companies, the plaintiffs would not have been thereby discharged of their debts to the defendants in the absence of an express provision to that effect, or under some doctrine analogous to the English doctrine of novation. Assuming, therefore, that the decree of March 4, 1919, was intended to apply to insurance companies, as to which I need not express an opinion, it did not, in my judgment, destroy the debt of the plaintiffs under the Inward Treaty.

I must now refer to certain decrees relating to financial transactions in Russia that are relied upon by the plaintiffs as putting an end to their liability to the defendants. The first one which is dated June 16, 1917, prohibited the making of money transfers to foreign countries as well as payments of roubles to the accounts of persons or bodies abroad or to their representatives in Russia except with the consent of the Minister of Finance. By another one dated September 14, 1918, it is provided as follows: "There remains in force the prohibition for private persons, private firms and institutions and also for Government bodies to effect any settlements of accounts whatever with whomsoever abroad, even for obligations which have originated before the beginning of the War, without special permission of the credit

Chancellery of the People's Commissariat of Finance." By the third one dated October 3, 1918, payment of roubles into accounts of persons and institutions situate abroad or their representatives in Russia were prohibited unless authorized by the same Chancellery. It is unnecessary to set out these three decrees at length. But if they be examined carefully it is clear that they were primarily intended for the purpose of supporting the rate of exchange and protecting Russian currency, and this was the view of Dr. Idelson. None of them purported to discharge persons in the position of the plaintiffs from their liability to other parties, and Mr. Krougliakoff said that they did not have the effect of doing so in Russian law. They merely prohibited the discharge of such liability in a particular way. There was nothing in them, so far as I can see, that in any way prevented the plaintiffs from discharging their liability to the defendants by a payment in London out of assets of the plaintiffs outside Russia, or by means of a set off against the defendants' liability to them under the Outward Treaties. In any case the prohibition was not an absolute one. A payment on or after December 1, 1918, could be made even in Petrograd if the consent of the Chancellery of the People's Commissariat of Finance were obtained. And if the plaintiffs are relying upon the prohibition as discharging them from all liability it is for them to show that they applied for such a consent and were refused, or that such an application would, if made, have necessarily been refused. This they have not done.

The plaintiffs next rely upon the Introductory Law relating to the Civil Code of the Soviet Republic. So far as material it is in these terms : "Par. 1. Civil Code is carried into effect from January 1, 1923. Par. 2. No disputes over civil legal relations which relations arose prior to November 7, 1917, are accepted for consideration by judicial or other institutions of the Republic. Par. 3. Disputes as to civil legal relations which relations have arisen between November 7, 1917, and the date when the Soviet Civil Code comes into force are determined by laws which were in force when such legal relations arose. Par. 4. As far as the legal relations which were allowed by laws in force at the moment when such relations arose are not sufficiently fully determined by the above mentioned laws, the provisions of the Soviet Civil Code are to be applied. Par. 5. Enlarging interpretation of the Civil Code of R.S.F.S.R. is permitted only in case if so required by the defence of the interests of the Workmen's and Peasants' State and of the toiling masses. Par. 6. Interpretation of provisions of the Code on the basis of laws of overthrown Governments and of practice of pre-revolutionary Courts is forbidden."

As to the meaning or effect of this Introductory Law in respect to the plaintiffs' debt under the Inward Treaty, the experts are by no means agreed. Shortly stated, the question upon which they are at issue is as to whether the law destroys merely the remedy or whether it also destroys the right. Dr. Idelson's view is that the right has been destroyed. But when his evidence is examined it appears that in his opinion it is only in some cases that the right is extinguished, and that in the others it is only the remedy that is taken away. When asked what the cases are in which the right is extinguished, he said : "The class of cases where the right is extinguished is the class of cases where the Soviet Government meant that the right should be abolished and the meaning or intention of the Soviet Government I have to get from other decrees." So far, therefore, as the Introductory Law is concerned, I may take it that the remedy alone is affected, and that if the right is abolished this must be due to some other decree, in which expression, as appears from other parts of his evidence, Dr. Idelson intended to include authoritative pronouncements as to the Soviet law. It is, indeed, extraordinarily difficult to understand, even in the case of such legislation as this, how the very same words can be construed as affecting the right in some cases and only the remedy in others. And *prima facie*, the law would seem to be dealing with the remedy only. Now I have already considered the decrees that are thought to have destroyed the right, and have given my reasons for thinking that they have not that effect. It remains, however, to consider the authoritative pronouncements as to the Soviet law that Dr. Idelson had in mind. These are two circulars issued by the People's Commissariat of Justice of August 28, 1923, and October 16, 1924, respectively, and are admittedly authoritative pronouncements. They are somewhat lengthy documents, and I need not occupy time by reading them. Dr. Idelson says that they show that in the view of Soviet jurists every insurance agreement died in Russia when the monopoly of insurance business was declared, but that all the agreements that could be enforced abroad remained in force. As a matter of construction, however, it would seem that the circulars are not directed to fire insurances at all. In any case I can find no indication in them that in the view of the Soviet jurists such a debt as that due from the plaintiffs under the Inward Treaty had been extinguished. Mr. Krougliakoff stated that the principle of the circulars would no doubt apply to fire insurances as well as life policies ; and by this I understand him to mean that the obligations of foreign fire offices outside the territory of the U.S.S.R. would be considered by Soviet jurists as remaining in force, even if their obligations within that territory should have been annulled. He pointed out, however, that although there was a specific decree annulling policies of life insurance, there never had been any specific decree annulling other contracts of insurance.

I think that I have now referred to all the decrees and regulations upon which the plaintiffs rely in support of their contention that their liability under the Inward Treaty has been extinguished, and have given my reasons for coming to the conclusion that this contention has not been made good. It only remains to deal with their defence of the Statute of Limitations.

The defendants' first answer to this is the Statute 4 and 5 Anne, chapter 3, section 19. The plaintiffs, they say, were at all material times "beyond the seas." I have already decided, however, that the plaintiffs were in December, 1918, carrying on business in London by their duly authorized agents. They were, as it seems to me at that time, and they continued thereafter to be, sufficiently resident here to enable them to be sued here by the defendants. But the defendants further contend that the letters from Mr. Dobrynin dated August 4, 1922, constitute acknowledgments of the debt sufficient to take the case out of the statute. I need not read them, as it is not denied by the plaintiffs that such letters are sufficient acknowledgments if Mr. Dobrynin had authority to make an acknowledgment of the plaintiffs' debt so as to bind them. Now Mr. Dobrynin had been the managing director and the general manager of the plaintiffs in Petrograd. As such, he would appear to have had ample authority to bind the plaintiffs unless his authority was determined by the

decree of December 1, 1918. By Article 19 of the statutes of the plaintiff company the management of the company's affairs is declared to be the duty of the manager. By Article 27 the duties of the board of directors are defined as follows: "(1) To constantly control the Manager's actions, his precise execution of the Board's instructions and to watch over the safety of the Company's funds; (2) To appoint and dismiss, on the Manager's report, the Company's staff of officials and to fix their salaries and the remuneration for their services; (3) To establish general tables of premiums for the Manager's guidance; (4) To determine the limits of risks to be accepted by the Company; (5) To settle with what foreign insurance companies the Company is to enter into transactions of reinsurance, as well as to conclude obligatory contracts with other companies; (6) To authorize the payment of sums for losses insured; (7) To receive the interest on the Company's funds, as well as to buy, exchange or sell all kinds of stock belonging to the Company; and (8) To present to the Company the yearly reports and balances and to fix the amount of sums to be distributed as dividends and assigned to increase the reserve fund, conforming to the Statute." I conclude from this that though questions of general importance, such as the making of reinsurance treaties, were to be decided by the board, the general management of the plaintiffs' business, such as the adjustment of the quarterly accounts under a reinsurance treaty when made, was entrusted to the manager. That being so, Mr. Dobrynin had, in my opinion, authority to make on behalf of the plaintiffs a promise to pay the balance shown by the accounts to be due to the defendants under the Inward Treaty. But was this authority determined by the decree of December 1, 1918? In my opinion it was not. I have already given my reasons for coming to the conclusion that the authority of Middleton and Cater was not determined by that decree, and the same reasons lead me to the conclusion that the authority of Mr. Dobrynin also continued. Dr. Idelson was asked in cross-examination the question: Whether the decree by itself interfered with or took away the powers of the plaintiffs' agents, and he answered "No." The authority to act in matters relating to the affairs of the plaintiffs in Soviet Russia could no doubt have been determined by the liquidation, but there is no evidence that it was so determined. There was, indeed, no reason why it should have been. No insurances could be effected by the plaintiffs in Soviet territory after December 1, 1918, and practically all their assets in that territory had been confiscated. The business of the liquidators was merely to collect what assets remained and hand them over to the State. For it seems quite clear that they were never intended to pay any of the plaintiff company's liabilities. In such circumstances there would be no object in determining the authority of the company's various agents, who were powerless to do anything that could prejudicially affect the company's assets in Russia.

In my opinion the defendants' claim against the plaintiffs under the Inward Treaty is a valid and subsisting claim, and whatever is due to them in respect of such claim must be set off against the sum due to the plaintiffs under the Outward Treaties. It was suggested by the plaintiffs that having regard to the arbitration clause in the Inward Treaty there will be insuperable difficulties in attempting to ascertain in this country what is the amount so to be set off. I am not greatly impressed by this. It was stated in evidence by Dr. Idelson that the clause does not oust the jurisdiction of the Court, though for the purpose of deciding any question in dispute under the treaty it would be necessary to have expert evidence as to the principles and usages of insurance business in Russia. This is because the parties, to use the words of Dr. Idelson, "agreed not to settle their disputes in accordance with the strict law, but agreed to settle their disputes according to the principles and usages of the reinsurance business." It is, however, to be observed that these principles and usages are only brought into operation in regard to any question not specially mentioned in the treaty, and I see no reason for supposing that for the purpose of ascertaining the amount of the plaintiffs' indebtedness recourse will have to be made to such principles and usages. A difficulty might, it is true, have arisen from the fact that the books of the plaintiff company in Russia have in all probability been long since destroyed. The letter of Mr. Dobrynin, however, removes this difficulty if the defendants are willing to accept his figures. His account is not brought down to a later date than November, 1918; but it is highly improbable that any premiums would have been received after that time, or that any further losses would have been paid. Be this as it may, I cannot refuse the defendants the relief that they ask by their counterclaim merely by reason of the difficulty of ascertaining the amount due to them. It is alleged by the plaintiffs that at all material times the value of the rouble was so small that the sum due to the plaintiffs under the Outward Treaties will not be diminished appreciably by a set off. But the question as to the rate of exchange to be applied in ascertaining the defendants' claim in sterling was not argued before me, and must be left to be dealt with on the inquiry that I propose to direct. The amount found to be due in answer to that inquiry must be set off against the sum due to the plaintiffs under the Outward Treaties, and, if the parties are not able to agree, that sum must also be ascertained by taking an account.

The plaintiffs must have their costs of the action and the defendants their costs of the counterclaim, with the usual set off.

[Solicitors—Messrs. Lawrance, Messer, and Co.; Messrs. Parker, Garrett, and Co.]

K.B. Div. (Wright, J.) } 1928. May 25.

LONDON COUNTY COUNCIL v. HACKNEY BOROUGH COUNCIL.*

Replevin—Distress for non-payment of rates—No beneficial occupation of premises—Jurisdiction of justices to issue warrant—Maintainability of action.

Up to March 31, 1926, the plaintiffs, as education authority, had managed as an industrial school certain premises within the parish of which the defendants were the overseers of the poor. On that day the premises were closed and the plaintiffs' furniture, stores, documents, and other equipment were removed, with the exception of some furniture which was left in two rooms for a caretaker and of a few articles which were regarded as of so little value as scarcely to

* Reported by G. F. L. Bridgman, Esq., Barrister-at-Law.

be worth removing. The caretaker remained on the premises with his family as a mere caretaker. Repairs to the premises were executed from time to time. The future use of the premises was in doubt until March, 1927, when plans were made which necessitated the erection of entirely new buildings, and work on them was started after April, 1927. The defendants rated the plaintiffs in respect of the premises for the half-years ending September 30, 1926, and March 31, 1927.

Held, that during the periods in question the plaintiffs were not in beneficial occupation of the premises in the sense that their occupation was of benefit or advantage to them in the performance of their public duties, and they were therefore not rateable.

When the plaintiffs refused to pay the rates the defendants seized a tramway-car belonging to the plaintiffs under a distress warrant issued by justices for the non-payment of the rates.

Held, that the plaintiffs could not recover damages for the seizure in an action of replevin because the jurisdiction of the justices to issue the distress warrant depended not on beneficial occupation of the premises by the plaintiffs, but simply on occupation within the parish.

Judgment was delivered in this action in which the London County Council claimed from the Mayor, Aldermen, and Councillors of the Metropolitan borough of Hackney damages in replevin for the seizure and detention of a tramway-car which, the plaintiffs alleged, the defendants had wrongfully seized and distrained in respect of certain rates by which the defendants had purported to rate and assess the plaintiffs, and which the plaintiffs alleged were not due and payable by them.

The defendants pleaded that the rates in question were due from the plaintiffs to the defendants and that their bailiff had seized and distrained the tramway-car in execution of a distress warrant issued by justices before whom the plaintiffs had appeared.

The facts and the arguments are fully stated in the judgment.

Mr. E. M. Konstam, K.C., and Mr. E. H. Tindal Atkinson appeared for the plaintiffs; Mr. Joshua Scholefield, K.C., and Mr. Hubert Hull for the defendants.

Mr. Justice Wright read the following considered judgment:—In this case the plaintiffs claim damages for the seizure by the defendants by their bailiff of a tramway-car, the plaintiffs' property, under a distress warrant issued by justices for non-payment of rates. The plaintiffs, having taken proceedings in replevin and given a replevin bond in the usual form, claim a declaration that the distress was illegal, and also damages and cancellation of the bond. The defendants claim that the rates were duly levied and were in arrear, that the distress warrant was issued on a determination by justices acting within their jurisdiction and that the question of the legality of the distress could not be raised in these proceedings.

The facts out of which the dispute arises are comparatively simple. The defendants are the overseers of the poor of the parish of St. John in the Hackney Union, in the County of London. Within their parish was a building called the Industrial School, Upton House, Urswick-road. Up to March 31, 1926, the plaintiffs, as the education authority, managed that building as an industrial school, the premises being vested in them in virtue of the Education (London) Act, 1903, and the Children Act, 1908. They had taken over the management of the industrial school from their predecessors, the London School Board. The Home Secretary, who is the central authority for industrial schools, had granted a certificate dated April 1, 1909, for the premises (the number of inmates being limited to 150) under the Children Act, 1908. Towards the end of 1925 the plaintiffs decided to close Upton House as an industrial school by reason of representations from the Home Secretary that, owing to the decrease in the number of committals to such schools, Upton House had become unnecessary. The Home Secretary had further declined to authorize a proposal by the plaintiffs to continue the building as a Central Industrial School. On November 21, 1925, the plaintiffs accordingly wrote to the Home Secretary resigning the certificate for the industrial school as from March 31, 1926, that being the close of their financial year. The Home Secretary, in reply, by a letter dated December 2, 1925, stated that six months' notice was necessary, and the school would accordingly cease to be a certified school on May 21, 1926, though it might be closed earlier. From the date of the Home Secretary's letter no further new boys could legally be received in the school, and from May 21, 1926, the premises could no longer be legally used as an industrial school. It was, in fact, closed as such on March 31, 1926.

The plaintiffs immediately proceeded to remove the furniture, stores, documents, and other equipment, the main removal being complete by April 10, 1926, and the residue by April 21, 1926. Some necessary furniture was, however, left in two rooms for a caretaker, and, in addition, two large wooden cupboards and an iron mangle were not taken away till the following September. The mangle was described as scrap iron and the cupboards could not be removed except by being broken up, when, as I infer from a minute, they were only fit for firewood. These articles were left in the building, not as valuable things needing a store place, but as things of so little value as scarcely to be worth removing. The caretaker, who was graded in the plaintiffs' service as a schoolkeeper, not because that truly described his functions, as there was no school to keep, but because the plaintiffs had no grade of caretaker, was a mere caretaker. He kept the place clean, answered the door, noted defects that needed repairs, and generally looked after the vacant premises. He lived at first in two rooms near the main door. Later, when joined by his family, he made a home with them in what had been the infirmary. The only persons who came were various workmen to repair defects in gas, plumbing, or roofing, and some architects and surveyors who came to take measurements and make plans with a view to the future use of the buildings. Gas, water, and electric light were left without being disconnected. Only the two former were used, and that only by the caretaker. The plaintiffs supplied the caretaker with coal.

After April, 1926, the future use to which the building might be put was in doubt. It was early suggested that it might be made into an elementary school; it necessitated large structural alterations to change a boarding school for 150 boys into a day

school for 350. It was not till March 29, 1927, after many discussions, that it was finally decided to turn one part of the premises into an elementary school for 350 boys, and another part into offices for use by the plaintiffs as the education authority, and also to build an open-air school in the grounds. This last scheme involved entirely new buildings; the two former schemes involved very expensive structural alterations. The whole work, which commenced after April, 1927, and has only now, in May, 1928, been completed, cost about £12,000. The buildings are now ready for use for their new purposes. It was only after considerable doubt and discussion that this plan was decided on at the end of March, 1927. The plaintiffs were free to use the buildings for any of their purposes, or to sell them. Their valuer gave an estimate of value for the purposes of sale. There was some opposition in the educational committee to the idea of converting them in part into elementary school premises, since they would be less efficient, though less costly, than a newly-erected school building. They might have been pulled down and rebuilt as a school, or a housing scheme might have been carried out.

The rates in question duly appeared, as assessed on the premises, in the rate book, for the half-years ending September 30, 1926, and March 31, 1927. It is not disputed by the plaintiffs that the rate was, as regards form, duly made and confirmed. It is not disputed that the plaintiffs were in occupation of the premises during the material period. It is disputed that they were in beneficial occupation. It is accordingly disputed that they were duly assessed. The plaintiffs contend that there was no jurisdiction to rate them at all, as the only jurisdiction to rate is on the ground of beneficial occupation. The plaintiffs did not appeal against the rate, but they refused to pay. The defendants in due course lodged a complaint in respect of non-payment before the justices by a summons against the plaintiffs issued on May 14, 1927, which came on for hearing before the justices on June 16, 1927. The justices decided to issue a distress warrant. The plaintiffs did not ask for a special case for the opinion of the High Court. The distress was levied on a tramway car, the property of the plaintiffs, who did not appeal to quarter sessions but took proceedings in replevin, which have resulted in this action.

The main questions are, shortly, as follows:—(1) Was there beneficial occupation of the premises by the plaintiffs during the relevant period? (2) If not, are the plaintiffs entitled to take these proceedings? The defendants not only say that there was beneficial occupation, but they further say that if there was not the plaintiffs could only raise that issue by appeal from the rate in the first instance to quarter sessions, or, it may be, on the complaint before the justices, who were willing to state a case for the High Court, or by appeal to quarter sessions against the distress warrant. The plaintiffs reply that, as they had no beneficial occupation, there was no jurisdiction to rate them and any proceedings before justices or quarter sessions were *coram non judice* and of no effect, so that the seizure under the distress warrant was illegal. Both these issues have been fully argued before me, and I shall give judgment on each.

Mr. Konstam took, but not very strenuously, a further point, viz., that the rate was in any case bad on its face, because the assessment was made on "the Industrial School, Upton House, Urswick-road." The defendants' answer was that the description was a correct description of the actual premises, even if the use of the building as an industrial school had been discontinued. I think that answer is sound.

I shall deal first with the question whether the occupation of the premises by the plaintiffs was beneficial during the year of assessment. It is now clear law that "beneficial" in this connexion does not connote pecuniary profit. It is enough in the case of a public body, such as the plaintiffs, that the occupation is of benefit or advantage to them in the performance of their public duties. Nor, in these proceedings, can any question be raised of the quantum of benefit, if there be any benefit. Any question of quantum can only be raised on appeal against the rate. That the plaintiffs are in occupation is not disputed. They are owners of the premises and no one else is in occupation. By their caretaker they are in visible occupation. But occupation is not enough. The essentials to constitute rateability are thus stated by Lord Atkinson in *Liverpool Corporation v. Chorley Union Assessment Committee* (29 *The Times* L.R., 246; [1913] A.C., 197, at p. 208): "(1) Does the appellant occupy this cemetery"—that being the *locus* in question—"for which he is rated. (2) If he does, is his occupation a thing of value?" To make the plaintiffs rateable both these questions must be answered, *mutatis mutandis*, in the affirmative. It is the second question which is now being considered.

The main contention of Mr. Scholefield is that the plaintiffs had beneficial occupation because they were keeping the premises in reserve for the purposes of their undertaking, and holding them available for use for any of their purposes whenever they should require them, and had at no time abandoned the intention to use them for some educational purposes, even if not the same as those for which they had used them previously. It was contended that with regard to vacant buildings the issue of rateability must be determined by considering what the owner's intention was, and the relevant intention of the plaintiffs in this case in the rating period in question was, as the contention ran, to use the premises in the future for some purpose of their undertaking. To escape rateability, it was contended, the plaintiffs must show that in the material period they had decided completely to abandon any user of the premises, as, for instance, by definitely deciding to let or sell. It was also said that the plaintiffs were putting the premises to the only use which they had intended or contemplated in the relevant period, viz., to keep them in reserve and available for any purpose when required.

Apart from principle and authority to which I shall refer, I do not think that these contentions are in consonance with the facts. The premises were before April, 1926, used as an industrial school and not otherwise. They were only capable *rebus sic stantibus* of being so used, and no other user had been intended or contemplated. They could not any longer, legally, after April, 1926, be so used, nor had the plaintiffs any longer any intention of so using them. They could not be used for any other purpose, educational or other, without elaborate alterations incapable of being completed within the year. The original user having been finally abandoned, no fresh plan of employment of the premises was decided on till March 29, 1927, when a plan was formed which could only be put into service after elaborate structural changes. In the meantime the plaintiffs could well have sold or let the premises, or have decided to prepare to turn them to uses other than educational.

I think that the only conclusion on these facts is

that the premises in the relevant period were neither being used nor capable of being used for any beneficial purpose of the plaintiffs but were simply vacant premises. They were not being kept in reserve in the same sense as a furnished house, ready for the owner's occupation at any time, is kept in reserve, or as a warehouse, empty indeed, but ready at any time to receive goods for storage, is kept in reserve, as in *Rex v. Melladew* (23 *The Times* L.R., 207 ; [1907] 1 K.B., 192), or as the empty warehouse kept by the owners "as a 'standby' for use at any moment when the exigencies of their business might make it desirable to so use it, and in readiness for such use," was kept in reserve in *Borwick v. Southwark Corporation* ([1909] 1 K.B., 78). These seem to be the strongest authorities relied on by the defendants, but they appear to be clearly distinguishable from this case. In those cases, the premises, without alteration, were kept ready for a definite employment, and this was what was contemplated and intended and was the reason why they were acquired. In the present case there was no employment for which the premises were suited. Their future employment was uncertain and under deliberation and they could not be made ready for any probable prospective employment without elaborate re-equipment.

The principles applicable to vacant buildings or houses have been discussed in certain cases, not always very clearly. Lord Atkinson, following Lord Halsbury, put the matter thus in the case of *Liverpool Corporation v. Chorley Union Assessment Committee* (*supra*, at p. 211), to which I have already referred : "When the statute, therefore, enacts that the occupier of a house should be rated, it must mean that the person to be rated shall occupy the house *as a house* ; that is, that he shall use the house for the purpose of living in it, or sojourning in it, or working in it, keeping animals in it, storing other chattels in it, or using it for some such other purpose as houses may reasonably be devoted to ; and that, as a vacant house is not used for any of these purposes, it is not occupied *as a house* within the meaning of the statute." It is, I think, clear that in this sense there was no user by the plaintiffs of their premises in the material period. In *Rex v. Melladew* (*supra*, at p. 203) Lord Justice Farwell puts the question thus : "The test, in a case like the present, of business premises, appears to me to be, Has the person to be rated such use of the tenement as the nature of the tenement and of the business connected with it renders it reasonable to infer was fairly within his contemplation in taking or retaining it ? " Lord Justice Buckley, in *Liverpool Corporation v. Chorley Union Assessment Committee* (28 *The Times* L.R., 177 ; [1912] 1 K.B., 270, at p. 288), thus states the problem : "Are the corporation using the land for the purpose of their business or adventure and deriving benefit from it ? " Such questions, I think, could only here be answered in a sense favourable to the plaintiffs' case.

Nor can the defendants, I think, derive any support for their contentions from cases of seasonal trades where in any year the profits can only be made during a short time and at the expense of a period of dormancy or vacancy, which, however, is a necessary condition of the fruitful or profitable period, such as the case of a shop in a seaside watering place (*Southend Corporation v. White*, 17 *The Times* L.R., 5) or a boarding-house in a seaside town with a short season (*Gage v. Wren*, 18 *The Times* L.R., 699), where the vacancy of the premises during the idle season, both of residents and furniture, did not afford a relief from rateability. In the present case the period of vacancy follows on a complete cessation of the original user and an absence at the relevant times of any intended or contemplated new employment.

The relevant intention must, I think, have regard to employment of the premises in the rating year, and to an employment for which they were suited or readily capable of being suited in their then actual condition. This was the ground of the decision in *Bootle Overseers v. Liverpool Warehousing Company* (17 *The Times* L.R., 550), which turned on a finding that in the rating year there was no intention to use the premises. This is quite different from keeping premises definitely and intentionally in reserve for purposes for which they are prepared. In such a case the contemplated and intended user is being enjoyed, just as the intended user was being enjoyed in different circumstances in *Liverpool Corporation v. Chorley Union Assessment Committee* (*supra*). Mr. Scholefield also relied on the case of *Hackney Borough Council v. Metropolitan Asylums Board* (40 *The Times* L.R., 645), but in that case beneficial occupation was held to be established from "an accumulation of facts," each of such facts being "one of small but not negligible moment." I cannot deduce from that case any guidance for the present case, which, as I regard the facts, is simply the case of an owner who has abandoned the user of certain premises in the way for which they had been acquired and equipped and has not decided as to their future disposal at any relevant time.

I shall consider next the contention that there is beneficial occupation (*a*) because of the presence of the caretaker, and (*b*) because of the cupboards and mangle left on the premises till September, 1926. In my judgment, neither of these facts constitutes any evidence of beneficial occupation in the circumstances of this case. The caretaker may be necessary to protect the premises from injury and damage and to facilitate the entry of the owners or of any persons calling on their behalf. But rating is on the occupier, that is on the beneficial occupier and not on the owner, and I do not think that the caretaker in this case fulfilled any functions towards the beneficial user or enjoyment of the premises during the year in question, however useful he may have been in safeguarding the interests of the plaintiffs as owners. It has been held that a mere caretaker does not render a house liable to be rated (*North Dublin Union v. Scott*, 1 Ir.C.L.R., 76). See also *Rex v. Morgan* (2 A. and E., 618). I may also refer to the observations of Lord Alverstone, C.J., in the case of *Bertie v. Walthamstow Overseers* (68 J.P., 545, at page 546). If a man is a mere caretaker put in to preserve and guard the house from depredation—in other words, to take care of it—the master is not liable to be rated, because the master has no beneficial occupation. In the case where it was held that the presence of the caretaker constituted beneficial occupation by the owner, since the caretaker himself could not be rated as occupier (*Yates v. Chorlton-on-Medlock Union*, 47 J.P., 630), either the caretaker was cultivating the ground and benefit was being derived therefrom (*Hicks v. Dunstable Overseers*, 48 J.P., 326) or the caretaker was rendering valuable services in other respects to the owner (*Bertie v. Walthamstow Overseers, supra*). In these cases it was held that there was beneficial occupation, but it has not been so held where the caretaker was merely a caretaker, as I find him to have been in this case.

Nor is the presence till September, 1926, of the two cupboards and the mangle on the premises any evidence, in my opinion, of beneficial occupation.

Leaving furniture in a house may render it rateable as stated by Mr. Justice Lush in *Reg. v. St. Pancras Assessment Committee* (2 Q.B.D., 581, at p. 588) : "The owner of a vacant house . . . is not rateable for it as an occupier. If, however, he furnishes it, and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in a year." The reason for this is not that it is simply a storehouse for the furniture, but that the owner is having such beneficial enjoyment of it as he desires. It is ready for him whenever he wants to reside in it. No doubt in such a case it might be also regarded as the subject of beneficial occupation as a storehouse for the furniture which must be stored and safeguarded somewhere. On these principles, in *Staley v. Castleton Overseers* (5 B. and S., 505) it was held in respect of a cotton mill, which owing to bad trade it did not pay to work : "Regarding the mill merely as a storehouse for valuable machinery which it is important to keep in a state fit for use, it is obviously property for which some persons would give a rent" ; and similarly, in *Harter v. Salford Overseers* (6 B. and S., 591), a mill not being worked was held rateable as a warehouse for the machinery necessary for its working when required. These cases, in my opinion, afford no analogy to the present case, where the chattels, as I find the facts, were kept on the premises simply because they were of no practical importance and, though they had to be removed before any valuable use could be had of the premises, were not worth the trouble of removing for their own sake. It seems to me to be fallacious to say that these buildings were beneficially occupied to any extent, merely because these unwieldy and obsolete articles were not taken away earlier.

I ought in passing to notice Mr. Scholefield's argument, not perhaps strenuously pressed, that there was some beneficial occupation because the premises were repaired from time to time and because the architects and surveyors of the plaintiffs visited them. The former is, I think, merely a matter of the preservation of the premises for the plaintiffs as owners and not any act of beneficial occupation. The latter is of the same character, and in any case has no reference to actual beneficial occupation, but only to future or prospective valuable user.

In my judgment, for the above reasons, the plaintiffs were not beneficial occupiers and were not rateable in the year in question, but that still leaves the further question whether they can succeed in this action. The action being an action of replevin, they have to show that the distress was unlawful, and this involves that the warrant issued by the justices was issued without jurisdiction. Such actions have been maintained where rates have been levied on premises which a person did not occupy, or which were outside the period, as in *Milward v. Caffin* (2 W. Bl., 1330) and *Bristol Guardians v. Wait* (1 A. and E., 264), or where the rate was bad on its face. A more modern instance where a claim in replevin succeeded, on the ground that the plaintiffs were not occupiers but licensees, is *Rochdale Canal Company v. Brewster* (10 *The Times* L.R., 595 ; [1894] 2 Q.B., 852). The reason is that in such a case both the allowance of the rate by the justices and its confirmation by Quarter Sessions on appeal, if appeal be taken, and the proceedings before the justices who grant the distress warrant are proceedings *coram non judice* and are void of legal effect.

Mr. Konstam has, however, contended that the basis of the justices' jurisdiction depends not on occupation, that is actual occupation, but on beneficial occupation, and hence that a distress warrant against an occupier who is not a beneficial occupier is without jurisdiction because the proceedings are *coram non judice*, and hence, the warrant being without jurisdiction and bad, the action in replevin will lie. He admits that no authority in terms justifies this contention and there are decisions and dicta to the contrary effect, but he prays in support of his argument the case of *Mersey Docks and Harbour Board Trustees v. Cameron* (11 H.L., 443), where, in an action for replevin, the House of Lords heard and determined the question whether the occupiers were beneficial occupiers, and he argues that, as jurisdiction cannot be given by consent, the House of Lords must have assumed that this issue of beneficial occupation was a relevant issue to be determined where the validity of a distress warrant was in question. I do not think that the latter contention is sound. What happened in that case was that the point was waived by the overseers in order to obtain the decision of the House of Lords on so vital a question of principle as that case raised. Their Lordships do not mention the question, but it is thus stated in the opinion of the majority of the Judges, read by Mr. Justice Blackburn, at page 461 : "The question whether replevin lies has been waived, and therefore it is not necessary farther to consider whether in such a case the more proper expression would be that the person in possession of the property was not an occupier at all within the meaning of the Statute of Elizabeth, so that the overseer had no jurisdiction to make the rate, and consequently that the levying of it might be resisted in replevin or trespass ; or whether, as seems to have been the opinion of the Court of Queen's Bench in *Birmingham Overseers v. Shaw* (10 Q.B., 868) and *Reg. v. Bradshaw* (29 L.J.M.C., 176), he is an occupier, whom, as such, the overseers have jurisdiction to tax, though on appeal the rate must be reduced to nothing. Whichever may be the true mode of enunciating the position, it is clear that there can be no valid rate unless the occupation be such as to be of value ; and if the words 'beneficial occupation' are to be understood as merely signifying that the occupation is of value (which is obviously the sense in which the phrase is used in many of the cases cited at the Bar), it is clear that a beneficial occupation is essential as the foundation of the rate." I confess I feel some doubt how Mr. Justice Blackburn would have answered the question he so propounds. But in the Court of Common Pleas (9 C.B.N.S., 812) judgment was given by the majority of the Court (Chief Justice Earle, Mr. Justice Williams, and Mr. Justice Keating—Mr. Justice Willes doubting) against the plaintiffs, not on the merits of the case, but simply on the ground that replevin did not lie, where the only question was whether the occupation was or was not beneficial. They held themselves bound by the principles enunciated in the earlier decisions of *Birmingham Overseers v. Shaw* (*supra*) and *Reg. v. Bradshaw* (*supra*), deferring to them as a matter of duty, and leaving all further consideration for the Court of Error.

The principle of these cases (which were cases of *mandamus*, not of replevin) was thus stated in *Reg. v. Bradshaw* (*supra*) : "*Birmingham Overseers v. Shaw* (*supra*) adopts and confirms the case of *Marshall v. Pitman* (9 Bing., 595), which establishes the principle that where there is visible occupation of property within the rating parish, and the party rated objects that, although he is in the visible occupation of the premises, his occupation is altogether devoid of benefit to himself—that is matter

for which he must seek his remedy by appeal to the Quarter Sessions." I think that, as a Judge of first instance, I am bound by this decision. Mr. Konstam, however, contends that, though there has been no case of an action of replevin where, there being occupation, there was no beneficial occupation, yet I ought not to follow the case of *Mersey Docks and Harbour Board v. Cameron* in the Court of Common Pleas (*supra*), because by subsequent cases the jurisdiction of magistrates, in considering questions on proceedings for distress warrants, has been enlarged. In *Reg. v. Bradshaw* (*supra*) it was held that the duties of magistrates were ministerial, and that when called upon to enforce a rate good on the face of it they had no jurisdiction to go into the question of beneficial occupation. It is clear that that view is no longer accepted or acted upon. It was held in the case of *Fourth City Mutual Building Society v. East Ham Churchwardens and Overseers* ([1892] 1 Q.B., 661) that justices in proceedings for a distress warrant were authorized to inquire into objections and state a case for the opinion of the High Court, so that their duties were not simply ministerial. The power to state a case depended on the Summary Jurisdiction Act, 1884. Cases have accordingly been thereafter from time to time stated by justices, and their jurisdiction was thus defined by Mr. Justice Atkin (giving the judgment of himself and Mr. Justice Bray) in the case of *Whenman v. Clark* ([1915] 1 K.B., 548, at p. 559): "In *Reg. v. Hannam* (2 *The Times* L.R., 234) Lord Esher and Lord Justice Cotton laid down a rule that where there can be an appeal to quarter sessions the justices have only to enforce the rate, and are bound to assume the rate to be good if the property is within the district. This was in the year 1886, and if this rule had been uniformly acted on since we should have been bound to follow it, but the cases which I have mentioned show that this is not so, and that other exceptions have been made, and it is open to this Court to lay down a general rule which will embrace these exceptions; and we think the rule to be laid down is that the justices have jurisdiction if the question is whether the defendant ought to have been rated at all, or, if at all, for the full rateable value." That was on the hearing of an application for a distress warrant for non-payment of rate. In the same case, in the Court of Appeal ([1916] 1 K.B., 94), that rule was adopted by Lord Justice Swinfen Eady and Lord Justice Pickford, with the qualification "where the material facts are not really in dispute." I gather that in such cases as the present there is seldom any real dispute on the material facts. Notwithstanding some doubts expressed *obiter* in *Shillito v. Hinchliffe* ([1922] 2 K.B., 236), the rule thus expressed has been acted upon, as for instance in the case of *Hackney Borough Council v. Metropolitan Asylums Board* (*supra*), to which I have already referred, where the case was stated by the justices on the question of beneficial occupation.

But though the practice, or, as I think, the law as to the scope of the justices' jurisdiction in such cases has been thus extended since *Reg. v. Bradshaw* (*supra*), I do not think that this extension affects the law established by the authorities cited as to the foundation or origin of their jurisdiction, which I feel bound to hold still depends simply on occupation within the parish, and not on beneficial occupation. What gives jurisdiction is a different matter from the scope of jurisdiction when once it is given. As I am deciding the matter simply on the basis of authority, I do not consider it necessary or desirable to consider it further, or to discuss further the difficult question of precisely defining the principles necessary to ascertain, in the case of inferior tribunals, what goes to absence of jurisdiction on the one hand and erroneous exercise of jurisdiction on the other, or to discuss the balance of expediency in procedure having regard to the complicated inter-relationship between justices, quarter sessions on appeal, and the High Court on *mandamus* and similar proceedings and case stated. It is enough that the defendants rely on the point which I have been considering and in my opinion it is covered by authority binding on me. I, therefore, hold that the claim in replevin is not maintainable.

There must be judgment for the defendants. I shall give them judgment with costs, subject to the condition that they will pay to the plaintiffs the costs of the issue which has been tried before me and on which the defendants have failed so far as I am concerned—namely, the issue of beneficial occupation.

[Solicitors—Mr. T. Bullivant; Mr. R. H. R. Tee.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) 1928. May 11.

THE PENELOPE.*

Ship — Charterparty — Coal cargoes — Strike clauses—Coal strike of 1926—Embargo on coal exports—Frustration of adventure—Termination of charterparty.

By a charterparty dated March 24, 1926, the plaintiffs chartered the defendants' steamship to run consecutive voyages with cargoes of coal from one of the South Wales ports to one or other of specified Italian or Sicilian ports for a period of "twelve months as and from date of notice of readiness to load for first voyage." The charter was on the printed form of the Chamber of Shipping Welsh Coal Charter, 1896, and contained the ordinary clauses as to strikes and lock-outs, with the addition of the following written clause: "Steamer not to be ordered to any loading port at which there is a strike in force. Steamer to be free to interpose a substantially similar voyage if charterers unable forthwith to order steamer to another loading port stipulated in charter, free of strike."

In May, 1926, the defendant shipowners, through their agents, and in accordance with the provisions of the charterparty, gave notice to the plaintiff charterers that the ship would be ready to load about the first week in June, and they asked for orders as to the port of loading. Meanwhile the coal strike had begun, resulting in a total prohibition of coal exports by the British Government, and on June 12 the charterers replied that they could not order the vessel to a port to load, and must leave the owners to make their own arrangements. Thereupon the owners, under the written clause in the charterparty, arranged to interpose two "similar" voyages, after which, as the strike was still proceeding, and as the charterers were still unable to order the ship to a loading port,

* Reported by A. W. Grant, Esq., Barrister-at-Law.

the owners took independent action and chartered the vessel for voyages to America and back to Naples, Huelva, and Rouen. At the end of November, when the strike had become restricted in its operation (although the Government embargo upon the export of coal remained in force until December 17), the charterers notified the shipowners that the ship must be ready to carry out the charter within a reasonable time after the settlement of the strike. The shipowners replied that by reason of the prolonged strike and the Governmental embargo on coal exports the commercial venture had been frustrated, and the contract therefore became null and void. In these circumstances the charterers claimed damages for breach of contract.

Held, that the total impossibility of any export of coal from the South Wales ports for a period of upwards of six months was a circumstance not contemplated by the parties which had prevented the performance of the charter according to its true intent, and that, the charterers not having been "ready and willing" to perform their obligations under the charterparty at the material times, the shipowners were justified in treating the contract as at an end.

This was an action brought by Cleeves Western Valleys Anthracite Collieries, Limited, and Luigi Monge, an Italian coal importer, against the owners of the Greek steamship Penelope, for damages for breach of contract under a charterparty dated March 24, 1926. The case arose out of the prolonged cessation of work in the collieries of the United Kingdom during the coal strike of 1926, and the consequent embargo by the British Government upon coal exports.

The charterparty was in the form known as the Chamber of Shipping Welsh Coal Charter, 1896, and was stated "to be in force for twelve months as and from date of notice of readiness to load for first voyage, steamer to run consecutive voyages . . . . and to make as many voyages as she can over the said period." The ship was expected to be ready to load "between May 20 and June 20 next, steamer giving charterers 14 days' notice of vessel's expected readiness to load the first cargo." The charterparty contained the usual printed clauses as to strikes, &c., as follows: "In the event of any stoppage or stoppages arising from any of the above causes"—(strikes, lock-outs, or any dispute between masters and men)—"continuing for a period of six running days from the time of the vessel being ready to load, this charter shall, provided, however, that no cargo shall have been shipped on board the vessel previous to such stoppage or stoppages, become null and void. In the event of such stoppage or stoppages commencing after the vessel is ready to load, and continuing for six running days, then this charter shall, at the expiration of such period, provided that no cargo shall have been shipped on board the vessel previous to such stoppage or stoppages, become null and void. If at the commencement of such stoppage or stoppages the vessel is on demurrage, then, provided that no cargo has been shipped and the stoppage extends to not less than 75 per cent. of the collieries in South Wales and Monmouthshire working steam coal (including the colliery working the coal for which the vessel is stemmed), the charterers may at any time during such stoppage after the expiration of three days from the commencement thereof give three days' written notice that they are prepared to cancel this charter, and from and after the expiration of such notice no further demurrage shall be payable in respect of the time lost through such stoppage. . . . On receipt of such notice the vessel may either thereupon sail, or the owners may, within 24 hours of its receipt, give the charterers written notice of their intention that the vessel shall remain until the termination of the stoppage, and in such event the charterers shall, upon the termination of the stoppage, load the vessel under this charter. . . . In the event of the owners not giving such notice as above mentioned, then, upon payment of the demurrage due to the vessel, this charter shall become null and void."

Admittedly, at the time when the charterparty was entered into, serious labour difficulties were foreseen by the parties, and a clause in writing was added to the charter to the following effect: "(16) Steamer not to be ordered to any loading port at which there is a strike in force. Steamer to be free to interpose a substantially similar voyage if charterers unable forthwith to order steamer to another loading port stipulated in charter, free of strike."

In due course the shipowners, through their agents, gave notice to the charterers that the ship would be ready to load about the first week in June, and asked for orders as to her loading port. Meanwhile, the coal strike had commenced, and an embargo had been placed by the Government on exports of coal. Therefore on June 12 the charterers wrote that they could not order the vessel to a port to load, and must "leave the owners to make their own arrangements." The shipowners thereupon interposed two substituted voyages, which were agreed by the parties to be within the terms of the above clause 16. At the end of the second of these substituted voyages the shipowners again called upon the charterers for orders, and when on September 9 the charterers replied that they could not give any instructions, the shipowners chartered the ship for voyages from Holland to Montreal and from Montreal to Naples, Huelva, and Rouen. On November 29, by which time the strike had become restricted in its operation (although the embargo on coal exports continued), the charterers wrote threatening a claim for damages if the strike should end before the Montreal-Naples-Huelva-Rouen voyage was completed, and added: "The owners should be prepared to give us the steamship within a reasonable time after the settlement of the strike." The shipowners, in reply, set up the contention that the contract was put an end to by the prolonged strike and prohibition of coal exports, which had wholly destroyed or entirely altered the identity of the commercial venture provided for by the charterparty. On December 17 the embargo was removed, and after negotiations for a settlement had failed the charterers issued their writ. They denied by their pleadings that there had been a frustration of the contract; and they contended that the delay which had occurred had been contemplated by the parties when the contract was made, that the parties had treated the charterparty throughout as a subsisting and effective contract, and that the shipowners had waived their rights (if any) to treat the contract as at an end.

Mr. G. P. Langton, K.C., and Sir Robert Aske appeared for the plaintiffs ; Mr. C. R. Dunlop, K.C., and Mr. H. O. O'Hagan for the defendants.

LORD MERRIVALE read the following judgment:— The plaintiffs, a joint stock company having offices in South Wales, and an Italian coal importer, Signor Monge, are jointly interested in coal exports from the Bristol Channel ports to Italy. The defendants are sued as owners of a Greek steamship, the Penelope, and so far as appears from the evidence, Speridian Paramythiotis, who was a witness in the case, is the owner. In this judgment he is described as the defendant.

The plaintiffs bring their action to recover damages for breach of contract under a charter of the Penelope made in March, 1926. By the charterparty it was agreed that during twelve months from a date to be fixed between May 20, 1926, and June 20, 1926, the ship should be employed in carrying successive cargoes of coal from one of the South Wales ports to one or other of the specified Italian or Sicilian ports.

The differences between the parties arose by reason of the interruption of industry in May, 1926, known as the general strike, and the prolonged cessation of work in the collieries of the kingdom during 1926, known as the coal strike. The plaintiffs allege that in December, 1926, when performance of the agreement was practicable, it was wrongfully refused by the defendants, to the loss of the plaintiffs. The defendants, by their defence, allege that by reason of the coal strike "the commercial venture provided for by the charterparty was wholly destroyed and/or its identity wholly altered," and that this contract between the parties thereby became null and void.

By the pleadings a question is raised with regard to an accidental stranding of the Penelope in the course of a voyage from Huelva to Rouen. It was little discussed during the hearing, and I may dismiss it as a suggested material element in the case by stating, as I find to have been the fact, that the stranding took place without default of the defendant, and that the questions on which the plaintiffs' action and the defendant's answer depend do not, in my opinion, depend upon any matter connected with or arising from the stranding, or consequent detention at Rouen, of the vessel.

The main issue at the hearing was whether the contract was put an end to by the coal strike, and counsel dealt with this matter on the footing of the principles of law which are illustrated in numerous cases in the House of Lords, mostly brought about by events of the Great War, in which there was discussed the frustration of contracts by unforeseen causes preventing their performance. This case is, however, complicated by the admitted fact that serious labour difficulties were foreseen when the charter was made, and that it contains a clause relating to possible strikes. Moreover, for a considerable time after performance of the charter was due and the coal strike prevented it, each party anticipated that the Penelope might sooner or later carry coal for the plaintiffs on the terms of the charter and acted on this supposition. There is a further complication by reason of disputes as to the authority by which the brokers who negotiated the charter gave information and made representations of various kinds during a period of many months after the charterparty had been signed and while it was impossible of fulfilment. The brokers had interests of their own in the matter, inasmuch as their remuneration for the negotiation of the contract was a commission on profits earned thereunder. The plaintiffs instructed Messrs. Petters and Co., of Cardiff, from time to time, as to the steps which they should take with regard to the matter in dispute. The defendant was not shown to have given to any one any general authority to act for him and, except where his own letters show it, I think he did not.

Before attempting to apply to the case the legal principles which are invoked by the parties, it is essential to appreciate the terms of the contract, the situation which supervened upon it and is said to have caused frustration, and the effect from time to time of the conduct of the parties, not only upon their original rights and duties, but upon their obligations as changed, if they were changed, by the various occurrences in the course of their mutual dealings. Under the charterparty the owners were to take the first step. They were to give to the charterers 14 days' notice of expected readiness to load a cargo at one of the specified ports. Next the charterers were to specify a port. Then the vessel was to be brought to roads. Mr. Petters, of Swansea, took upon himself, without authority, to write into the contract a word which was to require the bringing of this ship into Mumbles Roads, but that does not affect the respective obligations of the parties, and has not added, as it might have done, to the necessary complications of the case. To the vessel on or before her arrival in the roads the charterers were to specify a dock at the specified Bristol Channel port to which they required the vessel to proceed. There the charterers were to produce, and the vessel was to receive, cargo of the agreed quantity and character. Such cargo the vessel was to convey to the specified Mediterranean port and there deliver it to the consignees. Liability of the charterers for demurrage is prescribed and limited by the charter, and there are protective exceptions in favour of the charterers in special events arising in normal cases. A strike of workmen during loading is one of the contemplated possibilities, and there are provisions that if a stoppage from a specified cause shall continue for six running days after the vessel is ready to load, or commences then and continues for that period, then, provided that no cargo shall have been shipped, the charter shall become null and void. There is an option to the charterers also in some cases of the same class to give to the owners the option of cancelling the charter, and if the owners do not exercise their option the contract leaves the charterers free to determine the charter upon payment of accrued demurrage. The charter was not a mere time charter. It was expressed "to be in force for twelve months as and from notice of readiness to load for the first voyage, the steamer to run consecutive voyages, that is, out with cargo returning in ballast, and to make as many voyages as she can over the said period." Added to the common form of clauses and the provisions contained in the clause last cited were terms—now of special importance—inserted by the parties to meet labour difficulties. These are worded as follows: "Steamer not to be ordered to any loading port at which there is a strike in force. Steamer to be free to interpose a substantially similar voyage if charterers unable forthwith to order steamer to another loading port stipulated in charter, free of strike." It is necessary to observe and bear in mind which of the parties had the veto and the initiative under the two parts of this clause. On the question of urgency which arose at the hearing, I have come to the conclusion that Messrs. Petters and Co. were not the defendant's agents to alter the charter by inserting the word

"Mumbles," and that the defendant did not ratify the alteration; that they had no authority at any time to vary the terms of the charter, that they had no authority at any time after it had been executed to vary the terms of the charter, and that in the instance where they and the London brokers, Messrs. Stavroudis, differ to some extent in their version of the transaction in question, the account of Messrs. Stavroudis should be accepted. Messrs. Stavroudis, as the defendant's brokers, kept him informed of facts material to be known by him, and had authority to inform the plaintiffs through Messrs. Petters or directly of the various matters of which they from time to time informed them, and on the defendant's behalf to require a specified action under the charterparty which they from time to time required, but no authority to agree upon any variation of the terms of the charterparty. Such variation as in fact occurred is that resulting from conduct, and not from express bargain. The charters for the steamer made after the conclusion of the contract between the parties in March, 1926, were made on the direct instructions of the defendant, and he gave no general authority to a broker to conclude contracts. Having disposed of some preliminaries, I proceed to state the course of events under the contract.

The charter having been signed on March 24, 1926, the outlook as to labour troubles became progressively worse. On May 1 the coal strike began and involved a universal stoppage of work in the mines from which coal for the loading of the Penelope was to be obtained. On May 1 Stavroudis wrote to Messrs. Petters and Co. for the information of the plaintiffs that the ship would proceed to the Mediterranean, and would return to Swansea in ballast, "provided, of course, the strike is settled," that the notice of readiness stipulated for in the charterparty would be formally handed to the charterers in due course, and that the vessel would be ready in Swansea, "assuming the strike is ended," about the first week in June. After later correspondence to the same effect they, at the end of May, directed Petters to inquire of the charterers to what port they wished the Penelope to proceed, impressing upon them at the same time the owners' rights under the special clauses of the charter. They directed notice of readiness to load to be given to the charterers, and emphasized as strongly as possible the fact that the charter required of them action which would bind them to load in due course, or to take the agreed consequences. They were entitled to expect an equally definite answer, but they did not get it. The substance of what was said was that "until the strike is settled we cannot give you any information or orders." The plaintiff company, however, wrote to Signor Monge in Italy: "We fear they can insist upon our making a declaration." They apparently entertained at the same time an unwarranted notion that the charterers would be entitled to treat the charter as running for 12 months, not from her first notified readiness to load, but "from the date when the charterers are first able to load." Stavroudis insisted on the owners' right, and on June 12 the plaintiffs wrote that they could not order the vessel to a port to load, and must "leave the owners to make their own arrangements." No orders being given, a substituted charter was arranged. In course of the substituted voyage, Tunis-London-Swansea, the defendant arrived in Swansea—he had by this time taken command of the Penelope, and he then saw the representatives of the plaintiff company. Stavroudis had suggested through Petters, that instead of voyages which the defendant could make of right there should be, without prejudice to the charterers, an agreement for interposing a voyage to the United States. That substituted voyages such as the defendant was entitled at his choice to make could only be made with difficulty appears clearly on the evidence. Paramythiotis discussed the situation with the plaintiffs. They declared their inability to order the ship to a dock for loading. They rejected the suggestion of agreement upon a United States voyage; they dissented from a suggested chartering from Rotterdam. The defendant, left to his own resources, chartered the vessel for a voyage from Stettin to Manchester. This was a second voyage treated by consent of the parties as an interposed voyage under the special clause in this charter. During the discussions at Swansea a suggestion was made that the charter should be converted into a forward contract for voyages to be made during a period of 12 months, to date from a time at which the defendant should be able to tender the ship for loading after the termination of the strike. The correspondence and the oral testimony create uncertainties as to the origin of this idea, and as to the extent to which the parties respectively then appreciated their relative positions. This is immaterial, however, as Signor Monge informed the plaintiffs that he preferred to leave "things as they are," and nothing of the kind was agreed.

A critical period in the case was reached when the Penelope arrived at Manchester on the second substituted voyage. The defendant, with apparent appreciation of his rights, called for orders from the plaintiffs. They replied on September 9, through Petters: "We cannot give any instructions." Nearly three months had now elapsed since the defendant originally tendered the vessel to the plaintiffs. According to the evidence on both sides one-fourth of the series of voyages by which the defendant was to earn freights from the plaintiffs had been forgone. The coal strike showed no signs of probable early settlement. In this condition of affairs the defendant resolved upon independent action. Stavroudis wrote him on September 9 that he was entirely free to "interpolate another voyage as stipulated in your charter." He elected not to do so. Disregarding the objection of the plaintiffs in their conversation with him at Swansea, he accepted an offer received by him from Stavroudis of a charter from a Dutch port to Montreal and thence to Naples. Petters knew of this in due course. The plaintiffs were only directly informed later. The defendant's account of his reasons for accepting a charter in breach of the plaintiffs' charterparty was this: "Till I was at Manchester I had my mind for the strike to finish and then to deliver the ship to Cleeves. After Manchester, as the strike was going on so long, I thought the charter was void and chartered the ship for America. I avoided short voyages and chartered for America." The case would have been free of some of its perplexities if the defendant had explicitly told the plaintiffs what he was doing and intending to do. He made personally no communication to them. I do not find that he directed that any express statement as to the future should be made to them. He took his independent course, and left the plaintiffs to learn of it through the brokers or the published lists of ships' movements. Stavroudis kept the plaintiffs informed through Petters. They notified the making by the defendant of a new charter for a voyage of the Penelope from Montreal to Huelva, and thence to Rouen, and they wrote on the subject of this voyage from Rouen to this effect: "If the strike is

over she will, of course, proceed to Swansea." I see no reason for believing that the defendant authorized any promise to this effect, though he no doubt intended to make some offer to the plaintiffs at a convenient time if circumstances should admit of it. When the plaintiffs became aware of the intended Montreal voyage they complained to Stavroudis. When they were informed through Petters of the Naples-Huelva-Rouen voyage they stated their position, threatened a claim for damages if the strike should end before this voyage was complete, and said: "The owners should be prepared to give us the steamship within a reasonable time after the settlement of the strike." On what footing it was supposed that the Penelope must be, or could be, kept at all for the plaintiffs in this way I do not understand.

The claim provisionally notified by the plaintiffs to the brokers was put forward by Petters to the defendant by a letter of November 29, 1926, which reached him at the beginning of December, and he thereupon set up, to and through Stavroudis, his contention that the charter of March was at an end.

It is material to realize the state of things which existed in December, when the parties respectively took conclusive action. The coal strike had become restricted in its operation during November. After it was at an end the Governmental embargo upon coal export remained operative. It had been in force while the strike was in progress, and it was a means of frustration probably identifiable under clause 3 of the charterparty and certainly effectual to prevent any utilization of the charter. The embargo continued until December 17. A week earlier the plaintiffs purport, by a letter written by them to Petters and Co., to have arranged for another ship for loading on December 10. The plaintiffs' manager, however, said in the witness-box that Messrs. Cleeves had no loading instructions, and at the end of the month when they directed Petters and Co. to "order (the Penelope) to the Mumbles for orders" they added, "we cannot yet give you a dock or port as we are awaiting instructions." On the day of their so writing Signor Monge had telegraphed to them, "Impossible to load her for my account. Charter her elsewhere." It was while this singular state of affairs existed that on December 31 Messrs. Stavroudis wrote to the plaintiffs that "owing to the strike the commercial object of this charter, which contemplated loading approximately in the month of May, was frustrated." Laborious efforts made by the brokers in January and February to bring matters to some amicable settlement were without success, and on March 4—after the period of accidental disablement due to the grounding of the Penelope was at an end—the plaintiffs issued their writ.

The difficulty of the case seems to me to arise rather from uncertainty due to the action of the parties—and of the respective brokers—at the successive stages of their relationship, than from any ambiguity in the law. The discussions in the House of Lords upon the variety of contests which arose during the Great War out of contracts frustrated by the incidents of the war did not, as I think, create new law. They illustrated and emphasized familiar principles of the common law.

The judgment delivered in *Taylor v. Caldwell* (3 B. and S., 826, at p. 833) by Lord Blackburn—then Mr. Justice Blackburn—formulates them: "Where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burthensome or even impossible. . . . But . . . where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

At an intermediate period between the decision of *Taylor v. Caldwell* (*supra*) and the litigation which arose from the frustration of contracts by the War, the principles stated by Lord Blackburn in *Taylor v. Caldwell* (*supra*) had been considered and applied in a series of cases which arose from the postponement of the Coronation of King Edward VII.: *Krell v. Henry* (19 *The Times* L.R., 711; [1903] 2 K.B., 740), *Herne Bay Steamboat Company v. Hutton* (19 *The Times* L.R., 680; [1903] 2 K.B., 683), and *Elliott v. Crutchley* (22 *The Times* L.R., 83; [1906] A.C., 7).

In the course of this litigation it was made clear that the principle which applies where there is "cessation of the existence of the thing which is the subject-matter of the contract," applies also where there is "cessation or non-existence of an express condition or state of things going to the root of the contract." This was reaffirmed in the House of Lords in *Horlock v. Beal* (32 *The Times* L.R., 251; [1916] 1 A.C., 486, at p. 513), one of the frustration cases during the Great War which were principally discussed in the argument in the present case.

Whether the "doctrine of frustration" is applicable to a time charter, or to the charter here in question, and whether the presence in this charter of express terms, with regard to strikes or a strike, operates to prevent the application of any implied conditions, were outstanding topics in the discussion. For my own part I find it difficult to conceive a contract which shall be free from implications, but it may be that by the use of apt words in the document the contracting parties could make the agreement proof against implication. Moreover, the charter is not a time charter within the common meaning of the term. It is a charter for a series of voyages with limits of time as to commencement and continuance. I may add that *F. A. Tamplin Steamship Company, Limited v. Anglo-Mexican Petroleum Products Company, Limited* (32 *The Times* L.R., 677; [1916] 2 A.C., 397), was a case of a time charter, and a condition in respect of frustration was implied.

The presence of an express provision in favour of the owners, giving them an option to accept substituted employment in certain specified circumstances, though it is an important fact, does not of itself determine that the contract may not be frustrated by the inability of the charterers to employ the ship. Suppose, for example, that on the first failure of the charterers to nominate a port and dock, at which they would undertake to load, no employment was obtainable by the owners. It could hardly be suggested that in that event the owners had bound themselves to have the ship ready for the charterers at some undetermined and indeterminable time when they might be ready. In the charterparty case of

Bank Line, Limited v. Arthur Capel and Co. (35 *The Times* L.R., 150; [1919] A.C., 435) there was a provision as to requisitioning, but it was held not to exclude implication as to frustration when the vessel was requisitioned. Some implication must certainly be made in the present case. Otherwise the plaintiffs, by their default of ordering the Penelope to a dock, were liable in damages for breach of contract in June, 1926, and again on each subsequent occasion when the ship was tendered, and they declared that they could not load her. The real difficulty in the case seems to me to be to find the implied condition or conditions by which the express terms of the charter are controlled. To adapt some words from the opinion of Lord Parker of Waddington in the case of the *Tamplin Steamship Company* (*supra*), what condition is to be implied? Can you frame such a condition as the implied condition to be relied upon "without contradicting the express provisions of the contract and defeating the intention of the parties as disclosed by those provisions"?

It was argued for the plaintiffs that, inasmuch as strikes are not only repeatedly mentioned in the charterparty but are matter of common occurrence, a strike of any nature or extent must be taken to be within the contemplation of the parties. I do not find myself able, however, to say that the coal strike of 1926 might not be an unforeseen event in the sense which involves frustration. Sickness is an everyday affair; but a contract for personal service may become null and void by reason of a physical or mental disability of the obligee which frustrates the object of the engagement: *Robinson v. Davison* (L.R., 6 Ex., 269), *Storey v. Fulham Steel Works Company* (24 *The Times* L.R., 89), and *Poussard v. Spiers and Pond* (1 Q.B.D., 410).

The facts must be examined to determine whether apart from the agreement of the parties after the occurrence the coal strike was an event which frustrated the object of this contract. This being ascertained, it will be proper to see what arrangements, if any, were made during the strike, and how they affect this contract, and the rights of the parties thereunder. The defendant agreed to employ his ship for twelve months in carrying coal to the Italian ports for the charterers. Of such voyages, conducted on the terms of the charterparty, he could reckon upon completing eight (about six weeks per voyage), and eight voyages at most was the estimation of the plaintiffs' witness, Mr. Ellis. Overhead expenses, running expenses, whatever return was to be had from the use of the vessel, are included in the earnings of this series of voyages. They were to extend from June to June. A series occupying six or eight months would be quite another affair. So would a series of six voyages running from December to June. So far as I can see, neither party was entitled, without agreement on the part of the other, to require substitution for the agreed series of any other series, or any less series. Cancellation of voyages, except by agreement would, in my opinion, wholly and fundamentally change the conditions of the contract, and, to quote the opinion of Viscount Finlay in *Metropolitan Water Board v. Dick, Kerr and Co., Ltd.* (34 *The Times* L.R., 113; [1918] A.C., 119), adapting a phrase from the judgment of Viscount Dunedin in the same case, would make the contract when resumed a really different contract from the contract when broken off. It was persuasively argued before me that as the coal strike was not unforeseen, the principles expressed in the cases on frustration could not apply. What was unforeseen, however, was the total impossibility of any export of coal from the South Wales ports for a period of half a year and upwards. Was this a delay contemplated by the parties? I take into consideration what was said by Viscount Sumner in *Bank Line, Ltd. v. Arthur Capel and Co.* (35 *The Times* L.R., at p. 155; [1919] A.C., at p. 458): "Delay even of considerable length and of wholly uncertain duration is an incident of maritime adventure which is clearly within the contemplation of the parties, such as delay caused by ice or neaping. . . . Delays such as these may very seriously affect the commercial object of the adventure. . . . None the less this is not frustration; the delay is ordinary in character." The kind of interference which the parties in this case contemplated is that dealt with in the printed provisions of the charterparty and in the added clauses—an interruption of work by a local withdrawal of labour. Such an interruption is a trivial occurrence compared with the events in question. As to this actual event, the plaintiffs' witness, Mr. Ellis, said: "No prudent man could have foreseen the state of things which arose." On the whole I come to this conclusion, that there was an unforeseen compulsory change of circumstances not contemplated by the parties, and that as soon as it manifestly prevented performance of the charter according to its true intent, to quote from the opinion of Earl Loreburn in *F. A. Tamplin Steamship Company v. Anglo-Mexican Petroleum Products Co., Ltd.* (*supra*), the time had arrived at which the facts of the contract ought to be determined.

What then was the effect upon the contract contained in this charterparty of the conduct of the parties? After considering the correspondence and the evidence of the witnesses, I find that the parties impliedly agreed that the voyage Tunis-London-Swansea, and later the Stettin-Manchester voyage, should be made as though they were voyages within the provisions of clause 16 of the charterparty. They made no subsequent agreement. When the defendant was at Swansea in August the plaintiffs declared themselves unable to fulfil their obligations to name a port for loading, and he took his own course by accepting the Montreal charter. Afterwards he determined without any consent of the charterers to make his Huelva-Rouen voyage. Probably he reckoned upon the plaintiffs' knowledge of these fixtures. In due course he learned that they did not consent to them. He did not ask their consent or make any bargain about it. He intended, as he stated in the witness-box, to offer them the vessel at a reasonable period after the end of the strike. No doubt he thought that he and the plaintiffs might agree upon some voyages on the terms on which the Penelope was to have been employed under the charterparty. There was, however, no bargain made to this effect. Each party from time to time made suggestions which the other would not accept. I find that the charterparty, as varied by the understanding which was arrived at, first as to one, and then as to another, substituted voyage, was not further varied or prolonged; that when the defendant refused to satisfy the demands of the plaintiffs in and after November, 1926, they were rightfully refused; that the plaintiffs made in this later period no demand with which the defendant was bound to comply, and that when he declared through Messrs. Stavroudis that the contract was at an end he was entitled so to do. If one uses the words "ready and willing" in the sense in which they are properly used in matters of contract, the plaintiffs were not ready and willing to perform

the obligations of the charterparty at the material times to which the dispute relates.

The action fails, and must be dismissed with costs.

[Solicitors—Messrs. Botterell and Roche, for Messrs. Vaughan and Roche, Cardiff; Messrs. Holman, Fenwick and Willan.]

Court of Appeal.
(Lord Hanworth, M.R., Lawrence and Russell, L.JJ.)
1928. June 7.

IN RE PETITION OF RIGHT OF MASON AND OTHERS.*

Limitations, Statute of — Lunatic — Funds in Court—Administration — Escheat—Payment out — Indemnity — Mistake of fact—Petition of right to recover — Lapse of time — Droits of the Crown — Limitation Act, 1623 (21 Jac. I., c. 16).

In 1799 and 1801 the Crown made an *ex gratia* grant of certain funds in Court, which were claimed as *bona vacantia,* and took an indemnity in respect of the funds so granted. These funds represented the residuary estate of the father of a female lunatic, and she was entitled to them at the date of her death in 1798. In 1794 the Master had reported that she had no heir-at-law or next-of-kin. In July, 1926, a petition of right was presented by persons alleging that it had recently been established that the lunatic did in fact leave next-of-kin surviving her, and that they represented the next-of-kin, and they sought to recover from the Crown the personal estate of the lunatic.

Held, that as the Crown had not created a trust in favour of any person the claim of the suppliants was barred by the Limitation Act, 1623.

Decision of Romer, J. (44 *The Times* L.R., 225 ; [1928] 1 Ch., 385), affirmed.

This was an appeal by the suppliants, other than Viscount Bangor, against the decision of Mr. Justice Romer (44 *The Times* L.R., 225 ; [1928] 1 Ch., 385) dismissing their petition of right, the object of which was to obtain the replacement and distribution among the suppliants of £45,000, representing the personal estate and effects of Maria L'Epine, a lunatic, who died intestate on April 30, 1798. There was also a cross-appeal by the Crown.

The suppliants alleged that the property had erroneously vested in the Crown at the death of Maria L'Epine and they claimed to be entitled to the property as her next-of-kin.

The facts were as follows :—Maria L'Epine, at the date of her death, was entitled to certain funds in Court representing the residuary estate of her late father, but subject to the payment of two annuities. In 1791 she had been found to be a lunatic and in the course of proceedings in Chancery, instituted for the administration of her father's estate, the Master had, in July, 1794, reported that she had no heir-at-law or next-of-kin. That report was confirmed by the Court.

In those circumstances the Earl and Countess Howe obtained letters of administration of the estate of Maria L'Epine for the use and benefit of King George III., and then petitioned the Court for payment out to them as such administrators of the funds in Court, after appropriation of a sufficient sum to answer the annuities. On July 22, 1799, an order was made directing the appropriation of securities to meet the annuities and payment of the balance in Court to Lord and Lady Howe.

Lord and Lady Howe then presented a memorial to the Lords Commissioners of the Treasury seeking to obtain a grant for their use and benefit. After their deaths a further memorial was presented by their two surviving children—Sophia, Baroness Howe, and Catherine, Marchioness of Sligo—who were their personal representatives. The King's assent having been obtained, the two daughters appeared to have paid over 10 per cent. on the value to his Majesty and thereupon, by Royal Warrant dated June 8, 1801, his Majesty granted to them in equal moieties the personal estate and effects of Maria L'Epine, including £15,000, still in Court at that time, appropriated to answer the annuities.

Two bonds were entered into in penal sums for the purpose of securing repayment of the estate to his Majesty, his heirs, and successors if any person or persons whosoever should at any time thereafter by due course of law prove himself or themselves to be the next-of-kin of Maria L'Epine ; and for the purposes of indemnifying the King, his successors, or assigns, against all claims and demands which might at any time be made on him or them for or in respect of the personal estate and effects of Maria L'Epine.

The two annuitants having died in 1818 and 1830 respectively, the £15,000 was duly paid out of Court to persons claiming under the two daughters of Lord and Lady Howe.

On July 1, 1926, the petition of right was presented by the suppliants—Miss Amy Knight Mason, Miss Jessie Margaret Mason, Miss Ethel Marion Mason, Mr. Alfred William Mason, Mrs. Emily Eliza Harrison (formerly a Miss Mason), Mr. Herbert Frederick Mason, Mr. Arthur Charles Mason, Mr. William Henry Knight, Miss Lucy Isabella Coldwell Knight, and Lord Bangor. They alleged that they had recently established that Maria L'Epine did in fact leave next-of-kin surviving her, whom they represented. They accordingly sought to recover from the Crown, with interest, the whole of the personal estate of Maria L'Epine, or, alternatively, the 10 per cent. of such estate paid over to the Crown.

The petition came before Mr. Justice Romer with an agreement between the parties to confine themselves for the time being to the determination of the following questions :—(1) Whether the petition was maintainable on the assumption that no part of the funds in question ever came into the hands of, or was dealt with by, his present Majesty, or his nominees or grantees, or was carried to the Consolidated Fund. (2) Whether the petition was barred by any statute of limitations. (3) Whether, in view of section 5 of the Petitions of Right Act, 1860, the suppliants could proceed, without serving the petition on the successors in title of Lord and

* Reported by H. C. Garsia, Esq., Barrister-at-Law.

Lady Howe and Sophia, Baroness Howe, or Catherine, Marchioness of Sligo.

MR. JUSTICE ROMER held that the first question must be answered in favour of the suppliants, but that the petition was barred by the Limitation Act, 1623, and, therefore, failed. He also held that section 5 of the Petitions of Right Act, 1860, had no application to the present case.

The suppliants, other than Lord Bangor, appealed, and there was a cross-appeal by the Crown.

Miss Amy Knight Mason appeared in person; Mr. J. M. Symmons for the remaining appellants; and the Attorney-General (Sir Thomas Inskip, K.C.) and Mr. Stafford Crossman for the Crown. Mr. Montgomery White held a watching brief for persons interested.

Miss Mason contended that a trust had been created by the Royal Warrant and the bonds of indemnity in favour of the next-of-kin, if any, and that, there being a trust, no statute of limitation applied to bar a claim by the next-of-kin. *Rustomjee v. The Queen* (1 Q.B.D., 487, at p. 491) showed that the Crown was not bound by the statutes of limitation, which had no application to proceedings by petition of right.

Mr. SYMMONS said that the suppliants for whom he appeared desired to adopt, and he was instructed to adopt, that argument.

The ATTORNEY-GENERAL said that as regarded the point taken that the statutes of limitation did not apply to petitions of right, no such question arose here, because they were in time made applicable to such a petition of right as the present by section 3 of the Intestates Estates Act, 1884, now repealed and reproduced by section 30 (2) of the Administration of Estates Act, 1925.

On the second contention, that the forms of the Royal Warrant and bonds had made the Crown a constructive trustee, there was really no ground for it. The Crown did not take the property by virtue of any trust or confidence reposed in it but because it was entitled to the property by virtue of a finding of the Master, confirmed by the order of the Court, that there were no next-of-kin. The only right of the Crown was by virtue of the assertion that nobody else was entitled to the property. The fact that, on making *ex gratia* grants, the Crown required an indemnity could make no difference. That was the regular practice of the Crown in making such grants.

It had been contended in the Court below that time under the Statute of Limitations, 1623 (21 Jac. I., c. 16), did not begin to run until the discovery of the mistake, and *Brooksbank v. Smith* (2 Y. and C. Ex., 58) had been relied on. But that case was explained in *Baker v. Courage and Co.* ([1910] 1 K.B., 56). It was impossible here to imply a trust: see *Soar v. Ashwell* ([1893] 2 Q.B., 390), which was considered in *In re Robinson* ([1911] 1 Ch., 502).

The MASTER of the ROLLS said that the Court felt difficulty in asking for further argument on the footing that there was a trust, for they had formed the opinion that there was none. As regarded the cross-appeal, the best course would be to make no order on it. That would keep open the points sought to be raised by it.

Miss Mason replied.

The MASTER of the ROLLS (Lord Hanworth), in giving judgment, said that in his view the appeal failed. It had been contended that the Crown had created a trust in favour of the next-of-kin. He found himself quite unable to accept that argument. After the finding of the Master, which was confirmed by the Court, the title of the Crown was immediate to the funds in question as *bona vacantia*. The Crown took and held as of right and not in trust for any person, and, if and so far as the Crown made *ex gratia* payments, it did so out of its own money.

It was said that the form in which the *ex gratia* payments were made and indemnities taken from the recipients operated to create a trust. He (his Lordship) did not so read the bonds, and he desired to adopt the view expressed by Mr. Justice Romer. It was impossible, therefore, to hold that any trust had been created.

Mr. Justice Romer had held that the present claim was barred by the Statute of Limitations, 1623. It had been argued that the statute did not apply to petitions of right but the effect of section 3 of the Intestates Estates Act, 1884, was to prevent this petition of right filed in respect of the estate of Maria L'Epine from being brought except within the same time and subject to the same rules of law and equity as if it had been an action. The Crown was, therefore, entitled to rely on the statute of 1623.

The only answer that it had been sought to make was that the six years under the statute only ran from the time when the suppliants became aware of their claim. The petition was, however, in respect of a claim which had arisen either at the death of Maria L'Epine or when the funds were paid over—that was, more than 100 years ago. The claim was, therefore, barred.

There would be no order on the cross-appeal. The Attorney-General had felt compelled to bring it, as the judgment of Mr. Justice Romer dealt with two other points. They had not formed part of the order as drawn up, but it was right to take note that they had been decided and that the right to raise them by way of appeal would be open to the Attorney-General if the case went higher.

LORD JUSTICE LAWRENCE said that the appeal was proceeding on the single question whether the claim in the petition of right was barred by the Statute of Limitations and on this point he agreed with Mr. Justice Romer. By the Intestates Estates Act, 1884, section 3, a petition of right was not to be presented "in respect of the personal estate of any deceased person or any part or share thereof, or any claim thereon, except within the same time and subject to the same rules of law and equity in and subject to which an action for the like purpose might be brought . . . against a subject." This petition of right was in respect of the estate of Maria L'Epine and fell within those words. That Act had been repealed by the Administration of Estates Act, 1925, but by section 56 it was only repealed so far as it applied "to deaths occurring after the commencement of this Act." By reason of the Act of 1884 the Crown was therefore entitled to rely on the defence of the Statute of Limitations. The statute said to apply was 21 Jac. I., chapter 16, and Mr. Justice Romer had held that the claim in the present case was of the nature of a claim for money had or received and had come to the conclusion, as he (his Lordship) thought rightly, that the cause of action was complete as soon, at all events, as the money in question was received by the Crown. It was at that date that the cause of action was complete and it was then that Maria L'Epine's maternal aunt, who it was claimed was then alive, could have claimed the estate. It followed that the action was barred after six years from that date.

The only way of escaping from that conclusion was to say that the Crown held the money as a construc-

tive trustee. He (his Lordship) was not able to follow the argument that a constructive trust was created by the Crown's obtaining an indemnity from the person to whom it paid the money over. The learned Judge in the Court below was quite right in negativing a trust either express or constructive. The Crown received the money on the footing that there were no next-of-kin in existence. The Crown was justified in making this assumption, for a Master in Chancery had reported that there were no next-of-kin and the Court had confirmed this report. Therefore the Crown took possession of this estate as being entitled to retain it and make *ex gratia* payments out of it. The mere fact that an indemnity was taken from the recipients of the *ex gratia* payments could not create a trust. It followed that there being no trust created the remedy of the suppliants was barred by the statute. The appeal must therefore be dismissed.

LORD JUSTICE RUSSELL said that the only point argued before them had been fully discussed by Mr. Justice Romer in the first part of his judgment. He was quite content to adopt that judgment and the reasons there stated and desired to add nothing to them.

[Solicitors—Messrs. Langford, Borrowdale, and Thain ; the Treasury Solicitor ; Messrs. Trower, Still, and Keeling.]

K.B. Div. } 1928.
(MacKinnon, J.) } June 12.

BRANCH AND OTHERS v. BENNETT'S DAIRIES, LIMITED, AND OTHERS.*

Landlord and Tenant—Restrictions—Covenant—Breach—Action for possession—Counterclaim for renewal of lease—House within Rent Restriction Acts—Costs—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 17 (2).

His LORDSHIP, in giving judgment for the plaintiffs in this case, referred to the effect of the Rent Restriction Acts on costs in cases relating to dwelling-houses subject to those Acts, but involving questions outside the provisions of the Acts.

The action arose out of a dispute between the parties in regard to the renewal of a lease which was provided for by the terms of an existing lease. The plaintiffs claimed possession of the premises and the defendants counterclaimed for a renewal of the lease, contending that if there had been any breach in the covenants of the existing lease such breaches were of a character that entitled them to relief.

Mr. Conway, K.C., and Mr. H. S. G. Buckmaster appeared for the plaintiffs ; Mr. Hilbery, K.C., and Mr. R. Fortune for the defendants.

His LORDSHIP had held that the breaches had been sufficient to enable the plaintiffs to refuse a renewal of the lease and to have possession of the premises.

Mr. HILBERY, K.C., thereupon contended that, since this was an action relating to the possession of a house subject to the Rent Restriction Acts, it was an action that could have been brought in the county court, and that, as it had been tried in the High Court, no costs would be awarded the plaintiffs. He relied on *Gunter v. Davis* ([1925] 1 K.B., 124) and *Russoff v. Lipovitch* (41 *The Times* L.R., 278 ; [1925] 1 K.B., 628).

Mr. CONWAY argued that the fact that the dwelling-house was of a rental which enabled the Rent Restriction Acts to apply did not necessitate the provisions of those Acts being applicable to a dispute such as arose in this action.

His LORDSHIP said that the position was very unsatisfactory. The whole dispute between the parties was about the rights of an occupier to have a renewal of a lease in accordance with the terms of his existing lease. No mention of the Rent Restriction Acts was made until there appeared a few words with regard to them in the pleadings. Nevertheless, on the authority of the cases cited, he was bound to say, strange though it might seem, that this was a claim in respect of a house affected by the Rent Restriction Acts, and, in consequence, the plaintiffs were not entitled to costs. It was most repugnant to him not to grant costs to the plaintiffs because the dispute was purely on a commercial question and not on a point arising under those Acts.

Strangely enough, he was entitled to give costs in respect of the counterclaim, and that right was not contested.

[Solicitors—Messrs. Watkins, Phipos, and Brown ; Mr. S. L. MacAndrew.]

* Reported by G. G. BEAGLEY, Esq., Barrister-at-Law.

K.B. Div. } 1928.
(Wright, J.) } May 16.

G. AND T. EARLE, LIMITED v. HEMSWORTH R.D.C.*

Contract — Building contract — Retention moneys—Specific fund—Assignment—Debentures — Floating charge — Appointment of receiver—Priorities.

By a lump sum building contract entered into in 1922 between S. and Co., Ltd. ("the contractors") and the defendants, provision was made for interim payments on the architect's certificates, to be given monthly at the rate of 90 per cent. of the value of all work executed. The remaining 10 per cent. ("the retention moneys") was to be retained and deposited in a bank until the final adjustment of accounts. The contract was varied by consent, and in the events which happened the retention moneys amounted to £1,000 at the beginning of 1924 ; this was never deposited in a bank and remained a merely notional fund, but both parties treated it as a separate sum capable of being earmarked. It was included, without distinction, in the architect's final certificate for £1,848 10s. 2d. on January 28, 1927.

Meanwhile, the plaintiffs, who were supplying cement to the contractors, found that the latter were getting into arrears with their payments, and to obtain further credit the contractors, being then indebted to the plaintiffs in the sum of £671 on April 7, 1924, assigned to them the retention moneys by a document in these terms : "In reduction of the amount now or to be owing

* Reported by J. W. HALL, Esq., Barrister-at-Law.

from us to you for goods supplied by you, we hereby assign to you all moneys now or hereafter to become due to us from the Hemsworth R.D.C. for retention moneys in respect of the G. Housing Scheme, and for which your receipt shall be a sufficient discharge . . ." Of that assignment due notice was given by the plaintiffs to the defendants next day.

The contractors had at various dates between 1900 and February 2, 1924, issued to the Manchester and County Bank, Ltd., a number of debentures charging the undertaking of the contractors and all their property, both present and future, the charge being a specific charge on the contractors' freehold and leasehold property, machinery, goodwill, and uncalled capital, and a floating charge on all the company's other assets, subject to a proviso that the contractors were not to be at liberty to create any mortgage or charge for any of their assets in priority to the debentures. On October 13, 1924, a receiver for the debenture holders was appointed, who duly entered into possession. On October 20, 1924, a resolution was passed for the voluntary winding-up of the company. The receiver refused to recognize the right of the plaintiffs to payment under their assignment in priority to the debentures holders, and on the architect's final certificate being given, in January, 1927, the defendants declined to interplead and paid the retention moneys to the receiver for the debenture holders, and the plaintiffs thereupon brought their action upon their assignment.

Held, (1) that the debentures only created a floating charge on the retention moneys, which the contractors could therefore assign or charge in spite of the clause in the debentures prohibiting the creation of charges in priority to the debentures ;

(2) that the plaintiffs had no express notice of that clause in the debentures ;

(3) that, though the registration of the debentures affected the plaintiffs with constructive notice that debentures existed, it did not affect them with notice of the terms (including the limitation on prior charges) of those debentures ;

(4) that on the facts of this case the retention moneys constituted a specific fund capable of assignment, and represented moneys actually earned at the date of the architect's several certificates, and were future only in the sense that they were not payable till the final certificate was issued ;

(5) that therefore the retention moneys were capable of being the subject of a valid legal assignment ;

(6) that the letter of assignment to the plaintiffs was in terms a good legal assignment, though partly intended to cover future credit ;

(7) that the assignment, being of the whole of a specific fund, could not be treated as an assignment of part of a debt merely because the architect included other sums with it in his final certificate ;

(8) that the plaintiffs were entitled to recover on the assignment.

This was an action tried by Mr. Justice Wright without a jury. The facts are fully stated in his Lordship's considered judgment.

Mr. Alexander Neilson, K.C., and Mr. W. H. Owen appeared on behalf of the plaintiffs ; Mr. W. N. Raeburn, K.C., and Mr. N. L. Macaskie appeared on behalf of the defendants.

MR. JUSTICE WRIGHT.—The plaintiffs in this case are claiming from the defendants a sum of £1,000 which they claim as being retention moneys due from the defendants to certain contractors, Messrs. Smith Brothers (Burnley), Limited, and the plaintiffs are claiming under an assignment of those moneys to them dated April 7, 1924. The defendants deny that they are liable to pay those moneys, and they raise a number of points which I shall have to deal with in detail. In effect they say that the assignment, if any, was a merely equitable assignment, and that the rights of the plaintiffs as assignees are postponed, in the events which have happened and which I shall describe in detail later, to the rights of the receiver on behalf of the debenture holders of the contractors.

The facts which I shall first have to state are these. On November 21, 1922, the defendants entered into a building contract with Messrs. Smith Brothers (Burnley), Limited (whom I shall hereafter refer to as the contractors), for the construction of a number of cottages, the contract providing for the payment, which is the material question in this case, with some elaboration. It was a lump sum contract, but provision was made in clause 29 for interim payments. No money was to become payable to the contractors except on the architect's certificate in writing, and certificates were to be issued when work to the value of £1,000 had been executed and thereafter at monthly intervals as certified by the architect in writing: he was to certify the amount from time to time payable to the contractors under the contract. Provision, however, was made for retention moneys. The amount to be certified by the architect on his first and monthly certificates as due to the contractors was to be at the rate of 90 per cent. of the value of all work, including all authorized extras and so forth. The balance of 10 per cent. of the value of the work was to be retained until the sum so retained, called a retention fund, should amount to £2,472, after which the contractors were to be entitled to be paid monthly to the full value of all work executed and materials supplied. One-half of the retention fund was to be paid at a certain period, namely, at the completion and occupation of the works, and the other half, together with any further sum found due to the contractors at the final adjustment of the accounts by the quantity surveyor, was to be paid six months after completion or occupation of the works ; provided that all defects for which the contractors should be liable were made good and their liabilities were otherwise discharged. The contract provided for the retention fund to be deposited in a bank in the names of the defendants, and any interest on such sums was to be the property of the contractors and paid to them by the defend-

ants as employers at the time of the final payment. It was finally provided that no certificate of the architect, except for the final balance, was to be considered conclusive evidence of any works or materials to which it related, nor of the value thereof; nor was it to relieve the contractors of their liability to make good any defects as provided by the conditions of the contract nor to prejudice the defendants as employers in the final settlement of the accounts. The contract, as I have said, was a lump sum contract, the amount being £46,589 8s. 4d., but subject to variation having regard to changes in the cost of labour and other matters. There was provision in the contract that the contractors were to complete by a certain date and were to be liable in damages if they failed to do so, and there was a provision also that they were to be liable for improper work or other breaches of contract. In arriving at a final adjustment, the defendants were to be entitled to set off against any sums otherwise due on the final adjustment any liability of the contractors in those respects. That being the building contract, matters proceeded, but in working out the contract variation was made in the course of procedure as regards the retention fund. The retention fund was duly created in accordance with the agreement until it amounted to £2,472, but it was and remained merely a notional fund: it was never created by special deposit, as the contract stipulated for, in an agreed bank. At a certain date, by correspondence which has been put in, the position of the fund was further varied as to amount. It was agreed in January, 1923, that the retention money should be reduced to £1,500; that is to say, that the contractors should be paid the balance of £972, which was done under an architect's certificate, which has been produced, and it was further provided that that should be further reduced to a sum of £1,000 in certain events, which duly happened; and by the beginning of 1924 the retention fund had been so reduced and stood as between both the defendants and the contractors at the sum of £1,000. As I say, it was never in the form of a sum of money kept in a separate earmarked account, but it is constantly referred to in the documents before me as the "retention fund," and both parties, as I find, that is to say, both the contractors and the defendants, treated these moneys as a definite sum capable of being earmarked, though not kept apart in the defendants' accounts. That being the state of things, the plaintiffs, who had been supplying cement to the contractors, found, in the early part of 1924, that the contractors were getting into arrears in their payment. By April, 1924, the debt of the contractors to the plaintiffs amounted to £671 10s. 5d., and, that being so, a transaction was entered into between the plaintiffs and the contractors which I imagine is very common in the building trade. The contractors, having standing to their credit this retention money, and being desirous of obtaining financial assistance for the purpose of completing their contract and obtaining payment of that retention money and the other sums due to them under the contract, could only do so by obtaining some financial assistance, and they obtained assistance by getting further credit from the plaintiffs by agreeing to assign to them these retention moneys. No doubt in doing so they were doing so by way of security or mortgage. Accordingly, a document was executed which is the assignment relied upon; that is dated April 7, 1924. It is signed by the contractors, it is addressed to the plaintiffs, and it is in these terms: "In part reduction of the amount now or to be owing from us to you for goods supplied by you, we hereby assign to you all moneys now or hereafter to become due to us from the Hemsworth Rural District Council for retention moneys in respect of the Grimethorpe Housing Scheme"—that was the part of the contract in question—"and for which your receipt shall be a sufficient discharge. It is understood that we are only to be credited with the amount actually paid to you under this assignment as and when the same is received by you." Of that assignment due notice was given on April 8, 1924, by the plaintiffs to the defendant Council in these terms: "We beg to give you notice that by a Memorandum in writing dated April 7, 1924, Messrs. Smith Brothers (Burnley), Limited, assign to us all moneys now or hereafter to become due to them from your Council for retention moneys in respect of the Grimethorpe Housing Scheme and for which our receipt shall be sufficient discharge." There was some little delay before that document was acknowledged by the defendants, but eventually the defendants wrote to the plaintiffs' solicitors in these terms on May 26, 1924: "I am in receipt of your letter of the 23rd instant enclosing a copy of the assignment of Messrs. Smith Brothers (Burnley), Limited, of all moneys now or hereafter to become due to them from the Hemsworth Rural District Council for retention moneys in respect of the Grimethorpe Housing Scheme. The matter shall receive attention. I am unable to inform you how much will be due to Messrs. Smith Brothers at the end of the contract." By this time the contractors had issued a number of debentures. The particulars of these debentures are set out in paragraph 1 of the defence. The debentures were issued to the Manchester and County Bank, Limited, and were dated at various periods between February 1, 1900, and February 2, 1924, and they were debentures charging the undertaking of the contractors and all their property, both present and future, the charge being a specific charge on the contractors' freehold and leasehold property, machinery, goodwill, and uncalled capital, and a floating security as regarded all the company's other assets, but subject to a proviso that the contractors were not to be at liberty to create any mortgage or charge for any of their assets in priority to these debentures. The moneys so lent were to be paid on demand to the debenture holders, and it was further provided that if at any time when the moneys became payable, that is to say, for example, on demand (as it was further provided they should immediately become payable if an order was made, or an effective resolution was passed for the winding-up of the contractors' company), then the debenture holders might appoint a receiver who should have power to take possession of the property and to sell, or concur in selling, the same and to apply the proceeds towards the satisfaction of the debenture holders. The building went on; the plaintiffs delivered cement to the contractors on the credit of the assignment, and so matters proceeded until October. On October 13, 1924, the debenture holders, default having been made by the contractors in not repaying on demand the moneys lent, appointed a receiver on their behalf under the debentures, and he duly entered into possession. On October 20, 1924, a resolution was passed for the voluntary winding-up of the company. From then matters proceeded; the receiver's solicitors refused to recognize the assignment which the plaintiffs notified to them, claiming that they had a prior claim. Messrs. Southern, Fullalove and Ritchie were the receiver's solicitors, I think. These solicitors wrote to the plaintiffs on December 6, 1924: "We are now informed that the retention moneys held by the Hemsworth Council in

respect of the Grimethorpe Scheme were at the date of the alleged assignment (and still are) £1,000." There was some considerable delay in closing up the affairs of the contract, and it was not till January 28, 1927, that the architect issued his final certificate, which has been put in, showing a balance due on the entire contract of £1,848 10s. 2d. That was accompanied by a final statement of account. The architect in issuing that certificate has not distinguished between the retention moneys and the other moneys which were due to the contractors. It is perfectly clear, however, on that certificate that there was a balance due to the contractors over and above the £1,000 retention moneys after all adjustments and cross-claims had been brought into account, and I do not think that the position or existence of the retention moneys as a separate fund capable of being earmarked and identified can be affected by the fact that the architect has not thought fit in his final certificate to say that the sum he certifies for does include the retention moneys. I am perfectly satisfied that that £1,848 included, and was meant to include, and indeed must have included, the retention moneys.

A considerable number of points were raised by the learned counsel who appeared on both sides, and they referred to a great number of authorities. Some of those matters I can deal with quite shortly, because on some points I imagine there is no serious dispute either of fact or of law. In the first place, it is perfectly clear that so far as the moneys due from the Council to the contractors under this contract are concerned the debentures constituted merely a floating charge. The nature of a floating charge has been so often discussed that it is almost unnecessary for me to say any more about it, except this, that the effect of a floating charge is not enough in itself, and apart from specific terms, to prevent the debtors from specifically charging any of the assets subject to the floating charge for purposes of the legitimate and proper carrying on of their business. A floating charge, which has been described as ambulatory or dormant, has not that effect. The whole intention is that the company which gives the floating charge should be free to conduct its business and free for that purpose to deal with those assets subject to the floating charge in the ordinary course of its business, selling, pledging, charging or otherwise disposing of them so far as may be necessary. It is not till some event occurs which, as it is called, crystallizes (another of those picturesque metaphors) the floating charge and causes it to cease to be dormant or ambulatory or floating, that this power of disposing of the assets on the part of the company comes to an end. I need only refer to one of the many cases in which that principle has been recognized, *Evans v. Rival Granite Quarries, Limited* (26 *The Times* L.R., 509 ; [1910] 2 K.B., 979), a case in which there is found again cited the description of a floating charge given by Lord Macnaghten in *Governments Stock and Other Securities Investment Company, Limited v. Manila Railway Company, Limited* (13 *The Times* L.R., 109 ; [1897] A.C., 81, at p. 86). A floating security is there described by Lord Macnaghten as "an equitable charge on the assets for the time being of a going concern." That being so, there would so far be no hindrance to the contractors charging or transferring the retention moneys by means of the assignment to which I have referred. It is said, however, that this floating charge is subject to a specific limitation—namely, that it prohibits the contractors from creating any mortgage or charge over any of their assets in priority to the charge created by the debentures. If the plaintiffs had notice of that limitation on the powers of the company to charge their assets, that notice would affect them even though they obtained a legal assignment and a legal mortgage : it would affect them, and they would not be able to rely upon the legal mortgage or charge as against the debentures. It is not, however, suggested that the plaintiffs had any notice in fact of the terms of the debentures. It is not proved that they had actual notice that there were debentures. That fact in itself, however, would not be material because the debentures having been duly registered under the Companies (Consolidation) Act, 1908, the plaintiffs, like all the world, are deemed to have constructive notice of the fact that there are debentures. But it has never been held that the mere fact that persons in the position of the plaintiffs have constructive notice of the existence of debentures also affects them with constructive notice of the actual terms of the debentures or that the debentures are subject to the restrictive condition to which these debentures were subject. No doubt it is quite common for debentures to be subject to this limiting condition as to further charges, but that fact is not enough in itself to operate as constructive notice of the actual terms of any particular set of debentures. That again has been recognized in a great many cases, and it is enough for me now to refer to one only. There are many others, but it is enough for me to refer to *Wilson v. Kelland* (26 *The Times* L.R., 485 ; [1910] 2 Ch., 306). There is, therefore, nothing to affect the rights of the plaintiffs so far by reason of the existence of those debentures or by the terms in those debentures.

The next question I have to determine is whether there was an assignment here which fulfilled the conditions of section 136 of the Law of Property Act of 1925; that is to say, whether there was a good legal assignment of a specific and identifiable fund. Mr. Raeburn, in his able argument for the defendants, has contended on a number of grounds that there is here no legal assignment. His argument is that at most there was only an equitable assignment of a future debt, an assignment which, assuming the retention moneys to have constituted a specific fund, would only become a legal assignment and enforceable as such when the moneys became earned and due, which, according to his argument, only occurred when the final certificate was granted in January, 1927, before which time the rights of the debenture holders had crystallized by the appointment and possession of the receiver. He further contended that in any event the assignment was never more than an equitable assignment and therefore the action could not be maintained by the plaintiffs without the joining of the assignors—namely, the contractors. Mr. Neilson has contended, on the contrary, that the conditions of section 136 are one and all complied with and that he is entitled to recover here on behalf of the plaintiffs on that ground. I think that his very able argument is successful and is justified by the facts of the case and the law which is applicable. In the first place, I have to determine whether the retention moneys constituted a specific fund so as to be capable of assignment, whether it constituted a debt or legal chose in action. I have referred to the terms of the building contract, and it is on those terms and on what was done in pursuance, with some variation, perhaps, of those terms, that I must decide. It really is a question of fact, the question of the position in this special case, whether the retention moneys constituted such a fund. I think that they did. The retention moneys according to the express

terms of the contract were clearly intended to constitute a specific fund, they were to be actually deposited in a bank by the council as they accrued due, and they were so to remain until the final payment after completion, when they were to be paid over. That agreement was varied in the sense which I have indicated, but the retention moneys still remained according to the contract, notwithstanding the variation, retention moneys in the proper sense of the term, that is to say a specific fund notionally set aside and appropriated, and a specific fund which, subject to the conditions of the contract, the contractors remained entitled to claim *eo nomine*. I find, therefore, that there was a specific fund. Secondly, I have to determine whether the retention moneys were merely a future debt—future in the full sense of the term ; that is to say, that they were not merely not payable but were not earned at the date of the assignment, that is to say in April, 1924. Mr. Raeburn further contended that they were not earned and were not payable, and, more than that, that they were only payable on a contingency—namely, the entire satisfactory completion of the work under the building contract, and he further relied on the fact that the contract was a lump sum contract and therefore on well-known principles no money could be due and payable under a lump sum contract until the whole work for which the money was payable had been completed. I do not think that that is a correct statement of the position in this case. I have referred to the terms of the building contract in some detail a little time ago, and I am satisfied, on considering that contract and hearing the evidence of the architect, that the amounts for which month by month the architect was to certify and for which thereupon the contractors had a vested right of action under the certificate were not mere arbitrary amounts but were amounts which were to be certified for and were certified for on a calculation of the value of the work actually done. Though it may be that when the final settlement came some adjustment had to be made, I am satisfied that the intention and meaning of this contract was that the architect was only to certify for work in an amount which in his judgment represented the value actually executed. That is the precise language of clause 29, and when reference is made to the creation of the retention fund it is expressly said "The amount to be certified by the architect on his first and monthly certificates as due to the contractor shall be at the rate of 90 per cent. of the value of all work executed and materials delivered" and so on. Then the remaining balance of 10 per cent. of the value of the work is to be retained. In my judgment the retention moneys represented moneys actually earned at the date of the certificate, though in fact these retention moneys, as their name indicates, were to be held as a sort of security and in any case subject to having set off against them any cross-claims, which would reduce the amount when the final settlement came and the final certificate was issued. The retention moneys, therefore, were only future in the sense that they were not payable until some future date, and such moneys in my judgment are capable of being the subject of a good and valid legal assignment. *Walker v. Bradford Old Bank, Limited* (12 Q.B.D., 511), is a well-known authority for the principle that there may be a good legal assignment of future debts. Nor is this conclusion affected by the circumstance that the £1,000, the retention moneys for this purpose, as events have turned out, are not only not payable till the final settlement, but when the final settlement comes may not become payable either in whole or in part by reason of the building owners, the defendants, having cross-claims or rights of set-off in connexion with the execution of the work or delay in completion under the various terms of the contract. That, I think, does not affect the question at all, because every legal assignment is, according to the express terms of section 136 of the Law of Property Act, 1925, subject to equities having priority over the right of the assignee, and it has long been established that a legal assignee is liable to have his rights affected and reduced, or even destroyed, by the fact that the debtor has cross-claims arising out of the same transaction which he could have set off against the creditor and which he can equally set off against the creditor's assignee. It is true that these rights of set-off are strictly limited in character : they must have their origin in the same contract and in the same transaction, and they must be inseparably connected with that transaction. But if that condition is fulfilled, then they may be set off. That is well illustrated in a case of *Government of Newfoundland v. Newfoundland Railway Company* (13 App. Cas., 199). There were, as it turned out in this case, no cross-claims or rights of set-off affecting the £1,000 retention moneys in question, but the point was raised by Mr. Raeburn, and it has to be considered as meeting his argument that the retention moneys were only payable on a contingency and therefore were not either earned or payable at the date at which the assignment took place. Then I further hold that this letter of assignment is a good legal assignment ; that is to say, is a mortgage and is not merely a charge or equitable assignment. I have read the terms of the document, and they are absolute in their character. It is perfectly true that at the date of the assignment the indebtedness of the contractors to the plaintiffs was less than £1,000 ; it afterwards became more, but it was less at the time ; and the whole intention was to give the plaintiffs some security for further credit, which they were willing to give on those terms to the contractors. But what is material in considering this question is the terms of the assignment. If the assignment is absolute in its terms, if it is in terms a full legal assignment, then it is a good, absolute assignment within the section of the Act, even though in fact it is a mortgage and even though the assignee, if he collects the debt, may have to account for some balance to the assignor. That principle (namely, that it is the terms of the document which have to be looked at) is now well established, and it is only a question of the view which the Court takes of the terms. I need only refer to *Tancred v. Delagoa Bay and East Africa Railway Co.* (5 *The Times* L.R., 587; 23 Q.B.D., 239) and the more recent case of *Bank of Liverpool and Martins, Limited v. Holland* (43 *The Times* L.R., 29).

Mr. Raeburn has further contended that in this case there was only an assignment of part of a debt and not an assignment of the whole debt, and in that connexion, as I follow, he in particular relies on the terms of the architect's final certificate, to which I have already referred. I should not hold that an assignment of part of a debt was a good legal assignment within the terms of the Judicature Act : I should follow the various decisions to the contrary. There is some conflict, no doubt, but I should follow the decisions to the contrary, as an example of which I might refer to *In re Steel Wing Company, Limited* ([1921] 1 Ch.D., 349). But for the reasons which I have already indicated I think and I hold that this assignment was both in terms and in fact an assignment of the whole of the retention moneys, a specific fund, and that being so, the position is in no way

affected because the architect, for whatever reason, in his final certificate did not think fit to specify this specific fund, as I think he ought to have done, but simply included it in the total sum of £1,848 odd for which he certified. On those conclusions it follows that the plaintiffs are entitled to recover upon their assignment; the assignment being a good legal assignment, passed to the plaintiffs, as I hold, the full legal rights in the fund, and those legal rights were in no way affected by the fact that after the date of the assignment, though before the moneys became actually payable, the receiver in fact took possession.

Mr. Raeburn, basing on his argument that the assignment was merely future in effect and was merely equitable, has referred to cases where it was held that the rights of an equitable assignee, an assignee of merely future debts and therefore an equitable assignee, were postponed to the rights of a receiver for debenture holders or of a trustee in bankruptcy, and he says this is analogous. He has referred to cases like *Wilmot v. Alton* (13 *The Times* L.R., 58; [1897] 1 Q.B., 17) and *Ex parte Nichols* (22 Ch.D., 782). There is no doubt, of course, that where you have a purely legal assignment such as that in question in those cases, an assignment of future debts in the full sense of the term, a person like a trustee in bankruptcy, who takes the full legal title, takes precedence of a future assignee ; that is to say, if the debt is merely future and the money is not payable till a date subsequent to the trustee's rights attaching, and has not been earned at an earlier date, namely, at the date of the assignment. If, however, the money has been earned at the date of the assignment and before the trustee in bankruptcy's title has attached, then the assignee's rights remain unaffected. Such a case is well illustrated by the case of *Ex parte Moss—In re Toward* (14 Q.B.D., 310), a case of a building contract, where it was held that a charge on an instalment due on the building of a ship in favour of a creditor was good against the trustee in bankruptcy because the charge was upon money which had been already earned by the builder. That is a case which is parallel, so far as this argument is concerned, with this case, whereas those other cases, *Wilmot v. Alton* (*supra*) and *Ex parte Nichols* (*supra*) are different in an essential characteristic, and in those latter cases the money had not been earned before the rights of the trustee in bankruptcy accrued. But I have held that this is a legal assignment, and therefore these cases relied upon by Mr. Raeburn, cases of merely equitable assignment, have no application. I am far from saying, however, that even if this were merely an equitable assignment, though not of a strictly future debt, the rights of the receiver for the debenture holders when he entered into possession would take priority of the rights of the equitable assignees. No authority has been produced to me for an argument to that effect by Mr. Raeburn. I am not aware of any precise authority, and I express no view on the matter, because the matter does not, in my judgment, arise.

Under all those circumstances, I think the plaintiffs are entitled to succeed. I am told that the defendants have actually paid this amount to the receiver. That, I need not point out, would not be a good discharge as against the plaintiffs if I am right in holding that they, as assignees, have become legally entitled to receive and recover the debt in all the circumstances of the case. The defendants were invited to interplead and they might have interpleaded, but they have not thought fit to do so, and it may follow that if I am right in the conclusion at which I have arrived they will have to pay the money twice over. I know nothing about that, nor indeed is it material. All I have to do is to say that in this case, as between the plaintiffs and the defendants, I hold that the plaintiffs are entitled to succeed on their assignment, and there will be judgment for the amount claimed, with costs. That, I think, is £1,000.

[Solicitors—Messrs. Gregory, Rowcliffe and Co., for Messrs. Holden. Scott and Co., Hull ; Messrs. Emmett and Co., for Mr. C. E. Scholefield, Hemsworth.]

K.B. Div. (Rowlatt, J.) 1928. June 13.

BENYON v. THORPE.*

Revenue — Income-tax — Voluntary pension—Lump sum in lieu thereof—Whether recipient assessable—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. E.

The respondent had been the managing director of a company and after his retirement the directors paid him a voluntary pension and subsequently stopped the pension, and instead thereof gave him a lump sum as a personal gift. The respondent was assessed to income-tax on the amounts so paid to him.

Held, that as the payments were merely gifts moved by remembrance of past service already sufficiently remunerated, the respondent was not liable to be assessed upon them.

This was a case stated by the Commissioners for the Special Purposes of Income-tax, who had decided that certain sums paid by way of pension were not assessable, as being gifts of a personal nature only.

Mr. Thomas Wells Thorpe, the respondent, appealed to the Special Commissioners in respect of assessments made on him under Schedule E of the Income Tax Acts in respect of the following sums paid to him by Messrs. Mann, Crossman, and Paulin, Limited:—£1,736 for the year ending April 5, 1923 ; £6,451 12s. for the year ending April 5, 1924 ; £6,561 12s. for the year ending April 5, 1925 ; and £6,250 for the year ending April 5, 1926.

The respondent had been the managing director of the above company from its incorporation in the year 1901 to his retirement on December 31, 1922. It had been the custom of the company to give to members of its staff a voluntary pension or allowance on their retirement. In 1922 the respondent retired from the position of managing director, owing to ill-health. His resignation became effective from the end of the year, but he remained a director until the end of 1925, no salary or remuneration being voted to him as director.

By a resolution of the directors passed on January 11, 1923, a pension was awarded to the respondent in the following terms :—"It was unanimously resolved that Mr. Thorpe be paid during his retirement a pension of £5,000 per annum, free of income-tax, as from January 1, 1923." On August 6, 1925, the directors passed the following resolutions :—"The resolution of the board of

* Reported by T. R. F. Butler, Esq., Barrister-at-Law.

January 11, 1923, *re* Mr. Thorpe's pension, was considered, and it was resolved to rescind the same, which was accordingly rescinded." "It was resolved to give Mr. Thorpe a sum of £5,000, to be paid to him as to half thereof forthwith, and as to the remainder in January, 1926, and the secretary was instructed to prepare a cheque in favour of Mr. Thorpe for £2,500. This sum is not voted to Mr. Thorpe as or because he is a director, but as a personal gift to him."

The voluntary pensions or allowances paid by the company had been deducted by it in its own accounts for the purpose of ascertaining the profits divisible among the shareholders, but for purposes of taxation under the Income Tax Acts, the company had rendered an adjustment account, in which the allowances had been shown as added back, and had thereby been included in the taxable profits on which income-tax had been paid for all the years in question and previous years.

On behalf of the respondent, it was contended that the allowances were entirely voluntary payments, or gifts, of a personal nature, and that he was not assessable on them.

The Crown contended, *inter alia* :—(1) That the allowances were not gifts of a personal nature ; and (2) that the assessments appealed against had been rightly made and should be confirmed.

The Special Commissioners held that the allowances paid to the respondent were gifts of a personal nature only, and that he was not assessable on them under the Income Tax Acts. They accordingly discharged the assessments.

The Crown appealed.

The Attorney-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills appeared for the Crown ; Mr. Raymond Needham, K.C., and Mr. J. S. Scrimgeour for the respondent.

Mr. Justice Rowlatt, in giving judgment, said that it appeared that the company had been making payments of the kind in question for the last 20 years or more, that the Inland Revenue authorities had been fully aware of the fact, and that in every case they had refused to allow the deduction of those sums in the company's accounts because they were not expenses of the company's business—or, in other words, that the payments were mere gifts. They now reversed their position and said that such sums should have been allowed as part of the expenses of the company and the sums in question ought to be regarded as income in the hands of the respondent. If the Crown was entitled to succeed in this case it ought to be only on the terms of an undertaking to put right the assessments of the company by allowing it to deduct every payment of that kind that it had made.

In his judgment, however, the Crown was not entitled to succeed. The Special Commissioners must be taken to have found that the payments in question were made to the respondent not as a remuneration for acting as an ordinary director but as an allowance in the nature of a pension. The payments could not be regarded as a supplementary salary for services, as they were rendered. In *Cowan v. Seymour* (36 *The Times* L.R., 155 ; [1920] 1 K.B., 500) Lord Justice Atkin (as he then was) had pointed out that a sum might be paid after termination of services in respect of those services because the services themselves called for a supplement to a salary. That, however, was not the present case, because here the payments were clearly not payments by way of increment of salary for past labours but were payments, to a person whose services had ceased, in respect of the period during which he might live afterwards.

The question was whether the payments were "a profit or gain arising from an employment." To render them taxable at all they must be a "profit or gain" within the scope of the Acts. In his opinion the resolutions passed by the company were nothing more than the indication of an intention to make a series of gifts, and had no more effect than an ordinary banker's order given by a customer to his banker for the payment of a series of sums for charitable purposes.

It was true that a gift might become a "profit or gain" if it could be attached to an office, employment, or vocation, the best known instance being that of an offering made voluntarily to a minister of religion. The same principle applied to voluntary payments in the nature of gratuities to servants, such as waiters, which they obtained only because they were carrying on a particular employment. The question then arose whether a payment ceased to be a mere gift because what had led to it was a past employment, which had ceased.

It was abundantly clear that payments such as those arising in the present case could not be considered as receipts in respect of an office. The payments in question were, in reality, nothing more than gifts moved by remembrance of past service already sufficiently remunerated, and stood on the same footing as gifts to a child or any other person whom the donor thought ought to be provided with funds. The relation of employment which had generated the gifts was merely a matter of history.

For those reasons he was of opinion that the appeal failed, and must be dismissed with costs.

[Solicitors—The Solicitor of Inland Revenue ; Messrs. Crossman, Block, Matthews, and Crossman.]

Judicial Committee of the Privy Council.
(Viscount Haldane, Lord Buckmaster, Lord Shaw of Dunfermline, Lord Wrenbury, and Lord Blanesburgh.)
1928. June 12.

TINY TOWNSHIP ROMAN CATHOLIC SEPARATE SCHOOLS TRUSTEES v. THE KING.*

Canada — Ontario—Education—Roman Catholic separate schools—British North America Act, 1867 (30 and 31 Vict., c. 3), s. 93 (1).

By s. 20 of the Separate Schools Act, 1863, of the United Province, afterwards divided into the provinces of Ontario and Quebec,

"Every separate school shall be entitled to a share in the fund annually granted by the Legislature of this Province for the support of common schools, and shall be entitled also to a share in all other public grants, investments and allotments for common school purposes now made or hereafter to be made by the province or the municipal authorities. . . ."

By section 26 the Roman Catholic separate schools were to be subject to such inspection as might be directed from time to time by the Chief Superintendent and were to be "subject

* Reported by Sir W. J. Soulsby, Barrister-at-Law.

also to such regulations as might be imposed from time to time by the Council of Public Instruction for Upper Canada."

The above Act was in force at the passing of the British North America Act, 1867, which provided by s. 93 : "In and for each province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions :—(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union. . . ."

Held, that as the legislation in force in 1867, in what is now the province of Ontario, provided for the regulation of separate schools and did not entitle them to a fixed share in the fund granted for the support of common schools, the Legislature of the province of Ontario was not precluded by s. 93 (1) of the Act of 1867 from passing Acts for the regulation of separate schools and for the alteration of the amount of their share in the educational grant.

Judgment of the Supreme Court of Canada ([1927] S.C.R., 637) affirmed.

Their LORDSHIPS dismissed this appeal, which was brought by special leave, from a judgment of the Supreme Court of Canada ([1927] S.C.R., 637) affirming decisions of the First Divisional Court of the Appellate Division of the Supreme Court of Ontario (60 Ont. L.R., 15) and the Trial Judge (Mr. Justice Rose) (59 Ont. L.R., 96), relating to the education of Roman Catholic children in Ontario.

Mr. Hellmuth, K.C., and Mr. T. F. Battle (both of the Canadian Bar) appeared for the appellants ; Mr. W. N. Tilley, K.C., and Mr. McGregor Young, K.C. (both of the Canadian Bar), for the respondent.

VISCOUNT HALDANE delivered their Lordships' judgment as follows :—

Their Lordships are fully aware that this appeal is among the most important that have come before them from Canada in recent years. It relates to the interpretation of the Constitution of Canada in regard to the separate schools of a large part of her Roman Catholic population, and to the character of the rights conferred on them by the legislative settlement made at the time of Confederation under the British North America Act, 1867. So far as concerns the question brought before the Judicial Committee of the Privy Council, it will be found to be a question of pure law, turning on the interpretation and application of words in that Act. But it is none the less a question of far-reaching importance to Canada as a whole, and it has given rise to great differences of opinion among the Judges of the Canadian Courts. The tribunals of Ontario, indeed, before whom the question came in the first instance, decided unanimously against the appellants' claim. But the learned Judges of the Supreme Court, to which it was taken on appeal, were evenly divided.

Their Lordships have now to determine the point in issue as one of pure legal interpretation, disregarding every other consideration. This was the principle adopted by the Canadian Judges, and it is one which their Lordships have to apply anew, seeking to decide the appeal on the footing of an examination of the provisions of the Constitution of Canada.

It will be necessary in the course of this judgment to refer in outline, later on, to the history of education in Canada, and particularly to the phase of that history which is concerned with the development of the provisions made in regard to religious education. But before entering on this it is desirable to formulate distinctly the real point in this appeal and the nature of the proceedings by which it has been raised. These proceedings took the form of a petition of right presented by the appellants to the Supreme Court of Ontario. The petition claimed that certain Acts of the Legislature of that Province, and certain regulations purporting to have been passed under these Acts, prejudicially affected the rights conferred by the British North America Act, 1867, on the appellants and were *ultra vires*. The appellants asked for a declaration that the Acts of the Legislature, which had sought to alter the basis of distribution of legislative grants which existed at the date of Confederation, were *ultra vires* so far as concerned separate schools, and for judgment for a sum equal to the difference between the amount paid to the trustees of the Roman Catholic School for school section No. 2 in the township of Tiny, out of the legislative grant of the Province for 1922, and the amount that would have come to it if effect had been given to the Separate Schools Act, 1863, which was in force at the Confederation, and created (it was claimed) a right which the Legislature of the Province had no power after Confederation to affect prejudicially. The appellants also claimed that they had the right to establish and conduct in their own schools courses of study and grades of education such as were being conducted in continuation schools, collegiate institutes, and high schools, and that all regulations purporting to affect that right were invalid. They asked for a further declaration that the supporters of Roman Catholic separate schools were exempt from the rates imposed for the support of the former kind of school, unless established or conducted by boards of trustees of Roman Catholic separate schools.

All of these claims were traversed by the Attorney-General for Ontario on behalf of the Government of Ontario.

The question which has to be decided is one of far-reaching magnitude. To understand its scope it is necessary to have in mind the history of education in Canada, including that of section 93 of the British North America Act, 1867. This section embodies a compromise. The language proposed by the conferences of delegates from the various parts of Canada, which passed resolutions at Quebec on October 10, 1864, was not adopted, so far as the final arrangement was concerned, in the form in which the resolutions were passed (see Carter's Cases on the B.N.A. Act, Vol. II., Quebec Resolution No. 43). Resolution 43 proposed to give power to the local Legislatures to make laws as to education, saving the rights and privileges which the Protestant and Catholic minority in both Canadas might possess as to their denominational schools at the time when the union came into operation. In the British North America Act, 1867, as passed by the Imperial Parliament, the substance of this resolution is not included in section 92, but is embodied in a separate section, 93. The separate section enacts that in and for each Province the Legislature may exclusively make laws in relation to education, subject and according to certain provisions. These were (subsection 1), that nothing in such law should prejudicially affect any right or privilege with

respect to denominational schools which any class of person had by law in the Province at the union. By subsection 2 all the powers, privileges, and duties at the union, conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects are extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec ; (on this subsection no question arises in the present appeal).

By subsection 3 :—

"Where in any province a system of separate or dissentient schools exists by law at the union, or is thereafter established by the Legislature of the province, an appeal shall lie to the Governor-General in Council from any Act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education."

The fourth subsection enacts that if a provincial law which seems to the Governor-General in Council requisite to give effect to his decision is not made or the decision is not executed, then the Parliament of Canada may make the necessary remedial law.

It will be observed that subsection 3 goes further than subsection 1 in material respects. In the first place, it applies not merely to what exists at the time of Confederation, but also to separate or dissentient schools established afterwards by provincial Legislatures. In the second place, the word "prejudicially," in subsection 1, is dropped out from before the expression "affecting," in subsection 3. In the third place, the right or privilege is not confined to one in respect of denominational schools, but is given in respect of education. Their Lordships think that these changes in language are significant. They show that the protection given by subsection 1 was deemed, if taken by itself, to be insufficient. It was not considered to be enough protection for the denominational schools to apply to them a restriction which only rendered *ultra vires* of the provinces a law which took away what was an existing legal right or privilege at the time of Confederation in respect of denominational schools. Subsection 3 contemplates that within the powers of the provincial Legislature Acts might be passed which did affect rights and privileges of religious minorities in relation to education, and gives a different kind of remedy, which appears, as has already been pointed out, to have been devised subsequently to the Quebec resolutions of 1864, and before the bill of 1867 was agreed on. Whenever an Act or decision of a provincial authority affecting any right or privilege of the minority, Protestant or Roman Catholic, in relation to education is challenged, an appeal is to lie to the Governor-General in Council, as distinguished from the Courts of law. No doubt if what is challenged is challenged on the ground of its being *ultra vires,* the right of appeal to a Court of law remains for both parties unimpaired. But there is a further right not based on the principle of *ultra vires.* That this is so is shown by the extension of the power of challenge to any system of separate or dissentient schools established by law after Confederation, and accordingly this could not be confined to rights or privileges at the time of Confederation. The omission of the word "prejudicially" in subsection 3 tends to bear out the view that something wider than a mere question of legality was intended, and the language of subsection 4, enabling the Dominion Parliament to legislate remedially for giving effect, "so far only as the circumstances of each case require," to the decision of the Governor-General in Council, points to a similar interpretation. What is to be dealt with is a right or privilege in relation to education.

Their Lordships are of opinion that where the Head of the Executive in Council in Canada is satisfied that injustice has been done by taking away a right or privilege which is other than a legal one, from the Protestant or Roman Catholic minority in relation to education, he may interfere. The step is one from mere legality to administrative propriety, a totally different matter. But it may be that those who had to find a new constitution for Canada when the British North America Act was passed in 1867, came to the conclusion that a very difficult situation could be met in no other way than by transferring the question from the region of legality to that of administrative fairness.

There is no question before their Lordships in this case concerning any appeal to the Governor-General in Council, and they abstain from saying anything as to the principles on which, if invoked, he may think fit to proceed. But the view that the rights of the appellants are not necessarily confined to rights under subsection 1 has an important bearing on the construction of that subsection, inasmuch as it no longer takes away all remedy in cases to which the principle of *ultra vires* does not apply. It may even be that the power conferred on the Governor-General in Council enables him to take into account the considerations arising out of what had been done in the course of *de facto* administration which Lord Justice James excluded in delivering the judgment of the Judicial Committee in 1874, in *Maher v. Town Council of Portland,* reported in Wheeler's "Confederation Law of Canada," and quoted by the late Lord Chancellor in delivering his recent judgment of the Committee in *Hirsch v. Montreal Protestant School Commissioners* (44 *The Times* L.R., 287; [1928] A.C., 200) on February 2 last. The question is one of administrative policy, and it is not before their Lordships. They desire, however, to observe that the view now expressed as to the relations of subsection 1 and subsection 3 of section 93 is substantially the same as that taken in *Brophy v. Attorney-General for Manitoba* (11 *The Times* L.R., 198 ; [1895] A.C., 202). In that case, the question arose under the Constitution Act of Manitoba, 1870, a Dominion Act under which, as subsequently confirmed by Imperial statute, Manitoba became one of the provinces of the Dominion of Canada. The Act contains in section 22 provisions which, for present purposes, are identical with those of subsections 1, 3 and 4 of section 93 of the British North America Act, 1867. It is true that in the second and corresponding subsection of section 22 of the Manitoba Act the appeal is expressly stated to lie against any Act or decision of the Legislature of the province as well as of any provincial authority, thus in words saying more than in subsection 3 of section 93 of the Act of 1867. But Lord Herschell in *Brophy's* case (*supra*) expressed his dissent from the argument that the insertion of the additional words in the Manitoba Act showed that in the Act of 1867 it could not have been intended to comprehend the Legislatures under the words "any provincial authority." Their Lordships agree with his view, and they are of opinion that the Legislatures are so comprehended. The point may prove to be one of great importance if there is hereafter an appeal to the Governor-General in Council. In *Brophy's* case (*supra*) the Roman Catholic minority in Manitoba appealed to the Governor-General in Council under subsection 2 of section 22 of their Constitutional Act on the ground

that rights and privileges of theirs in relation to education had been affected by two statutes of the Legislature of Manitoba passed in 1890, which set up a general system of non-sectarian education. The schools of the Roman Catholic minority were deprived of their previously existing proportionate share of the money contributed for school purposes out of the taxes, while for the new non-sectarian schools they were both taxed and assessed for rates. It had been held, in *City of Winnipeg v. Barrett* (8 *The Times* L.R., 745 ; [1892] A.C., 445) that the statutes of 1890 did not affect any right or privilege with respect to their schools which the Roman Catholics of Manitoba had by law or practice in their province at the Union in 1870. The only right or privilege which they then possessed was to establish and maintain for the use of members of their own Church such schools, at their own expense, as they pleased. In *Barrett's* case (*supra*) this was the only question before the Judicial Committee, and it was held that the Acts of 1890 were not *ultra vires*.

But in *Brophy's* case (*supra*) the question was the wholly different one whether the rights and privileges of Roman Catholics in relation to education had not been so affected by the Act of 1890 as to enable an appeal to the Governor-General in Council in a *quasi*-administrative capacity. It was held that there was such affection, in fact although not in law, inasmuch as Roman Catholics were to be taxed and rated for the upkeep of schools which were obnoxious to their religious opinions in regard to education. It was no point of illegality. What was decided was that the Governor-General in Council had power to entertain such an appeal under subsection 2 of section 22 of the Constitutional Act, corresponding as their Lordships have already stated to subsection 3 of section 93 of the British North America Act, 1867.

Their Lordships have dwelt on what was decided in *Brophy's* case (*supra*) in reference to the scope of the appeal against the affection of rights or privileges within the meaning of subsection 3 of section 93 of the British North America Act, 1867, with a view to bringing out the limitation which has to be placed on the expressions used in subsection 1. The rights and privileges there referred to must be such as are given by law, and the redress which may be given in respect of prejudice to them, caused by laws made by the provincial Legislatures which, in other respects, have the exclusive power of legislation in relation to education, is a redress based on the principle of *ultra vires*. Such redress can, therefore, for the reasons given in *Brophy's* case (*supra*), be sought from the Courts of Law alone. The other remedy which subsections 3 and 4 afford not only supplements the former but affords cogent reason why subsection 1 should be construed as being confined strictly to questions of *ultra vires*. Were the Acts and Regulations complained of in the petition of right assailable under this principle ? In order to answer this question it is necessary to understand clearly what was their nature and to understand this it is essential to see what has been the development of the system of education in Upper Canada.

Before 1867 there were in Canada schools of three principal classes, common schools, grammar schools, and separate schools. Since Confederation there have come into existence continuation schools, collegiate institutes, and high schools, which have developed out of the three kinds of school last mentioned. The claim of the appellants is that, in 1867, Roman Catholics in Upper Canada enjoyed by law the right to establish denominational schools, to be conducted by boards of trustees chosen by themselves ; that, as regards selection of text books and courses of study, the control of these belonged to the boards of trustees, who could sanction in their schools courses of study co-extensive in scope with those, since Confederation, pursued in high schools, collegiate institutions and continuation schools. The case made was that the trustees could do this in the separate schools, inasmuch as these, although common schools, were not, under the old order of things, restricted in their scope as regards education of pupils up to 21 years of age. It is argued for the appellants that under section 93 (1) the Roman Catholics of Ontario continued to enjoy these autonomous rights, coupled with a consequential right of exemption from taxation for the purposes of the high schools, collegiate institutes, and continuation schools, which, it is said, are mere forms of what fall within the scope of existing separate schools, and are, therefore, of a kind for which the Roman Catholics were exempt from taxation.

Their Lordships may say at once that if such a right was really conferred on the boards of separate schools, the right and the title to grants dependent on it were not interrupted by the Act of 1867. It was held by Mr. Justice Rose, who tried the case, and by the Appellate Court of Ontario, that the newly created province of Ontario was not affected by any obligation in regard to this, and that the separate school trustees had consequently, after Confederation, no legal right to share in any appropriation or grants to be made by the new province of Ontario for common school purposes. For this conclusion reliance was placed on section 20 of the Separate Schools Act of the United Province of 1863, which enacts that "every separate school shall be entitled to a share in the fund annually granted by the Legislature of *this Province* for the support of common schools, and shall be entitled also to a share in all other public grants, investments, and allotments for common school purposes, now made or hereafter to be made by the province or the municipal authorities, according," &c. The learned Judges of the Appellate Court, who did not differ from the judgment of the first Judge in the case, have held that the right granted by the Act of 1863 was confined to a right to a share of the grants made by the old United Province of Canada, and had no application to the new Ontario established at Confederation. It was true, they said, that under section 129 of the British North America Act, 1867, all laws in force in Canada at the union were continued in Ontario as if the union had not been made, but subject to repeal or alteration by Parliament or by the legislature of Ontario. They thought, however, that to enact that a law shall continue in force after the union is not to declare that the meaning of that law shall be changed by the union, and there was nothing to indicate that a law relating to distribution of moneys voted by the Legislature of the old province of Canada should govern legislation after the union. The Act of 1863 might not be repealed, but the fund with which it dealt was no longer in existence.

The Supreme Court of Canada did not adopt this view. The Chief Justice of Canada emphatically dissented from it, and none of the other learned Judges who sat with him, not even those who were in favour of approving the judgment, expressed themselves as differing from his dissent. The Chief Justice of Canada thought the conclusion reached below on this question to be at variance with the spirit and intent of section 93 (1) of the Act of 1867. Unless the

Legislatures of Ontario and Quebec were debarred from prejudicially affecting the rights and privileges which the religious minorities possessed in regard to their denominational schools in regard to maintenance and support, the protection given by the section would be illusory. On this point their Lordships are in full agreement with the Chief Justice of Canada. Section 93 was, in their view, obviously meant to apply to the future as well as to the past, and to the new province of Ontario.

This consideration leads up to the crucial point in this appeal. Did the trustees of the separate Roman Catholic schools secure at Confederation a right to maintain, free from control or regulation by the legislature of Ontario, as respects the scope of instruction, denominational schools which could embrace the subjects formerly taught in the separate schools on their higher sides, and afterwards taught in the undenominational high schools, collegiate institutes, and continuation schools, as developed after Confederation, or analogous subjects taught in the Roman Catholic separate schools before Confederation, and to exemption from taxation for the support of such undenominational educative organizations? And did the trustees secure a title to receive a share of every grant by the Legislature for common school purposes, construed as extending to the maintenance of education of the type given in post-Confederation secondary schools, as well as in those that were merely elementary, based on the number of pupils attending the separate schools, and independent of the subjects taught, or the text-books used, every separate school being entitled to its share, calculated according to a statutory rate, however advanced, however rudimentary, the education and books might be? If these questions are answered in the affirmative then it was *ultra vircs* of Ontario to take away the right either to regulate the schools in a manner inconsistent with this freedom, or to diminish the grants or to tax for the support of the undenominational schools, by legislation, or administratively, so far as control was concerned, by State regulation.

The question is a very serious one. Before Confederation the common schools and with them the separate schools were left free, by statute (see Upper Canada Common Schools Act, 1859, section 16), to educate pupils up to the age of 21, and some of them were in the habit of giving to the older pupils advanced teaching such as would fit them to enter the University. But Roman Catholics find a great difficulty in sending their sons and daughters to the higher schools which have now been established for the purposes of this advanced teaching. As the Chief Justice of Canada has said, undenominational education is based on the idea that the separation of secular from religious education may be advantageous. But Roman Catholics, at least, hold that religious instruction and influence should always accompany secular training.

What, then, were the rights of the supporters of the separate schools at the time of Confederation? To answer this, and the question of *ultra vires* which arises out of it, it is necessary to look at the history of the development of education in Canada.

In the end of the eighteenth century there had been grants made for the establishment and support of schools for the children of the inhabitants of the Province of Upper Canada. These grants were at first grants of land, and the schools to be established were to be such as appear then to have been somewhat loosely called grammar schools. The schools were put on a statutory basis by an Act of the Legislative Council and Assembly of Upper Canada, passed in 1807, and were in that Act called "public schools," which were to be managed by trustees nominated for each school district. In 1816, under another Act, grants of money were made by the Legislature for the benefit of the schools, which were in that Act and the subsequent Acts renamed common schools, and local Boards of Education were set up. The trustees were to manage the schools and make regulations for them, but they were to report every three months to the proper Board as to the regulations and the books used in the schools, and the Board was to control the regulations and the books.

By an Act of the Province in 1820 further moneys were granted from the taxes for the use of common schools, and by a later Act of 1824 still more money for the extension of moral and religious instruction, and for the development of the common schools, was directed to be applied. Yet further grants were made by a statute of 1833. By a later statute of 1839 provision was made for the assistance of a university college, as well as for the grammar schools which had grown up in the Province, and for the appropriation of the proceeds of land granted for their maintenance.

In 1840 an Imperial Act was passed uniting Upper and Lower Canada into a single Province of Canada, with one Legislative Council and Assembly. Up to this date what had been established were common and grammar schools. They appear to have been undenominational, although provision was made for moral and religious instruction. In 1841 a change in policy was made, for in that year an Act was passed which not only provided for the further organization and endowment from provincial funds of the common schools, but enabled a Superintendent of Education to be appointed who was, among other things, to promote uniformity in the conduct of common schools throughout the Provinces. There were to be Commissioners elected for each township and parish, who were to regulate the courses of study to be followed and the books to be used. The chief change in policy made by this Act was that where a body of the inhabitants of a township or parish dissented from the regulations of the Commissioners, they could appoint trustees to take over the powers of common school Commissioners and to establish and maintain common schools "in the manner and subject to the visitation, conditions, rules, and obligations" provided for other common schools, and to receive a due proportion, according to their number, of the moneys coming from taxes and rates for the support of common schools. By a later section the Governor was to appoint a Board of Examiners for each city and town corporate, one-half of them to be Roman Catholics and the other half Protestants, each half to perform the duties in respect of the schools attended by children of its own religion.

Although the term "separate" is not in this Act applied to any school, it is plain that the Act initiated the principle of separate schools. And it is also plain that, so far as control by the State was concerned, the new separate schools were in all material respects under the same control as the ordinary common schools.

In 1843 the policy described was further extended. The supervision of education by the Government of the United Province was developed. The establishment of Protestant and Roman Catholic schools, with teachers of their respective persuasions, was

again provided for, and such schools were in this Act described as "separate" schools. But all such "separate schools" were to be subject, by section 56, to the visitation, conditions, rules, and obligations of common schools. Normal schools for the training of teachers, and model schools in which the principal teachers were to be certified by a normal school, were also provided for. In 1846 this Act was superseded by a new Common Schools Act. A Superintendent of Schools for Upper Canada was to be appointed, whose powers extended, among other things, to the provision and recommendation of uniform and approved text-books in all the schools. There was to be also a Board of Education for the Province. The limits of age for children attending the common schools were to be from four to 16. The principle of separate schools, with a right to receive a share of appropriations proportionate to the number of children attending the respective separate schools, was continued, and the separate schools were declared to be subject to the regulations obtaining with regard to other common schools.

Their Lordships do not think that the statutes which were subsequently passed down to 1855 bear materially on the question before them. It is plain that the policy laid down from the commencement of the nineteenth century up to 1855 was to place all the common schools, including the separate schools, which were merely a special form of these, under ultimate State regulation. By the Grammar Schools Act of 1853 the instruction in a grammar school was to extend to the higher branches of practical English and commercial education, including the elements of natural philosophy and mechanics, and also to Latin, Greek, and mathematics, so as to prepare students for University education. There was also provision for uniting some of the common schools with grammar schools, a provision which indicates that, subject to regulation, there was no very definite limitation imposed on what might be taught in a common school. The tendency of the Legislature up to this point was to bring education in Upper Canada, subject to minor variations, into a single system.

By 1855 the Roman Catholic population in Upper Canada had apparently increased in numbers and importance. For an Act was passed in that year, known as the Taché Act, which put the separate schools for Roman Catholics on a new footing. Meetings could be convened of persons desiring to establish separate schools, and they could select trustees, who became bodies corporate, and might become boards for the united separate schools of a city or town. The trustees were to have all the powers of rating and collection from persons sending children to their schools that the trustees of common schools had in respect of their schools. They were to be bound to perform all duties required of the latter, and their teachers were to be subject to similar regulations. The supporters of the separate schools were exempted from rates for future common schools and common school libraries. Each of the new separate schools was to be entitled to a share in the fund annually granted by the Legislature for the support of the pupils attending it, proportionate to the average numbers attending it. The trustees were to report to the Chief Superintendent of Education as to the average attendance, and he was to determine the share of grants to be received.

Meantime, statutory grants were made for improving the position of the grammar, normal, and model schools. In 1859 a Consolidating Act was passed by what had become the Legislative Council and Assembly for the now United Province of Canada. This Act related to common schools. It did not make any important changes in the law, but aimed, for the most part, at bringing together the existing statutory provisions relating to common schools. Many of the provisions of this Act were embodied by reference in the Act respecting separate schools passed in the same year as stated below. The office of Chief Superintendent of Education was reconstituted. He was to be under the direction of the Governor. The duty of the Chief Superintendent under the General Consolidating Act now cited was, among other things, under section 106, to apportion in each year

"all moneys granted or provided by the Legislature for the support of common schools in Upper Canada, and not otherwise appropriated by law, to the several counties, townships, cities, &c.," according to ratio of population.

There was also to be a Council of Public Instruction of nine persons, appointed by the Governor. Among other things it was to make regulations for the organization, government and discipline of common schools, for the classification of schools and teachers, and for school libraries, and to examine and at its discretion to recommend or disapprove of text-books for the use of schools or school libraries. By section 120 the Governor could authorize the expenditure, in Upper Canada, out of the share of the legislative school grant and the additional monies granted in aid of common and grammar schools "and not otherwise expressly appropriated by law," of certain sums for purposes which were not connected with the separate schools. By section 121, the whole of the remainder of the grants mentioned in section 120 and not exclusively appropriated in its subsections, were to be expended in aid of the common schools according to the provisions of the Act. There was a Conscience Section (129) in the Act.

In the same year (1859) the Separate Schools Act, already referred to, was passed. The main provisions of the Common Schools Act of 1859 were thereby made applicable to the separate schools, but the new Act was designed in sections 18 to 36 to make clear what was the position in particular of Roman Catholic separate schools. The existing provisions for these were repeated with variations, and it was enacted that the trustees of each separate school should perform the same duties and be subject to the same penalties as trustees of common schools. By section 33 every separate school was again to be entitled to a proportionate share in the annual grant for common schools. The trustees were to report the names and attendance of the children attending these schools to the Chief Superintendent, who was thereupon to determine what they were entitled to receive out of the legislative grant.

It is now necessary to refer to the final Separate Schools Act, passed in 1863, which substituted a new set of provisions in the Act of 1859, in place of subsections 18 to 36 which were by this Act repealed. Amongst those new provisions were section 20, a reenactment, with additions, of the old section 33 of the Act of 1859, and a section which their Lordships set out later in this judgment.

The appellants contend that the words in section 106 of the Common Schools Act of 1859 "not otherwise appropriated by law" include the share

of the apportioned fund to which they are entitled under section 20 of the Act of 1863, and show that they are not excluded from sharing in all the moneys appropriated outside those "granted or provided by the Legislature for the support of common schools." But their Lordships think that this is erroneous and that the learned Judges were right who thought that the separate schools are only entitled to share in the moneys "granted by the Legislature for the support of common schools, not otherwise appropriated by law," and also by the Act of 1863 in all other public grants made for common school purposes. The appropriations form, in short, a first debit item against the money grant. After that, after the appropriations have been made and the debit item has been satisfied, comes the second stage—namely, that of apportionment; and it is in this apportionment that the separate schools have their share. The apportionment mentioned in section 106 (2) is not that of the total fund, but only of that fund after the trustees of the separate schools had received their share. This their Lordships regard as the true meaning of the Act.

This statute of 1863 is an important one. Its declared purpose was to restore to Roman Catholics in Upper Canada certain rights in respect of separate schools, and to bring the law respecting separate schools more into harmony with the law respecting common schools. It was in force at Confederation, and it has been spoken of as the charter of the denominational schools. The chief points in it were that separate school sections, whether in the same or in adjoining municipalities (not only, as in the earlier Act, the schools in one ward of a city or town), might be joined in a separate school union section. The teachers of separate schools were to be subject to the same examinations, and to receive certificates of qualification in the same way as common school teachers generally. Supporters of separate schools were to be exempt from payment of municipal rates for common schools and libraries, while they continued to be supporters of separate schools, and not merely for the current year, as under the old legislation. The Roman Catholic separate schools were to be subject to such inspection as might be directed by the Chief Superintendent of Education, and were to be subject also to such regulations as might be imposed from time to time by the Council of Public Instruction for Upper Canada. All Judges, members of the Legislature, heads of local municipal bodies, the Chief Superintendent and the Local Superintendent of Common Schools, and clergymen of the Roman Church, were to be visitors of these separate schools. Section 20 is a section to which much of the argument at their Lordships' Bar was directed. It is in these terms :—

"Every separate school shall be entitled to a share in the fund annually granted by the Legislature of this province for the support of common schools, and shall be entitled also to a share in all other public grants, investments and allotments for common school purposes now made or hereafter to be made by the province or the municipal authorities, according to the average number of pupils attending such school during the twelve next preceding months, or during the number of months which may have elapsed from the establishment of a new separate school, as compared with the whole average number of pupils attending school in the same city, town, village or township."

By section 21 local assessments for common school purposes were excluded from the money to which the separate schools were to be entitled. By section 26 the Roman Catholic separate schools were to be subject to such inspection as might be directed from time to time by the Chief Superintendent and were to be "subject also to such regulations as might be imposed from time to time by the Council of Public Instruction for Upper Canada."

The questions which arise on this Act are, first of all, whether, having regard to the provisions quoted, laws have been enacted by the province which prejudicially affect any legal right or privilege with respect to denominational schools which the Roman Catholic community (a class of persons) had obtained under these statutes at the union. The second question is whether under these statutes the Roman Catholic schools had become entitled at the union to grants which were fixed and could not be taken away or interfered with by the authorities of the province. It has been to render the nature of these questions clear that their Lordships have considered it necessary to examine at some length the history and character of the legislation before Confederation.

The petition of right claims that the suppliants have a legal title to establish and conduct courses of study, with grades of education, such as are now conducted in what are designated as continuation schools, collegiate institutes, and high schools, and that any statutes and regulations purporting to limit or prejudicially affect this title are *ultra vires*. The petition further claims that the class of persons represented by the petitioners are exempt from payment of rates imposed for the support of these organizations when not established by trustees of Roman Catholic separate schools. Consequentially on their claim the petitioners ask that the trustees of the Roman Catholic separate schools for section 2, township of Tiny, may have paid to them certain monies to which it is said that they would have been entitled on the footing that the general claim as to validity is properly established.

The appellants say that the old common schools were allowed to give such education as was found suitable to pupils up to 21, who were thereby prepared for the University, and that the separate schools enjoyed the right thus permitted, and possessed it at Confederation. For this purpose the classes in the schools were in point of fact "graded." The Courts of Ontario have held in the present case that while this grading was *de facto* permitted it was always subject to the regulations by which the State authorities might from time to time alter and define the work in the common (including the separate) schools. Subject to this supervision, "grading" might take place either in the classes of a single school, or by distributing the teaching where there was a group of schools, as in urban municipalities. It is said for the appellants that the only rival of the common and separate schools as they were up to and after Confederation was the grammar school, which was not under the common school Acts, but was always organized under separate statutes. The appellants further argued that an Act passed after Confederation in Ontario in 1871 for the improvement of the common and grammar schools really transformed both the common and the grammar schools. They were re-arranged in two divisions, in one of which free education was to be given up to the age of 12, such division to be called a "public school." The other division was to be a "high school," and to give higher instruction with the aid

of the old grammar school grant and of contributions from local revenues by the municipal authorities. The boards of grammar school trustees were to take over these high schools, and to administer them under regulation.

The appellants contend that the common school was at the union entitled to provide for the public, other than separate school supporters, education of every kind which in the judgment of its trustees it was desirable to give, and that some of the urban common schools were then known as high schools, in which the teaching extended as far as that in the grammar schools, and was substantially that prescribed for the new high schools after the Act of 1871. The new public and high schools were, it is argued, just divisions of pre-Confederation common schools, with compulsory taxation for the new high schools. From such taxation, it is said, the Roman Catholic separate school supporters must be exempt, and they cannot be affected by the combination brought about by the Act of 1871.

Of the post-Confederation continuation schools, which were established by statutes of 1896 and 1908, it is said that these began by being only continuation classes in public schools in municipalities in which no high school had been established, but were by the Act of 1908 made into continuation schools supported by grants and rates. In any view, as they cannot be given the form of separate schools, Roman Catholics should be free from taxation for them. Of collegiate institutes, it is said that they are only certain high schools to which a special name has been given.

The petition also claims that certain sections in various statutes which infringe the principles thus contended for are *ultra vires*.

The provincial Legislature is supreme in matters of education, excepting so far as section 93 of the British North America Act, 1867, restricts its authority. Subsection 1 preserves as they stood any rights and the privileges given in relation to denominational schools by law in 1867. The question, therefore, is whether the province could then, as the law stood, so control the courses of study and the general range and quality of the textbooks used, as to enable the educational authorities of the province to prescribe the gradation of the separate school and the stages in which instruction should be given in it. Examination of the statutes and of the history of the subject have satisfied their Lordships that, while a settlement was come to in 1863 with both Roman Catholics and Protestants, a settlement which, in so far as it remained unaltered at Confederation, must be strictly maintained, the province showed in the wording of the successive earlier statutes the intention to preserve for the rest the power to mould the educational system in the interests of the public at large, as distinguished from any section of it, however important. This consideration does not relieve a Court of law from the obligation to confine itself strictly to the meaning of the words which define the legal rights, but it must be borne in mind in the interpretation of the language relating to regulation.

The examination of the series of statutes relating to education from 1807 onwards has led their Lordships to the view that the province did provide for the regulation, in the full sense, of its common or public schools. It is not necessary to repeat the citations which have already been made. It is sufficient, for showing what regulation means, to refer to section 6 of the Act of 1816, which delegated to the trustees of the common schools the power to make rules and regulations for their good government, the condition of the schools to be reported to the Board of Education, with the branches taught, the state of education, the number of scholars, and things that might benefit the schools directed by the trustees. The Board was to have power to superintend these common schools and to make reports to the Governor, which should be laid before the Legislature. This policy was maintained through the Acts which followed. In 1841 a Superintendent of Education for the Province was appointed to visit the schools and apportion the moneys voted. Common School Commissioners were set up for the various districts, with instructions to regulate for each school the course of study to be followed in it, and to establish general rules for the conduct of the school, to be communicated to the teachers. There were also to be appointed by the Governor boards of examiners (half to be Protestant and half to be Roman Catholic) to examine persons recommended as teachers, and to regulate for each school separately the course of study to be followed, the books to be used, and the general rules for the conduct of the schools. The Act of 1841 enabled, indeed, dissentient inhabitants to call for separate common schools and to appoint their own trustees, but these schools were to be subject to the "visitation, conditions, rules, obligations and liabilities" of ordinary common schools. This provision was repeated in the Act relating to common schools of 1843 (section 56), and in the Act of 1846 (section 33). In the Act of 1850 it is expressly provided (section 19) that the separate schools are to be under the same regulations as to the persons for whom the school is permitted to be established as common schools generally, and by section 9 of the Separate Schools Act of 1863 it is provided that the trustees of separate schools are to perform the same duties and be subject to the same penalties as the trustees of common schools. Section 26 subjects these schools to such inspection as the Chief Superintendent may direct, and also to such regulation as the Council of Public Instruction may impose.

It is this principle and purpose which appear to their Lordships to be dominant through the statutes, and the language used in the sections just quoted has brought this Committee to the conclusion that the power of regulation must be interpreted in a wider sense than that given to it in the judgment of the Chief Justice of Canada. They are not at one with him in thinking that separate school trustees could give secondary education in their schools otherwise than by the permission, express or implied, of the Council of Public Instruction. The separate school was only a special form of common school, and the Council could in the case of each determine the courses to be pursued and the extent of the education to be imparted. A full power of regulation, such as the purpose of the statutes quoted renders appropriate, is what suggests itself, and this is the natural outcome of a scheme which never appears to have really varied. Such expressions as "organisation," "government," "discipline," and "classification," do, in their Lordships' interpretation of them, imply a real control of the separate schools. The duty of the Judicial Committee is simply to interpret the words used. It may be that even if the contention of the appellants as to the scope of subsection 1 is shut out, there will remain to them a remedy of a wholly different kind in the shape of an appeal under subsection 3 to the Governor-General in Council in an administrative capacity. That question does not arise in this appeal and is in no way prejudiced by the conclusion to which their Lordships have come.

What has been said on the subject of *ultra vires* in regard to regulation also applies to the title to fixed grants. The appellants rely on section 20 of the Separate Schools Act of 1863, a section which has been already quoted. It declares every separate school to be entitled to a share in the fund annually granted by the Legislature for the support of common schools, and also to a share in all other public grants, investments, and allotments for common school purposes, according to a defined proportion. It is argued that their share of these grants is being withheld from the appellants and from the Roman Catholic separate schools generally. But the question really turns on whether the authorities of the province had power to make apportionments and payments out of the funds granted before the balance was arrived at which should be available for common school purposes. In their Lordships' opinion it is clear that there was such power. Section 106 of the Common Schools Act of 1859 defined as the duty of the Chief Superintendent to apportion the moneys granted or provided by the Legislature "and not otherwise appropriated by law" in a manner analogous to that subsequently provided by section 20 of the Act of 1863. Section 120 of the 1859 Act enabled the Governor to make a number of appropriations out of the sums granted, and section 121 provides that the whole of the remainder of the grants mentioned and not exclusively appropriated in the earlier sections to be expended in aid of the common schools according to the provisions of the Act.

In their Lordships' view, in the face of the provisions referred to, it is impossible to contend successfully that it was *ultra vires* after Confederation to make new appropriations out of the grants which would diminish what would otherwise have come to the appellants. Whether the case is looked at from the point of view of regulation, or whether it is regarded from that of discretion in power of appropriation, the result is the same. It is indeed true that power to regulate merely does not imply a power to abolish. But the controversy with which this Board has to deal on the present occasion is a long way from abolition. It may be that the new laws will hamper the freedom of the Roman Catholics in their denominational schools. They may conceivably be or have been subjected to injustice of a kind that they can submit to the Governor-General in Council, and through him to the Parliament of Canada. But they are still left with separate schools, which are none the less actual because the liberty of giving secondary and higher education in them may be abridged by regulation. Such an abridgment may be in the usual course when a national system of education has attained a certain stage in its development, and it would be difficult to forgo this power if the grading which may be essential is also to be possible. Their Lordships do not think grading is in itself inconsistent with such rights to separation of schools as were reserved at Confederation.

Copious reference has been made in the argument to the reports, circulars, and instructions which were issued with reference to educational administration by the Chief Superintendent and other officials, from time to time, before Confederation. These documents are not relevant in construing section 93, but they do show what the administrative system was, and, as doing so, they have been legitimately referred to. In the report in 1846, Dr. Ryerson, who was then Assistant Superintendent and shortly afterwards became Chief Superintendent, gave his first account of the system which was being progressively built up. He laid stress on the control of textbooks and on the provision of normal schools in which to train teachers. His activities, and the work of those who were setting themselves to the same task of developing the administrative side of the educational problem, are fully summarized in the elaborate judgment of Mr. Justice Rose who tried the case. While their Lordships do not agree with that learned Judge in the view, taken by himself and the other Ontario Judges, that there was no Province of Canada after 1867 to which the principle of *ultra vires* applied, they observe the thoroughness of his judgment in other respects and the way in which he has covered in detail the field of controversy. He devoted much of his judgment to pointing out that the real question is whether the legislation subsequent to 1871 has prejudicially affected the appellants' rights, firstly, by depriving separate school supporters of the power to conduct such schools as were actually being conducted at Confederation by common school trustees in certain localities, and secondly, by making separate school supporters liable for rates for the support of schools which have been set up to do some of the work which separate schools had a legal right to do.

It is a satisfaction to have had the advantage, in a case so important and complicated as this, of judgments so thorough and exhaustive as these, both in the Supreme Court of Canada and in the Ontario Courts.

For reasons which now sufficiently appear, their Lordships will humbly advise His Majesty that this appeal should be dismissed. There will be no order as to costs.

[Solicitors—Messrs. Lawrence Jones and Co.; Messrs. Blake and Redden.]

K.B. Div.
(Lord Hewart, C.J., Avory and Shearman, JJ.)

1928. May 9.

HAYES v. CURTIS.*

Agriculture—Minimum wage—Deduction—Sale of milk by employer—Set-off price—Agricultural Wages (Regulation) Act, 1924 (14 and 15 Geo. V., c. 37), s. 8 and Orders thereunder.

By an Order of the Agricultural Wages Board minimum rates of wages were fixed for workers in agriculture in the county of Dorset, and by an Order of the Dorset Agricultural Wages Committee it was provided that no benefit or advantage, except a cottage or board and lodging, should be reckoned as payment of wages in lieu of payment in cash.

The respondent employed a cowman under a contract in pursuance of which the employer supplied one pint of new milk daily, which was to be purchased by the cowman. The purchase price, amounting to 1s. 5½d. per week, was deducted from the cowman's wages. The justices found that the arrangement was "in the nature of a sale," and that the cowman "in effect" paid the purchase price by the deduction, but as there was, apart from his allowance, a deficiency in the wages paid they convicted the respondent. On a case stated as to the deduction of the price of milk,

* Reported by J. W. Hall, Esq., Barrister-at-Law.

Held, that the respondent had done the very thing which the statute and Orders forbade. The set-off of the purchase price was simply reckoning the milk as payment in lieu of payment in cash.

This was a case stated by justices for the county of Dorset.

Two informations were preferred on June 28, 1927, by Courtenay Hayes (hereinafter called the appellant) against Bertram Curtis (hereinafter called the respondent) for that he on March 11 and 18, 1927, at Coombe Farm, Sherborne, in the said county, being a person who employed James Ellis Hunt, a worker in agriculture, did not pay wages to the said James Ellis Hunt at a rate not less than the minimum rate as fixed under the provisions of the Agricultural Wages (Regulation) Act, 1924 (14 and 15 Geo. V., c. 37) and the Order of the Agricultural Wages Board made thereunder, No. 216, dated February 21, 1927, and the Orders of the Agricultural Wages Committee for the said county of Dorset, dated April 30, 1926, and February 11, 1927, respectively. The justices convicted the respondent and fined him 10s. in respect of each offence and also ordered him to pay the said James Ellis Hunt the sum of 5s. 4d. a week for a period of six months in accordance with the provisions of section 7, subsection 3, of the Agricultural Wages (Regulation) Act, 1924, and the Orders of the Agricultural Wages Board and the Agricultural Wages Committee for the county of Dorset aforesaid.

Upon the hearing of the said informations, the following facts were proved or admitted :—

(A) That the appellant was a person authorized by law to institute proceedings under the said Agricultural Wages (Regulation) Act, 1924.

(B) That the Orders of the Agricultural Wages Board and the Agricultural Wages Committee for the administrative county of Dorset material to this case were as follows :—

(i.) An Order of the Agricultural Wages Board, No. 216, dated February 21, 1927, prescribing minimum rates of wages.

(ii.) An Order of the Dorset Agricultural Wages Committee (Dorset 6) dated April 30, 1926, defining overtime employment.

(iii.) An Order of the Dorset Agricultural Wages Committee (Dorset 7) dated February 11, 1927, defining the benefits or advantages which might be reckoned as payment of wages in lieu of payment in cash. These were (*a*) a cottage and (*b*) board and lodging. The Order further provided : "Except as in this Order provided, no benefit or advantage shall be reckoned as payment of wages in lieu of payment in cash."

(C) That the respondent in or about the month of March, 1922, entered into a contract with the said James Ellis Hunt, whereby the respondent was to employ the said James Ellis Hunt as a worker in agriculture—namely, a cowman on the respondent's farm, called Coombe Farm, Sherborne, and that the said James Ellis Hunt continued in the service of the respondent until March 25, 1927, under the said contract.

(D) That at all material times the respondent paid to the said James Ellis Hunt a weekly wage of £1 12s. 6½d. and supplied him with one pint of new milk daily.

(E) That the value of the said milk was 2½d. a pint or 1s. 5½d. per week.

(F) That in accordance with the agreement made between the respondent and the said James Ellis Hunt, the said milk was purchased from the respondent, the price thereof being deducted from the weekly cash wages paid to the said James Ellis Hunt.

It was contended on behalf of the appellant :—

(*a*) That as and from the date of the Order of the Dorset Agricultural Wages Committee dated February 11, 1927, the respondent was prohibited from reckoning as payment of wages the value of the milk provided by the respondent, and that the respondent was bound to pay the said James Ellis Hunt such wages in cash without any deduction or set-off for any amount which might be owed by the said James Ellis Hunt.

(*b*) That if there was an agreement made between the respondent and the said James Ellis Hunt to set off the value of the said milk against the weekly cash wages due to the said James Ellis Hunt such deduction would be contrary to the said Orders and to the decisions in the cases of *Williams and Others v. North's Navigation Collieries* (1889), *Limited* (22 *The Times* L.R., 372 ; [1906] A.C., 136) and *Jones v. Harris* (43 *The Times* L.R., 1 ; [1927] 1 K.B., 425).

It was contended on behalf of the respondent that the respondent was entitled to set-off against the wages payable to the said James Ellis Hunt the value of the milk as a debt due to the respondent.

Upon the facts proved or admitted the justices held :—

(*a*) That the supply of the milk to the said James Ellis Hunt was in the nature of a sale ; that the said James Ellis Hunt in effect paid the money for the price of the milk to the respondent out of the moneys received by him as wages from the respondent.

(*b*) That excluding the sum of 1s. 5½d. referred to above, 5s. 4d. was in fact due from the respondent to the said James Ellis Hunt in respect of arrears of wages for the weeks ending March 11 and 18, 1927, respectively.

The justices therefore, in the circumstances, convicted the respondent and imposed upon him a fine of 10s. in each case and ordered him to pay to the said James Ellis Hunt the sum of £6 18s. 8d. in respect of arrears of wages at the rate of 5s. 4d. per week in accordance with section 7 (3) of the Agricultural Wages (Regulation) Act, 1924.

The question upon which the opinion of the Court was desired was whether upon the above statement of facts the said determination was correct in point of law.

Mr. Hubert Hull appeared for the appellant, contending that the justices were wrong in allowing a set-off of 1s. 5½d. a week ; the respondent did not appear and was not represented.

The Lord Chief Justice.—This is a case stated by justices and it raises a rather important point on the working of the Agricultural Wages (Regulation) Act, 1924. By section 8 of that Act the Minister of Agriculture has power to make regulations, and in particular " (*a*) for requiring the wages committees by order to define the benefits or advantages (not being benefits or advantages prohibited by law) which may be reckoned as payment of wages in lieu of payment in cash . . . and for enabling the committees by order to limit or prohibit the reckoning of benefits or advantages as payment of wages in lieu of cash. . . ."

In pursuance of those powers and the Orders made under them, the Dorset Agricultural Wages Committee made a certain Order, dated February 11, 1927, whereby it was ordered that, except as therein provided, no benefit or advantage should be reckoned as payment of wages in lieu of payment in cash. The only benefits permitted to be so reckoned were a

cottage and board and lodging. It was here found that the appellant paid Hunt £1 12s. 6½d. per week, and that that sum fell short of the minimum wage by 5s. 4d. even though credit were given for 1s. 5½d., which was paid, as it was said, for milk. The case finds that the respondent in March, 1922, entered into a contract with this cowman, and that in pursuance of that contract the milk was purchased from the respondent, and the price deducted from the wages paid by the respondent to Hunt. In other words, the price of the milk was treated as part of the wages. The justices found with some hesitation that this deduction was allowable, that it was "in the nature of a sale," and that the cowman "in effect" paid for the milk. It is clear that the respondent has done the very thing which the statute and Orders provide that he is not to do. The appeal, I think, succeeds.

MR. JUSTICE AVORY.—I agree.

MR. JUSTICE SHEARMAN.—I agree.

[Solicitor—The Official Solicitor to the Ministry of Agriculture and Fisheries.]

K.B. Div.
(Lord Hewart, C.J., Avory and Shearman, JJ.)
1928. May 11.

LAWRENCE v. MARTIN.*

Summary Jurisdiction—Local authority—Information preferred by clerk—Case stated—Personal recognizance by clerk—Summary Jurisdiction Act, 1857 (20 and 21 Vict., c. 43), s. 3—Public Health Act, 1875 (38 and 39 Vict., c. 55), s. 259.

Where the clerk to a local authority takes proceedings in his own name under the power conferred by s. 259 of the Public Health Act, 1875, he is the informant, and on a case stated being asked for by him, he is the appellant and the proper person to enter into the recognizance required by s. 3 of the Summary Jurisdiction Act, 1857. It is immaterial that he may have been described in the information as "duly authorized," such words being mere surplusage.

Leyton U.D.C. v. Wilkinson (43 *The Times* L.R., 326 ; [1927] 1 K.B., 853) distinguished.

A preliminary objection was taken by the respondent to the hearing of this case, stated by justices for Hampshire, on the ground that the appellant had not entered into the recognizance required by section 3 of the Summary Jurisdiction Act, 1857.

On November 24, 1927, the Eastleigh and Bishopstoke Urban District Council resolved :—

"Inasmuch as a report dated November 17, 1927, has been received by the Council from their Sanitary Inspector that Frederick George Martin, of Rose Cottage, Crowd-hill, Eastleigh, did on November 17, 1927, at 10.15 a.m., whilst in the employ of the Four Counties Bacon Company (1927), Limited, offend against the by-law numbered 9 in force with respect to slaughterhouses in the urban district of Eastleigh and Bishopstoke, by reason of the said Frederick George Martin proceeding to slaughter four pigs before the same had been effectually stunned with a mechanically operated instrument suitable and sufficient for the purpose as provided by the said by-law numbered 9, that proceedings be taken against the said Frederick George Martin in the Court of Summary Jurisdiction in respect of so offending against the said by-law, and that the Clerk to the Council be authorized to lay the necessary information and do all things necessary in connexion with such proceedings in the name of and on behalf of the Council."

In pursuance of this resolution, an information was preferred by the Clerk to the Council on December 1, 1927, of which the material parts were as follows :—

"The information of Jesse Lawrence, of the parish of Eastleigh in the said county, Clerk to the Urban District Council of Eastleigh and Bishopstoke, duly authorized, who states, &c.—(Signed) J. LAWRENCE."

On this information a summons was issued which was, so far as material, in the form following :—

"To Frederick George Martin.—Information has been laid before me this day by Jesse Lawrence, of the parish of Eastleigh, in the said county, Clerk to the Urban District Council of Eastleigh and Bishopstoke, duly authorized in this behalf, for that you, &c., &c.

You are therefore hereby summoned, &c., &c."

On December 12 the justices heard the matter of the information and dismissed the charge against the defendant. On December 16 Mr. Lawrence gave notice of his desire for a case to be stated, in these terms.

"URBAN DISTRICT OF EASTLEIGH AND BISHOPSTOKE.
Council Offices,
Eastleigh, Hants.

To Colonel Edwin King Perkins, C.B.E., M.P., Colonel Ernest Frederic Hall, C.M.G., and Frederick James Hendy and George Kennett Page, Esquires, four of his Majesty's justices of the peace for the county of Southampton, and to John Colin Dominy, Esquire, the Clerk of the Court of summary jurisdiction sitting at Eastleigh.

Whereas an information where I, the undersigned, Jesse Lawrence, was informant, and Frederick George Martin was defendant, was heard before and determined by the Court of summary jurisdiction sitting at Eastleigh on the twelfth day of December, 1927. Now I, the undersigned, being dissatisfied and aggrieved with your determination upon the hearing of the said information as being erroneous in point of law hereby, pursuant to the provisions of the Summary Jurisdiction Act, 1857, and the Summary Jurisdiction Act, 1879, apply to you to state and sign a case setting forth the facts and grounds of such your determination and the grounds on which the proceedings are questioned, for the opinion thereon of the King's Bench Division of the High Court of Justice.

Dated this sixteenth day of December, 1927.

J. LAWRENCE.
Clerk to the Urban District Council of Eastleigh and Bishopstoke."

On February 9, 1928, the Eastleigh and Bishopstoke U.D.C. passed the following further resolution :—

"Resolved that the Clerk to the Council be authorized to enter into the necessary recognizances on behalf of the Council in the sum of £50, with two sureties each in the sum of £25, in connexion with the case to be stated for the opinion of the High Court of Justice on the decision of the justices, in the recent proceedings for breach of by-laws with respect to slaughterhouses, and that the Council indemnify the two sureties from all responsibility."

* Reported by J. W. HALL, Esq., Barrister-at-Law.

The recognizance entered into by the Clerk on February 13, 1928, was in this form :—

"Be it remembered, that on February 13, 1928, Jesse Lawrence, of the Council offices, Leigh-road, in the parish of Eastleigh, in the said county, Clerk to the Urban District of Eastleigh and Bishopstoke, as Principal, A. B. and C. D., as sureties, personally came before one of his Majesty's justices of the peace for the said county and severally acknowledged themselves to owe to our Sovereign Lord the King the several sums following—that is to say, the said Jesse Lawrence the sum of £50 and the said A. B. and C. D. the sum of £25 each of good and lawful money of Great Britain to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said Lord the King, his heirs and successors, if he, the said Jesse Lawrence, shall fail in the condition indorsed."

The indorsed condition recited that on the twelfth day of December, in the year of our Lord One thousand nine hundred and twenty-seven, an information preferred by Jesse Lawrence, Clerk to the Urban District Council of Eastleigh and Bishopstoke, was dismissed, and that the said Jesse Lawrence being dissatisfied with the said determination as being erroneous in point of law, had applied for a case to be stated.

The condition continued as follows :—"If, therefore, the said Jesse Lawrence, after the said Court of summary jurisdiction shall have stated a case setting forth the facts and the grounds thereof as aforesaid for the opinion of the said Court, shall duly prosecute without delay such his appeal and submit to the judgment of the said Court thereon and pay such costs as may be awarded by the same, then the said recognizance shall be void or else to stand, in full force and virtue."

The notice which accompanied the copy of the case served on the respondent contained the following :—

"Take notice that I, the undersigned Jesse Lawrence, Clerk to the Urban District Council of Eastleigh and Bishopstoke, being the informant in an information preferred by myself . . .

(Signed) J. LAWRENCE.
Clerk to the Urban District Council
of Eastleigh and Bishopstoke."

Mr. Scholefield, K.C., and Mr. Sydney Turner appeared for the appellant ; Mr. Montgomery, K.C., Sir Henry Maddocks, K.C., and Mr. W. J. Gandy, for the respondent.

Counsel for the respondent took a preliminary objection that the recognizance should have been entered into by the Urban District Council, and have bound their goods. They relied on *Leyton U.D.C. v. Wilkinson* (43 *The Times* L.R., 326 ; [1927] 1 K.B., 853) ; the use of the words "duly authorized" in the information and summons showed that the principals were the Council.

THE LORD CHIEF JUSTICE.—In this case the preliminary point is taken that section 3 of the Summary Jurisdiction Act, 1857, has not been complied with. That section requires that the appellant, at the time of applying for a case to be stated by the justices, shall enter into a recognizance to prosecute the appeal. The person upon whom that duty is cast is the appellant. The argument has been put forward that this case is on all fours with *Leyton U.D.C. v. Wilkinson* (43 *The Times* L.R., 326 ; [1927] 1 K.B., 853). But there the ground of complaint was that the appellant, the Leyton U.D.C., had not entered into any recognizance at all. There, *ex concessis*, the appellant was the Urban District Council, and the Urban District Council had not entered into a recognizance. Here, the Urban District Council is not the appellant. The appellant is Mr. Jesse Lawrence, the Clerk. Why is he the appellant ? Because he laid the information and conducted the prosecution and applied for the case to be stated. He was able to do that under section 259 of the Public Health Act, 1875, which provides : "Any local authority may appear before any Court or in any legal proceeding by their clerk, or by any officer or member authorized generally, or in respect of any special proceeding by resolution of such authority, and their clerk, or any officer or member so authorized shall be at liberty to institute and carry on any proceeding which the local authority is authorized to institute and carry on under this Act."

But here it is said that someone, in drafting the information, added the words "duly authorized," and thereby made the clerk a mere agent for the Council, who were the true informants and the proper appellants. It is admitted that those words were not necessary. In my opinion, they are surplusage. The clerk was entitled to lay the information because he was the clerk, and it was not necessary to say that he was authorized. It is argued that because those words were inserted there is a discrepancy between the information and the recognizance, that the recognizance ought to have contained the words "duly authorized," and that the recognizance should have bound the goods and chattels of the Urban District Council. But the clerk was the informant, and he is the appellant, and he, the appellant, has entered into a recognizance. There is, I think, nothing in the point and it ought not to succeed.

MR. JUSTICE AVORY.—I agree.

MR. JUSTICE SHEARMAN.—I agree.

On the merits, the appeal was allowed. No new point of law calling for report was raised.

[Solicitors—Messrs. Lees and Co. ; Messrs. Sharpe, Pritchard and Co., for Messrs. Ryland, Martineau and Co., Birmingham.]

Judicial Committee of the Privy Council.
(Lord Hailsham, L.C., Viscount Haldane, Lord Buckmaster, Lord Wrenbury, and Lord Warrington of Clyffe.)

1928.
June 12.

REX v. CALEDONIAN COLLIERIES, LIMITED.*

Canada — Alberta — Legislation — Validity —Taxation—Whether direct or indirect—British North America Act, 1867 (30 and 31 Vict., c. 3), s. 92 (2)—Mine Owners Tax Act, 1923 (Alberta statute).

The Mine Owners Tax Act, 1923 (Alberta statute), is invalid as it imposed indirect and not direct taxation within s. 92 (2) of the British North America Act, 1867.

Decision of the Supreme Court of Canada ([1927] S.C.R., 257) affirmed.

This was an appeal from a judgment of the Supreme Court of Canada ([1927] S.C.R., 257) on

* Reported by SIR W. J. SOULSBY, Barrister-at-Law.

the question whether the Mine Owners Tax Act, 1923, of the province of Alberta, which imposed upon mine owners a percentage tax upon the gross revenue of their coal mines was *ultra vires* the province as an attempt to impose indirect taxation.

Mr. O. M. Biggar, K.C., (of the Canadian Bar), and the Hon. Geoffrey Lawrence, K.C., were counsel for the province of Alberta ; Mr. D. N. Pritt, K.C., and Mr. H. S. Patterson (of the Canadian Bar), for the respondents.

LORD WARRINGTON of CLYFFE in delivering their Lordships' judgment, said.—This appeal brought by special leave of His Majesty in Council, is from an order dated February 1, 1927, of the Supreme Court of Canada ([1927] S.C.R., 257), whereby that Court, consisting of Chief Justice Anglin, Mr. Justice Duff, Mr. Justice Mignault, Mr. Justice Newcombe, and Mr. Justice Rinfret, unanimously allowed an appeal from the Appellate Division of the Supreme Court of Alberta (22 Alb. L.R., 245) in favour of the present appellant on the ground that in their opinion the tax in question is not a direct tax and therefore one which it was not within the competence of the Province to impose.

The Act in question was passed by the Legislature of Alberta on April 21, 1923. It contained the following material provisions:—

"Section 3. Every mine owner shall from the last day of May, 1918, be subject to a tax upon the gross revenue received by him from his mine.

"Section 4. The said tax shall not be more than 2 per cent. of the said revenue and as determined by the Lieut.-Governor in Council under the provisions of this Act.

"Section 6. On or before the last day of each month each mine owner shall forward to the Minister a sum of money equal to 2 per cent. of the gross revenue received by him from his mine during the next preceding month."

The Act repealed a previous Act of the Province —the Mine Owners Tax Act, 1918—which also imposed a tax upon gross revenue, taking the form in that Act of 5c. per ton of the coal removed from the mine premises. The validity of this tax had been disputed by the mine owners, who had in many cases refused to pay it.

On August 1, 1925, the Lieut.-Governor by and with the advice of the Executive Council ordered that the tax in question should be 2 per cent. of the gross revenue received by the mine owner from his mine.

The respondent company are mine owners within the definition of that term contained in the Act in question. They began business in November, 1923.

They refused to pay the tax, and on August 21, 1925, the action in which the order under appeal was made, was commenced for the purposes of recovering the amount of the tax alleged to be due from them.

Is the taxation in question "direct taxation within the Province" within the meaning of section 92 of the British North America Act, 1867 ?

The question whether a tax is direct or indirect has on many occasions been the subject of decision by this Board, but it is unnecessary to refer to any of these decisions except that of *Bank of Toronto v. Lambe* (3 *The Times* L.R., 742 ; 12 App. Cas., 575), in which Lord Hobhouse, in delivering the judgment of the Board, made some useful observations as to the mode in which the question should be approached. The passage has often been cited, but it is worth while citing it again:—

"First, is the tax a direct tax ? For the argument of this question the opinions of a great many writers on political economy have been cited, and it is quite proper, or rather necessary, to have careful regard to such opinions, as has been said in previous cases before this Board. But it must not be forgotten that the question is a legal one, viz., what the words mean as used in this statute ; whereas the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the words 'direct' and 'indirect' according as they find that the burden of a tax abides more or less with the person who first pays it. This distinction is illustrated very clearly by the quotations from a very able and clear thinker, the late Mr. Fawcett, who, after giving his tests of direct and indirect taxation, makes remarks to the effect that a tax may be made direct or indirect by the position of the taxpayers or by private bargains about its payment. Doubtless, such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it ; and of every direct tax that it affects persons other than the first payers; and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The Legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies."

What then is the general tendency of the tax now in question ?

First it is necessary to ascertain the real nature of the tax.

It is not disputed that, though the tax is called a tax on "gross revenue," such gross revenue is in reality the aggregate of sums received from sales of coal, and is indistinguishable from a tax upon every sum received from the sale of coal.

The respondents are producers of coal, a commodity the subject of commercial transactions. Their Lordships can have no doubt that the general tendency of a tax upon the sums received from the sale of the commodity which they produce and in which they deal is that they would seek to recover it in the price charged to a purchaser. Under particular circumstances the recovery of the tax may, it is true, be economically undesirable or practically impossible, but the general tendency of the tax remains.

It is said on behalf of the appellant that at the time when a sale is made the tax has not become payable and therefore cannot be passed on. Their Lordships cannot accept this contention ; the tax will have to be paid, and there would be no more difficulty in adding to the selling price the amount of the tax in anticipation than there would be if it had been actually paid.

Their Lordships therefore agree with the views expressed by the Judges of the Supreme Court that the tax in question is not a direct tax.

Some attempt was made in argument to support the tax on the ground that it is analogous to an income-tax, which has always been regarded as the typical example of a direct tax; but there are marked distinctions between a tax on gross revenue and a tax on income, which for taxation purposes means gains and profits. There may be considerable gross

revenues, but no income taxable by an income tax in the accepted sense.

For these reasons their Lordships are of opinion that the appeal should be dismissed with costs and they will humbly advise His Majesty accordingly.

[Solicitors—Messrs. Blake and Redden; Messrs. Lawrence Jones and Co.]

Court of Appeal. (Scrutton, Lawrence, and Greer, L.JJ.) 1928. June 8.

HAIN STEAMSHIP COMPANY, LIMITED v. BOARD OF TRADE.*

Ship—Collision—War or marine risk—Meaning of "warlike operation."

During the War a steamer belonging to the appellants was requisitioned by the Shipping Controller under a charterparty providing that the Crown should be liable for all consequences of warlike operations but that the owners were to bear the marine risks. After the Armistice the steamer, when still under requisition, was on a voyage with a mercantile cargo of oats and collided at night with another steamer which had been requisitioned by the United States Government and which was taking mines back to America, probably in the belief that they were no longer required for the purposes of the War. The collision was caused by the negligent navigation of both steamers, and the appellants' steamer was off hire for 99 days as the result of the damage which she suffered. An arbitration took place and the arbitrator found that the collision was a consequence of warlike operations and that therefore the Crown was liable to compensate the appellants.

Held, (1) that there was evidence on which the arbitrator could find that the steamer requisitioned by the United States Government was at the time of the collision performing a warlike operation, and (2) that the fact that the negligent navigation of the appellants' steamer contributed equally to the loss did not relieve the Crown from liability; and therefore the arbitrator's award must be affirmed.

Decision of Rowlatt, J. (44 *The Times* L.R., 344) reversed.

This was an appeal by the Hain Steamship Company, Limited, from the decision of Mr. Justice Rowlatt (44 *The Times* L.R., 344), on a special case stated by an arbitrator, which raised the question whether injuries suffered by a requisitioned ship were or were not the consequence of a warlike operation.

In 1917 the steamship Trevanion, belonging to the appellants, was requisitioned by the Shipping Controller under the charterparty T.99, which provided that the Crown should be liable for all consequences of warlike operations, but that the owners were to bear the marine risks. In December, 1918, the Trevanion was on a voyage from the United States with a cargo of oats, and a steamer, the Roanoke, which had been requisitioned by the United States Government, was on a voyage from England to the United States with a cargo of mines which were no longer required for the purposes of the War. On the night of Christmas Day the steamers came into collision in mid-Atlantic, with the result that the Trevanion was so much damaged that she was off hire for 99 days. The collision was due to the fact that both steamers were being negligently navigated at the time.

The arbitrator considered that he was bound by the decisions in the *Geelong* case—*Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service* (39 *The Times* L.R., 133; [1923] A.C., 191)—and the *Warilda* case—*Attorney-General v. Adelaide Steamship Company, Limited* (39 *The Times* L.R., 333; [1923] A.C., 292)—and held that the collision was a consequence of warlike operations, and that, therefore, the Crown was liable to pay the owners of the Trevanion.

On appeal by the Board of Trade, which had succeeded to the Shipping Controller, against the award, Mr. Justice Rowlatt held that, as hostilities had ceased, the mine-carrying steamer was not engaged in a warlike operation, and that the Crown was not liable.

The owners of the Trevanion appealed.

Mr. Dunlop, K.C. (Mr. Balloch with him), appeared for the appellants; the Attorney-General (Sir Thomas Inskip, K.C.) and Mr. Russell Davies for the Crown.

At the conclusion of the arguments, the Court reserved judgment.

Lord Justice Scrutton, in the course of his judgment, said that two contentions were raised on behalf of the Crown; (1) That the Roanoke was not engaged in a warlike operation; and (2) that the collision was partly caused by the negligence of the Trevanion, and that that prevented the collision from being the consequence of a warlike operation by the Roanoke.

He would deal first with the second point, which could be shortly disposed of. The decision of the House of Lords in the *Warilda* case—*Attorney-General v. Adelaide Steamship Company, Limited* (39 *The Times* L.R., 333; [1923] A.C., 292)—showed that the negligence of a warship engaged in a warlike operation did not prevent the collision caused thereby from being the consequence of a warlike operation. It was only that the warlike operation was negligently conducted, and the collision happening in that warlike operation was still the consequence of it, though the navigation of the warship were negligent. So said the House of Lords.

But, further, it had been decided by the House of Lords that if a loss were equally caused by two risks or perils the person insuring or bearing the risk of one of those perils was not relieved because another peril which he did not insure or bear the risk of equally contributed to the loss. In his opinion, therefore, if the Roanoke was engaged in a warlike operation conducted negligently so as to cause the loss, the persons liable for "war risks" were not excused because the loss was equally caused by the negligence of another ship.

There remained the question whether the Roanoke, some six weeks after the beginning of the Armistice, was engaged in a "warlike operation." The Armistice did not suspend operations of war; the blockade continued, and any German ships at sea were liable to capture. Vessels carrying contraband were captured and condemned by the Prize Court. The state of active war might have revived in full severity. It was admitted that if on Christmas Day, 1918, the Trevanion had struck a floating mine the damage

* Reported by T. W. Morgan and E. J. M. Chaplin, Esqrs., Barristers-at-Law.

would be a consequence of a warlike operation. It was, he understood, admitted that if in the actual collision some mines on board the Roanoke had exploded the damage would be a consequence of a warlike operation.

The arbitrator found that there was no evidence as to the circumstances in, or the purposes for, which the mines were carried by the Roanoke. It was very probable that they were being carried home to the United States in the belief that the War was coming to an end, in which case the problem would be the same as if a warship were carrying the United States troops back to the United States. But the arbitrator also found that the Roanoke was at the time of the collision proceeding "under her aforesaid public employment"—namely, that of a regularly commissioned mine-planter of the United States Navy. He then found as a fact that the Roanoke at the time of the collision was performing a warlike operation. If there was evidence on which he could so find, his finding was conclusive, and he (the Lord Justice) was clear on the facts found that there was such evidence.

The word "warlike" was, no doubt, a difficult word to define. It was not made easier by the fact that in the case of the *Matiana—Green v. British India Steam Navigation Company, Limited—British India Steam Navigation Company, Limited v. Liverpool and London War Risks Insurance Association, Limited* (36 *The Times* L.R., 791 ; [1921] 1 A.C., 99)—the House of Lords, by a majority of three to two, held that requisitioned merchant ships, sailing in convoy under the orders of a warship, sailing without lights, and zig-zagging to avoid submarines, were not performing a "warlike operation." But for that decision one would have thought it clear that the operation was a defensive one against an enemy, carried out because of war, and that both the shepherding warship and the intelligent merchant sheep, who were acting in a most unpeacelike fashion to defend themselves against the enemy, were engaged in a warlike operation.

In the *Warilda* case (*supra*) a hospital ship carrying wounded home, but with means on board to protect herself against submarines, was held to have been engaged in a warlike operation. Lord Cave, in the *Geelong* case—*Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service* (39 *The Times* L.R., 133; [1923] A.C., 191), said:—

"Probably the phrase includes all those operations of a belligerent Power or its agents which form part of or directly lead up to those processes of attack and defence which are of the essence of war."

The question of the Armistice was not before the Lord Chancellor, but he (the Lord Justice) should amend the definition by reading "directly lead up to or are the necessary result of." He would like the definition "pertaining to or directly connected with war."

Marching down the hill under the command of the Duke of York was as much a warlike operation as the march up, and when Johnny came marching home again he was engaged, in his opinion, in as warlike an operation as when he marched out.

However that might be, in his view the findings of the arbitrator were conclusive here, with the result that the appeal would be allowed and the decision of the arbitrator restored, with costs here and below.

Lord Justice Lawrence.—The first question on this appeal is whether the Roanoke at the time of the collision with the Trevanion was engaged in a warlike operation within the meaning of clause 19 of Charterparty T 99.

The arbitrator has found that at the relevant time the Roanoke was in the possession and under the control of the United States of America ; that she was employed by the United States of America solely for naval purposes as a regularly commissioned mine planter of the United States Navy ; and that she was operated by the Navy Department, officered by commissioned officers of the United States Navy and manned by a United States Navy crew.

The arbitrator has further found that at the time of the collision the Roanoke was proceeding "under her aforesaid public employment" from Portland, England, to Hampton Roads, Virginia, having 720 mines on board, but no other cargo and no passengers, and that there was no evidence with regard to the circumstances under or the purposes for which the mines were being carried.

The collision occurred on December 25, 1918, some six weeks after the Armistice. The duration of the Armistice was originally fixed at 36 days, but was subsequently extended from time to time. During the Armistice the blockade conditions set up by the Allied and Associated Powers remained unchanged, and German merchant ships at sea and vessels carrying contraband goods remained liable to capture, but the other hostilities had ceased. The Roanoke had, up to the time of the Armistice, admittedly been employed as a warship engaged in operations of war, and the question is whether she was performing a warlike operation when proceeding, under orders, from England to America, during the temporary and qualified suspension of hostilities at sea brought about by the Armistice.

The owners of the Trevanion contended that the Armistice did not change the character of the Roanoke's employment, and that as the War had not terminated the case was simply one of a warship in the employ of one of the belligerent Powers carrying munitions of war from one place to another during a state of war, and consequently, that the Roanoke was engaged in a warlike operation at the time of the collision.

The Board of Trade, on the other hand, contended that in order to render an operation "warlike" within the meaning of clause 19, it must be one which is performed in furtherance of hostilities, or for combatant purposes, and that an American warship proceeding to America after the cessation of hostilities, with munitions of war which were no longer required, was not engaged in a warlike operation.

The arbitrator, in deciding in favour of the owners of the Trevanion, has found as a fact and held as a question of law that the Roanoke, at the time of collision, was performing a warlike operation.

Mr. Justice Rowlatt has disagreed with this decision and has acceded to the contention of the Board of Trade. Hence the present appeal.

In my opinion, the learned Judge has put too narrow a construction on the expression "warlike operations." In the collocation in which that expression is found, in clause 19, it is plainly wider than the expression "hostilities," which immediately precedes it and to which it is an alternative. A common acceptation of the word "warlike" is "pertaining to war" or "martial," and, in my opinion, it is used in that accepted sense in clause 19. Even so, however, that does not solve the present problem, because it still remains to be considered whether the operation in which the Roanoke was engaged at the

time of the collision can properly be called a warlike operation in the sense in which I have indicated.

In the present case, the Court is spared the more difficult task of determining whether a merchant vessel officered and manned by her owners is engaged in a warlike operation. Here the Court is concerned with the movements of a warship of one of the belligerent Powers, proceeding under orders in a time of war, in the area of the war, and on a mission directly connected with the war. There is no evidence with regard to the object with which the order was given to the Roanoke to proceed to Hampton Roads, and I can well conceive that it would be difficult, if not impossible, for the Board of Trade to have adduced evidence as to what the intention of the American Naval Authority was in giving the order. If one might be allowed to hazard a guess, the giving of the order was probably due to an intelligent anticipation that the peace negotiations with Germany would have a successful issue, but it is quite likely that the naval authority concerned deferred its decision with regard to what to do with the Roanoke, and with the mines which she had on board, until her arrival at Hampton Roads. It must be a matter of pure conjecture whether on her arrival there she would be ordered to remain in harbour with the mines on board, to await the outcome of the peace negotiations, or whether she would be ordered to disembark the mines and either be put out of commission or else be retained in commission and employed in carrying stores or munitions, or otherwise assisting the Fleet which was engaged in the blockade of the German ports and in other operations of war. One point, however, is clear—namely, that at the time of the collision the Roanoke was still in commission as a fully equipped mine-planter, immediately available in the possible event of the resumption of hostilities. It cannot, I think, be open to serious doubt that a warship, while hostilities are still in progress, is engaged in a warlike operation when, after having accomplished a particular operation of war (whether successfully or otherwise), she is returning home because, for the time being, she is no longer required at the place where she was conducting that operation, and even although it is unlikely that she will be required again during the war, and in that sense her return may be said to be a peaceable operation. In my opinion, the fact that the return of a warship from active hostilities is due to the temporary cessation of those hostilities (either in the particular locality where she was engaged or generally) does not operate to remove the return voyage from the category of warlike operations. Such a return of a warship, whether after a victory and undamaged or after a defeat and crippled, is, in my opinion a movement of a combatant force directly connected with its combatant duties, and is therefore a warlike operation.

The authorities cited by counsel do not deal with the effect of the Armistice on the character of the movements of warships, but they contain dicta which have been relied on by counsel on both sides as supporting their respective contentions.

The *Petersham* case and the *Matiana* case (*Britain Steamship Company v. The King* ; *Green v. British India Steam Navigation Company* (36 *The Times* L.R., 791 ; [1921] 1 A.C., 99)) were cases concerned with merchant vessels, both of which were held not to have been engaged in warlike operations at the material times. The actual decisions in those cases have no direct bearing on the question to be determined in the present case, but in the Court of Appeal Lord Justice Atkin said that he was inclined to think that during war almost any action or movement of the combatant forces in the course of their combatant duties, while exercised in the area of war, could be included in the expression "warlike operations" (see 35 *The Times* L.R., at p. 731 ; [1919] 2 K.B., at p. 695) ; and in the House of Lords various dicta concerning the operations of warships seem to support the present appellants' contention to this extent, that they point to the correct view being that in case of a warship the carrying on of actual hostilities is not a necessary ingredient in a warlike operation.

The *Ardgantock* case (*Attorney-General v. Ard Coasters, Limited*) and the *Richard de Larrinaga* case (*Liverpool and London War Risks Insurance Association, Limited v. Richard de Larrinaga* (*Marine Underwriters of*) (37 *The Times* L.R., 692; [1921] 2 A.C., 141) were cases concerned with warships, both of which were held to have been engaged in warlike operations at the material times. In the *Richard de Larrinaga* case (*supra*) it was decided that a warship proceeding to a particular place in order to pick up a convoy was engaged in a warlike operation. Although this decision does not cover the present case, there are some passages in the judgment of Mr. Justice Bailhache (36 *The Times* L.R., 147; [1920] 1 K.B., 700) and in the speeches in the House of Lords which are of assistance here. Mr. Justice Bailhache, in the course of his judgment, expressed the opinion that almost any movement of a warship at sea in war time is a warlike operation, and in the House of Lords the result of the opinions delivered seems to me to be that although there may be occasions when movements of warships in time of war are not warlike operations, yet, speaking generally, when a warship is in time of war at sea, under orders to proceed to a particular spot, to perform a warlike operation, whatever its nature may be, she is engaged in that warlike operation. If, as I think, the disembarkation of such dangerous and destructive munitions of war as live mines (which are never carried at sea except for the purpose of actual warfare) be a warlike operation, then the opinions expressed in the House of Lords in that case would cover the case of the Roanoke, even assuming that the proper inference to be drawn from the facts as found by the arbitrator is that she was proceeding to Hampton Roads in order to disembark the mines which she was carrying when the Armistice was signed.

The *Geelong* case (*Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service* (39 *The Times* L.R., 133; [1923] A.C., 191)) was concerned with the movements of a merchant vessel called the Bonvilston, which, at the material time, was under requisition by the British Government and was carrying ambulance wagons and other Government stores from Mudros to Alexandria. The speeches delivered in the House of Lords were, therefore, directed to the question whether a merchant vessel, under requisition by the British Government, carrying stores in time of war, was or was not engaged in a warlike operation. In such a case, it is, of course, of the utmost importance to ascertain for what particular purpose the stores were being carried, and the decision that the Bonvilston was engaged in a warlike operation was based entirely on the fact found by the arbitrator that the stores were carried from one war base to another war base. Viscount Finlay, in his speech, states that it was immaterial whether the stores were being carried to a

war base for the purpose of warlike operations to be conducted from that base, or were being fetched away from a base because the warlike operations conducted from it had ceased, as in either case the carriage was part of a military operation (see p. 204). This reasoning would *a fortiori* apply to a warship such as the Roanoke when carrying munitions of war from a war base because the warlike operations conducted from that base had temporarily ceased.

A careful perusal of all the opinions delivered in the House of Lords in the cases to which I have referred has satisfied me that they contain nothing which militates against the conclusion at which I have arrived that the Roanoke was at the time of the collision engaged in a warlike operation, but, on the contrary, so far as they go, they support that conclusion. I, therefore, think that the arbitrator was right and that his award ought to be affirmed on this point.

The second and only other question on this appeal is whether the negligent navigation of the Trevanion operates to take the loss out of clause 19 and to free the Board of Trade from liability. The arbitrator has found that the collision was caused by the negligent navigation of both vessels and that both were equally to blame, the negligence consisting in a bad look-out on both vessels, insufficient porting by the Trevanion and failure to keep her course on the part of the Roanoke.

This question is, in my opinion, covered by authority. The *Warilda* case (*Attorney-General v. Adelaide Steamship Company, Limited* (39 *The Times* L.R., 333; [1923] A.C., 292)) decides that when a ship, engaged in a warlike operation, comes into collision with another ship, the loss occasioned by the collision is none the less a consequence of a warlike operation because such operation is negligently conducted. The case of *Reischer v. Borwick* (10 *The Times* L.R., 568; [1894] 2 Q.B., 548 (approved in the House of Lords in *Leyland Shipping Company, Limited v. Norwich Union Fire Insurance Society, Limited* (34 *The Times* L.R., 221; [1918] A.C., 350)) decides that where a loss is due to two concurrent causes, each being as much the proximate cause as the other, it is no answer to a claim under a policy covering one of the causes that the loss was also due to the other cause which was not covered.

Applying the principles laid down in those cases to the facts of the present case, I am of opinion that as the negligent navigation of both vessels continued up to the moment of the collision and as the negligence of the Roanoke while engaged in a warlike operation did not alter the character of that operation, the Board of Trade cannot escape liability under clause 19 by reason of the fact that the loss was also due to the negligent navigation of the Trevanion.

In my judgment, for the reasons stated, the appeal succeeds, and the award of the arbitrator should be restored.

Lord Justice Greer stated the facts and said:—It was not suggested by the owners of the Trevanion that the collision was a consequence of hostilities, inasmuch as it could not be said that either vessel was at the time engaged in active hostilities, but it was said, and I think rightly said, that there was sufficient in the findings of the arbitrator, as stated in the special case, to show that the collision was the result of a warlike operation, that is to say, of the operation that was being carried on by the Roanoke steaming across the Atlantic towards Hampton Roads, carring mines.

Certain of the terms of the Armistice, so far as they related to naval operations, were made part of the special case. These terms included immediate cessation of all hostilities at sea, the surrender of all submarines, the dismantling of certain German surface warships, the right of the Allies to sweep up all minefields and destroy obstructions laid by Germany outside certain territorial waters, and the maintenance of existing blockade conditions (German merchant ships found at sea remaining liable to capture). By clause 34, the duration of the Armistice was 36 days, with powers of extension, and it was thereby agreed that during such period on failure of execution of any of the above clauses the Armistice might be repudiated by one of the contracting parties on 48 hours' previous notice.

It is clear from the terms of the Armistice that it did not put an end to all warlike operations. The continuation of the blockade involved a continuance of some warlike operations; so also, in my judgment, did the sweeping up of mines. The ss. Roanoke was at the time of the collision in all respects a United States war-vessel carrying munitions of war. The American Naval Department were the chartered owners of the vessel in possession, and she was carrying out an operation which, but for the Armistice, could not have been described otherwise than as a warlike operation. If she had been carrying mines during the War for the purpose of planting them she would, beyond question, have been engaged in a warlike operation. If she had been engaged in lifting mines during or immediately after war it would probably be admitted that her operations could properly be described as warlike operations. If she had been carrying mines towards the place where it was intended that they should be laid, this, again, would be a warlike operation. If for some reason it had been decided not to lay the mines in their intended position and the vessel had been carrying them back to a place of safety, till it could be decided in what other position they should be laid, she would still be engaged in a warlike operation. The existence of a temporary suspension of active hostilities at the time does not, in my judgment, convert that which would otherwise be a warlike operation into a peaceable operation. The Armistice only operated as a suspension of certain acts of hostility, and did not put an end to the War or render it impossible for warlike operations to continue. The Roanoke was at the time of the collision engaged in preserving and moving across the Atlantic munitions of war which could at any time, if the Armistice came to an end, be utilized for the purposes of war.

A number of decisions in the House of Lords and the Court of Appeal were discussed in the course of the argument, but on the question I am now considering, reliance was placed by the Attorney-General almost entirely upon the decision in the case which is known as the *Geelong* case (*Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service* (39 *The Times* L.R., 133; [1923] A.C., 191)), as establishing the proposition that in order to bring the carriage of combatant forces or of munitions of war from one area of war to another within the words "warlike operations" it must be proved that they were being so carried for combatant purposes. I assume for the purposes of my judgment that this was part of the *ratio decidendi* of that case, and of the *Petersham* case (*Britain Steamship Company, Limited v. The King* (36 *The Times* L.R., 791; [1921] 1 A.C., 99)), but I think that Mr. Dunlop was right in saying that it had reference to the temporary use of merchant vessels, and not to the carriage of munitions of war by the armed naval forces of one of the belligerents.

In my judgment the arbitrator was not wrong in law in deciding upon the facts stated in the special case, that the Roanoke was engaged at the time of the collision in a warlike operation.

A further point was raised on behalf of the Board of Trade by the Attorney-General. He contended that inasmuch as the negligence of both vessels contributed to the collision, the collision could not be said to be the consequence of the warlike operation which was being negligently conducted by the ss. Roanoke. I do not think that this argument ought to prevail. It was decided in the *Warilda* case (*Attorney-General v. Adelaide Steamship Company, Limited* (39 *The Times* L.R., 333; [1923] A.C., 292)) that the negligence of a vessel which is claiming under clause 19 of charterparty T.99 does not prevent her recovering against the Crown if she was engaged in a warlike operation. Lord Shaw, at page 300, uses these words:—"Faulty navigation on the part of one ship or the other is, of course, the determining factor of responsibility as between the two ships, but, in my opinion, it is not a legitimate factor for the other purpose which is here attempted—namely, of converting a war risk into a sea risk."

This must be equally true where the negligence is the negligence of both ships. The loss of a vessel caused by the entrance of water through a hole in the hull caused by a collision due to negligent navigation is without doubt an ordinary sea risk, and a marine underwriter would, in the absence of an f. c. and s. clause, be liable to indemnify the owner from damage so caused.

The question to be decided is not whether the collision in this case was a sea risk, but whether, being a sea risk, it is one of the risks covered by the exceptions created by the f. c. and s. warranty. If it comes within one or other of the special sea risks described in that clause, it ceases to be a risk for which the owner accepts liability under clause 18, and becomes one for which the charterer accepts liability under clause 19. If what happened is a consequence of a warlike operation it is none the less so because it is also a consequence of faulty navigation of one or other or of both of the colliding vessels. For the purpose of deciding this case negligent navigation of either or of both vessels is irrelevant.

When a collision is caused, as in this case it was, by more than one proximate cause, one of which is a "warlike operation," it seems to me that it is taken out of the sea risk by the warranty, inasmuch as it is a consequence of a warlike operation. This view is in accordance with the decision in *Reischer v. Borwick* (10 *The Times* L.R., 568; [1894] 2 Q.B., 548), and *Leyland Shipping Company, Limited v. Norwich Union Fire Insurance Society, Limited* (34 *The Times* L.R., 221; [1918] A.C., 350), as explained by Lord Sumner in *P. Samuel and Co., Limited v. Dumas* (40 *The Times* L.R., 375; [1924] A.C., 431). At page 467 of the report of the last-named case, Lord Sumner says: "Where a loss is caused by two perils operating simultaneously at the time of loss and one is wholly excluded because the policy is warranted free of it, the question is whether it can be denied that the loss was so caused, for if not the warranty operates. It is then convenient and even necessary to test the application of the term 'proximate' otherwise than by sequence of time, and attempts, more or less successful, have been made to explain it by using other adjectives, but the rule remains. I doubt if the present question would ever have been disposed of in favour of the respondents simply by saying that the hole had to be made first and then the water came in afterwards. Accordingly, the explanation of the two cases cited in this connexion, *Leyland Shipping Company, Limited v. Norwich Union Fire Insurance Society* (*supra*), and *Reischer v. Borwick* (*supra*), I think, is this. In the former, where the question was really one of fact, the pressure of the water overcame the resistance of the bulkhead and the ship filled and sank, but it was the explosion of the torpedo which admitted that pressure to the bulkhead. Thus there were two concurrent causes, proximately operating—namely, the opening of the ship's side and the pressure of the sea—and the policy, being free of the consequences of the former, it was free of this loss, though, if the insurance had been against perils of the sea and no more, the loss would have fallen within it. So in the other case. The policy was against collision and damage received in collision only, and it could not be denied that the vessel was damaged in collision. It took two things to sink her; the hole made in collision and water flowing into it. They were both immediate and concurrent causes, and if either was within the policy, the assured recovered."

For these reasons, I think that the appeal should be allowed.

The order of the Court was that the award of the arbitrator be restored with costs of the appeal and in the Court below.

[Solicitors—Messrs. Thomas Cooper and Co.; the Solicitor to the Board of Trade.]

Court of Appeal.
(Lord Hanworth, M.R., Lawrence and Russell, L.JJ.)
1928. June 11.

MANCHESTER CORPORATION v. AUDENSHAW URBAN DISTRICT COUNCIL.*

Highways—Road maintenance—Obligation imposed by private Act—Increase of traffic—Extent of obligation—Manchester Corporation Waterworks and Improvement Act, 1875 (38 and 39 Vict., c. clxi.), s. 14 (ii.).

The plaintiffs were empowered by statute to make a road in accordance with the provisions of the Act and to the reasonable satisfaction of the defendants' predecessors. The road was duly made and completed in 1878, in accordance with the Act and to the satisfaction of the defendants' predecessors, but the traffic and cost of maintenance had of late years greatly increased, and the road had fallen into disrepair. Eve, J., held, following *Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. Attorney-General* (31 *The Times* L.R., 254; [1915] A.C., 654) that the plaintiffs were only liable to repair the road according to the standard of requirement of 1878, but that as that standard would not last long under the strain of modern traffic it would be wasteful to order them to do it, and there must be an inquiry as to what contribution the plaintiffs should make towards the cost of durable repairs.

Held, on appeal, that the Judge had correctly estimated the plaintiffs' liability, but that there

* Reported by G. T. WHITFIELD-HAYES, Esq., Barrister-at-Law.

was no jurisdiction to make any other order or to direct the proposed inquiry.

Decision of Eve, J. (44 *The Times* L.R., 88 ; [1928] 1 Ch., 127), affirmed with a variation.

This was an appeal from a decision of Mr. Justice Eve (44 *The Times* L.R., 88 ; [1928] 1 Ch., 127).

The plaintiffs claimed a declaration with regard to a road constructed in the areas of the defendants, the Audenshaw Urban District Council and the Denton Urban District Council under the Manchester Corporation Waterworks and Improvement Act, 1875, that the extent of the plaintiffs' liability as to the maintenance thereof was determined by that Act and that they were not required to maintain a better road.

The road had been constructed by the plaintiffs in 1878 under powers conferred by the Act whereby the plaintiffs were authorized to make, construct, lay down, and maintain the reservoirs and roads (including the road in question) there enumerated, and when and as soon as the same were completed and opened to the public to stop up and appropriate to the purposes of the new reservoirs (*inter alia*) a portion of Taylor-lane. By section 14 (ii.) of the Act it was enacted that the road in question should be at all times thereafter maintained by and at the expense of the plaintiffs and should be of the width of 14 yards with footways as therein mentioned and that the carriage-way of the road should be macadamized.

In April, 1878, the road was completed in accordance with the statutory requirements and to the satisfaction of the two local boards. It served a district then and for many years thereafter of an agricultural character. It was satisfactorily maintained by the plaintiffs down to a date shortly after the commencement of the War.

The nature of the traffic had from about that time changed and it had been apparent that an ordinary waterbound macadamized road was not adequate for the increasing traffic of the district with the change from slow-moving traffic to fast motor traffic. The question was how the cost of reconstructing the road to suit modern traffic was to be borne.

The defendants pleaded that the plaintiffs' obligation was to maintain the road in a state adequate for the traffic of the present day and (in the alternative) they counterclaimed that the plaintiffs were at any rate liable to maintain the macadamized carriage-way as specified in the Act, whatever might be the nature of the present-day traffic.

Mr. Justice Eve held that on the construction of the Act the plaintiffs were liable only to maintain the road in the condition in which it was completed in 1878, and that they were not liable for the cost of providing for all modern means of locomotion by reconstructing the fabric of the road. He gave leave to the defendants to apply for an inquiry as to any contribution which they might allege ought to be made by the plaintiffs to the cost of re-conditioning the road.

The defendants appealed.

Mr. Scholefield, K.C., and Mr. H. A. Hill appeared for the appellants ; and Sir Herbert Cunliffe, K.C., and Mr. John Bennett for the respondents.

The MASTER OF THE ROLLS, after stating the facts, said that the findings in the Court below did not form any basis upon which it could be said that the plaintiffs had ceased to be liable under section 14 (ii.) of their Act for the maintenance of the road. It was possible for them to repair it. "The road is not incapable of being repaired," said Mr. Justice Eve, "as a water-bound macadamized road." There was therefore no reason for saying that that liability, which primarily rested upon the Corporation, did not continue at the present time, and he (the Master of the Rolls) could not see how their liability could be interpreted in the mere terms of a contribution to be made to some authority which had not the control at the present time. Mr. Justice Eve said, in his judgment, that reconstruction work was called for ; that the maintaining of the road as in 1878 was of no practical use; that that did not free the plaintiffs from all liability to repair, and that the failure of the plaintiffs to spend money on the road during recent years might have increased the necessity for repair. He therefore made an order that the defendants might apply for an inquiry as to the contribution which ought to be made by the plaintiffs towards the reconditioning of the road. He therefore carried to its conclusion the view which he held, based on the economic point of view. He established the liability of the plaintiffs, but it was to be a liability by way of contribution towards the proper reconditioning of the road.

Was that judgment right ? The plaintiffs were the owners of the road, and yet, somehow or other, the defendants were to repair the road, to re-make the road, and the plaintiffs were only to make a contribution. It appeared to him (the Master of the Rolls) that that judgment and the inquiry were based upon a confusion of thought, and did not allow for the continuance of the liability of the plaintiffs in respect of what Mr. Justice Eve called "this Corporation Road," which the plaintiffs still had to maintain.

The Court must therefore consider whether any modification ought to be made by virtue of the authorities cited. In *Sharpness New Docks and Gloucester and Birmingham Navigation Company v. Attorney-General* (31 *The Times* L.R., 254; [1915] A.C. 654)—a case of the greatest importance, the House of Lords held that there was no liability upon the undertakers to maintain their bridges so as to be suitable for the future traffic which had arisen after the bridges had been constructed. "Sufficient to bear the ordinary traffic of the district and the traffic which might reasonably be expected to pass along the said highways, having regard to the present character and needs of the district"—that was what was sought to be enforced. The smaller question whether they were bound to keep the bridges in the condition in which they had been approved by the Commissioners was not raised. It seemed that it was treated *sub silentio* as a point which of course remained. Lord Haldane said (31 *The Times* L.R., at p. 255; [1915] A.C., at p. 662): "The Court of Appeal seem to have thought that the obligation under these words to maintain and repair might have imposed an obligation to make new works, by analogy to the general obligation of the county authority to keep a highway in such a condition that it could carry not only the traffic of the period at which it was made, but heavier traffic coming into existence subsequently. But section 61 of the Act which we have to construe in the present case does not appear to me to admit of resort to any presumption of intention based on the analogy of the common law." Therefore what was ultimately determined in the *Sharpness* case (*supra*) was the duty imposed by the statute, which, by imposing a statutory duty, excluded the presumption of the common law. The decision, as a whole, was that, by virtue of the terms

of the statute, there was a liability to repair, and to repair only in accordance with and up to the standard accepted by the Commissioners when the bridges were built, with the result that the House negatived the claim for a declaration that the appellants were bound to maintain and keep in repair the bridges so that they might be able to bear the traffic expected to pass along the highways in view of the present character and needs of the district.

His Lordship referred to *Attorney-General for Ireland v. Lagan Navigation Company* ([1924] A.C., 877) and *Attorney-General v. Great Northern Railway Company* (32 *The Times* L.R., 674; [1916] 2 A.C., 356), and said that the *Sharpness* case (*supra*) had been applied for the purpose of saying that the measure of liability was that imposed by the statute; not the increased liability arising since the statute was passed. Applying that to the present appeal the Corporation had a duty to maintain the road at a standard fit for the traffic of 1878. There was no finding that they had done so. All that was said was that by reason of the increased traffic they ought not to be bound to repair at all, or else that, by reason of the increase of traffic, it would be unwise, economically or practically, to hold them liable to a duty which still remained upon them by statute. To him (Lord Hanworth) it seemed that they, and they alone, had a duty to repair the road. It was said that to repair according to the standard of 1878 would last only five, some said ten, years. If it lasted only five years the Corporation would have to repair it again, and it might be wiser upon their part to undertake more permanent repairs, and if they wished to do so, *Sandgate Urban District Council v. Kent County Council* (15 *The Times* L.R., 59) showed that it would be within their powers to take that course and to charge their ratepayers with it.

But the point to be determined was whether their liability under their Act had terminated or increased, and to him (the Master of the Rolls) it seemed that it had not. They were under a liability to repair according to the standard of 1878, whether it might last a longer or shorter time. Whether that might or might not be the most economical or practical way of dealing with the matter, it was the legal liability. To that extent the judgment of Mr. Justice Eve must be varied and the direction for an inquiry struck out.

Lord Justice Lawrence agreed. He said that the defendants in the action in their anxiety to make the Corporation construct a better and a stronger road had endeavoured to enforce that view on the Court below. They were wrong, and Mr. Justice Eve was right in dismissing their counterclaim to that effect with costs. But there could hardly be any justification for the assumption that if they so failed they would themselves undertake the construction of such a road, and would convert the liability of the Corporation under the statute into a money contribution towards the making of such a road.

The learned Judge below had founded his judgment on the *Sharpness* case (31 *The Times* L.R., 254; [1915] A.C., 654). He applied the reasoning in that case to the present case, and held that the standard by which the liability of the Corporation must be judged was neither the ordinary traffic when the road was constructed nor the ordinary traffic of to-day, but the road itself as determined by the Act. That seemed to be right, but the learned Judge had gone on to say that no Court would enforce such an obligation, because it would lead to extravagant and wasteful expenditure. Yet it was proved that the road was not incapable of being repaired according to the standard of 1878. There was a conflict of evidence as to how long such a road would last, but that only showed that the liability to repair might be heavier than when the road was originally constructed. The Corporation had power to make a road which would last longer, but whether they would do so was not for the Court to determine. There might, of course, be an agreement between the parties upon the lines indicated in the judgment below that the local authorities should construct the road and receive a contribution from the Corporation, but the Court could not assume that such an agreement would be entered into and direct an inquiry for which neither party had asked. The order of the learned Judge should therefore be varied as stated by the Master of the Rolls.

Lord Justice Russell said that there was no doubt that the liability of the plaintiffs in the action was determined by the *Sharpness* case (31 *The Times* L.R., 254; [1915] A.C., 654). Their liability was defined by the Act of 1875, and it was a liability to maintain the road as a road of the class and durability described in the Act of 1875, and as it was in fact constructed in 1878. So far, the judgment of Mr. Justice Eve was perfectly correct. But when he directed an inquiry as to the sum which the Corporation should contribute to the reconditioning of the road by the two Councils he was wrong. There was in that order a suggestion that the Corporation were not liable to repair the road, and that the liability to repair rested with the Councils. The judgment must therefore be varied in the manner suggested.

[Solicitors—Messrs. Stibbard, Gibson and Co., for Mr. Rupert Wood, Ashton-under-Lyne and Mr. William Richards, Denton; Messrs. Sharpe, Pritchard and Co., for Mr. P. M. Heath, Manchester.

K.B. Div. (Rowlatt, J.) } 1928. June 15.

ROYAL INSURANCE COMPANY, LIMITED v. STEPHEN.*

Revenue—Income-tax—Deductions from profits—Railway investments—Effect of grouping—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. D., Case I.

The appellants, an insurance company, had investments in British railway stocks, and it was admitted by the Crown that any loss suffered by the appellants on such investments was deductible from the appellants' profits for purposes of income-tax. The result of the Railways Act, 1921, was that the appellants received in exchange for their various railway holdings stocks in the four amalgamated railway companies created by that Act. The market value of these new stocks was less than the original cost to the appellants of the old stocks, and the appellants claimed that the loss so occasioned to them should be allowed as a deduction from their profits for 1922 and 1923 in computing

* Reported by T. R. F. Butler, Esq., Barrister-at-Law.

their income-tax liability under Case I. of Schedule D.

Held, that as the effect of what had happened was that the old investments had been closed and realized and new investments had been begun, the appellants were entitled to the deduction claimed.

This was a case stated by the Special Commissioners of Income Tax.

The appellant company appealed to the Special Commissioners against additional assessments to income-tax made under Schedule D by the Additional Commissioners for the division of Liverpool, in the sum of £38,123 for the year ending April 5, 1924, in the sum of £276,328 for the year ending April 5, 1925, and in the sum of £354,790 for the year ending April 5, 1926, in respect of the company's profits other than profits arising from life assurance.

In addition to their life assurance business (which was not material to the present case), the appellants carried on the business of fire, accident, and general insurance, and in the course of that business had occasion to make large investments, which were varied from time to time. Those investments at all material times included a great variety of stocks of railway companies. Any profit realized or loss suffered by the appellants on any such investments was admitted by the appellants and the Crown respectively to be an item to be included in or deducted from the appellants' profits for the purposes of income-tax. The appellants claimed to have suffered in the years 1922 and 1923 losses amounting to £753,971 on certain investments and claimed that those losses—namely, £39,414 in the year 1922 and £714,557 in the year 1923—should be allowed as deductions from their profits for the years 1922 and 1923 in computing their income-tax liability under Case I. of Schedule D for the years ending April 5, 1924, April 5, 1925, and April 5, 1926.

The only question for the Court was whether those two sums of £39,414 and £714,557 were properly allowable as deductions from the appellants' profits for the purposes of Case I. of Schedule D.

Under the Railways Act, 1921, the railway companies of Great Britain were formed into four groups, the principal railway companies in each group (in the Act referred to as "constituent companies") being amalgamated and other smaller companies (in the Act referred to as "subsidiary companies") being absorbed by one or other of the amalgamated concerns. Speaking in general terms the constituent and the subsidiary companies were wound up and the holders of stocks therein received in exchange stocks in one of the four great companies (in the Act referred to as the "amalgamated companies").

The various stocks received by the appellants in the amalgamated companies in exchange for the stocks held by them in the constituent and subsidiary companies had a definite market value on the date of the exchange. The cash paid to the appellants for fractions of stock held in the constituent and subsidiary companies was not based on the nominal or market value of those stocks, but on the market value of the new stocks in the amalgamated companies received in exchange.

It was contended by counsel for the appellants (*a*) that on the substitution of the stocks in the new companies for their holdings in the old companies the appellants, in fact and in law, suffered the loss claimed by way of deduction; (*b*) that the transaction was none the less a realization of investments because the old stocks were (except for fractions) not sold for cash; (*c*) that the appellants had made a loss on the realization, because the new stocks had a definite market value which was less than the original cost to the appellants of the old stocks, and the assessments should be reduced accordingly; and (*d*) that the amount of the loss suffered was the difference between the cost price to the appellants of the old stock and the market value of the stock received in the amalgamated companies.

For the Crown it was contended, *inter alia,* (*a*) that the amounts claimed as deductions were not deductible in computing the appellants' profits; (*b*) that there was no sale or realization of investments, but merely a substitution of securities; (*c*) that the amounts claimed as deductions were not an expense incurred in earning the appellants' profits; (*d*) that the appellants' claim was, in effect, a claim to write down the book value of investments which the appellants still held, and that such writing down was not a permissible deduction for income-tax purposes; and (*e*) that the appellants had not suffered any loss, and therefore the assessments should be confirmed.

The Special Commissioners held that the stocks held by the appellants in companies amalgamated or absorbed under the Railways Act, 1921, and the schemes made thereunder, were not realized when those stocks were exchanged for stocks in the four "amalgamated" companies, and that the amount claimed by the appellants to be the loss arising from the alleged realization was not a proper deduction to be made in computing the balance of the appellants' profits and gains for the purpose of Case I. of Schedule D. They accordingly confirmed the assessments.

The company appealed.

Mr. Latter, K.C., and Mr. H. P. Glover appeared for the appellants; the Solicitor-General (Sir Boyd Merriman, K.C.) and Mr. R. P. Hills for the Crown.

Mr. Justice Rowlatt, in giving judgment, said that the question was whether the old securities had been "realized" by the appellants. It was clear that the change of securities had been effected on a money basis, and that the appellants had now got stocks and shares which gave them an interest in the entirety of a new undertaking, of which only a very small part was represented by the shares that had disappeared. The new shares were not always of the same denomination or character as the old.

The Special Commissioners, in deciding in favour of the Crown, must be taken to have adopted the broad view that the appellants had not recalled their money, and that there had only been a change in the form of their investments. That argument had attracted him for some time; but, on the whole, he was of opinion that the appellants were right in their contention. Underlying the question was the principle that, while an investment was fluctuating, no notice could be taken of that fluctuation for income-tax purposes. But when that state of affairs ended, and when that investment ceased to figure in the appellant company's assets so that it became known what the holding of that investment had meant to them, and a start was made with a new investment, the position was different. Here the appellants had finished with their investments in the companies which had disappeared, and it could be calculated exactly in money what the holding of those investments had meant to them; the old securities would fluctuate no more, and what would fluctuate for the future would be different shares

in new companies. Looking at the matter from that point of view, the old investments had been closed and realized, and new investments had been begun.

He therefore came to the conclusion, with some degree of hesitation, as the point was a nice one, that the appellants were entitled to succeed. The appeal would be allowed, with costs.

[Solicitors—Messrs. Batesons and Co., Liverpool; the Solicitor of Inland Revenue.]

Judicial Committee of the Privy Council. (Lord Hailsham, L.C., Lord Buckmaster, and Lord Warrington of Clyffe.) 1928. June 19.

ESHUGBAYI ELEKO v. NIGERIA GOVERNMENT OFFICER AND ANOTHER.*

Habeas Corpus — Successive applications—To different Courts or to different Judges of same Court.

Although since the Supreme Court of Judicature Act, 1873, the several Superior Courts have been combined in one High Court of Justice each Judge of that Court still has jurisdiction to entertain an application for a writ of *habeas corpus* in term time or in vacation and is bound to hear and determine such an application on its merits, notwithstanding that some other Judge has already refused a similar application; and the same principle applies in the case of the Judges of the Supreme Court of Nigeria.

This was an appeal from a judgment of the Supreme Court of Nigeria which affirmed decisions of Mr. Justice Tew refusing to grant a writ of *habeas corpus* to a native chief against whom the Acting Governor purported to make an order of deportation from Lagos to Oyo. The appellant had already made an application to the Acting Chief Justice, which had also been refused.

Mr. Montgomery, K.C., and Mr. Horace Douglas appeared for the appellant; the Hon. Stafford Cripps, K.C., Mr. J. C. Howard (Solicitor-General for Nigeria), and Mr. Sydney E. Pocock for the respondents.

The Lord Chancellor (Lord Hailsham) delivered their Lordships' judgment as follows:—The facts which give rise to this appeal can be shortly stated; but the question of law involved is one of grave constitutional importance to his Majesty's subjects in this country as well as in the oversea Dominions.

By the Deposed Chiefs' Removal Ordinance of 1917, as amended in 1925, it was provided that:—

"(1) When a native chief or a native holding any office under a native administration or by virtue of any native law or custom has been deposed or removed from his office by or with the sanction of the Governor . . . the Governor may: (*a*) if native law and custom shall require that such deposed chief or native shall leave the area over which he exercised jurisdiction or influence by virtue of his chieftaincy or office . . . by an Order under his hand direct that such chief or native shall, within such time as shall be specified in the Order, leave the area over which he had exercised jurisdiction or influence and such other part of Nigeria adjacent thereto as may be specified in the Order, and that he shall not return to such area or part without the consent of the Governor. . . . (2) Any deposed chief or native who shall refuse or neglect to leave such area or part of Nigeria as aforesaid, as directed by the Governor, . . . shall be liable to imprisonment for six months, and the Governor may by writing under his hand and seal order such deposed chief or native to be deported, either forthwith or on the expiration of any term of imprisonment to which he may have been sentenced as aforesaid, to such part of Nigeria as the Governor may by such Order direct."

On August 6, 1925, the Acting Governor purported to make an order under the Ordinance in the following terms:—

"Whereas Eshugbayi, a native chief holding the office of Eleko in the Colony, has with my sanction been deposed and removed from his office, and whereas native law and custom requires that the said Eshugbayi shall leave the area over which he exercised influence by virtue of his office: Now therefore I do hereby direct that the said Eshugbayi shall leave the said Colony and the Province of Abeokuta Ijebu and Ondo within twenty-four hours of the service of this Order, and that he shall not return to any of the said areas without my consent."

On August 8, 1925, the acting Governor made a further order reciting the order of August 6, reciting that the appellant had refused or neglected to comply with it, and ordering that the appellant should be deported forthwith to Oyo, in the Province of Oyo.

Immediately on service of the order of August 6 the appellant gave notice of motion for leave to set aside the order and to stay execution on it. This motion was heard on August 7 and 8 by the acting Chief Justice of Nigeria, and was dismissed on August 8. On the dismissal of the motion the appellant gave notice of motion on August 8 for leave to issue a writ of *habeas corpus,* and on August 10 leave was granted for a rule *nisi* for a writ of *habeas corpus* returnable on August 13. On that day cause was shown against the rule and the rule was discharged on technical grounds without going into the merits. Meanwhile the appellant on the same August 8 had issued a writ against the acting Governor and the Chief Secretary of the Government of Nigeria claiming a declaration that the order of August 6, 1925, was void, and asking for an injunction to restrain the defendants from taking any steps under the Order. On August 19 the Attorney-General for Nigeria moved to stay or dismiss this action as being frivolous and vexatious and an abuse of the process of the Court. The motion was heard by the acting Chief Justice, and on September 7, 1925, he ordered that the action should be dismissed on those grounds.

On September 18, 1925, the appellant gave a fresh notice of motion for leave to issue a writ of *habeas corpus,* and on October 12, 1925, the acting Chief Justice gave judgment refusing the motion. The Judge held that the orders of August 6 and 8 had been validly made and that the detention of the appellant was, therefore, lawful. On December 4, 1925, the appellant gave a fresh notice of motion for a writ of *habeas corpus.* This motion was heard before Mr. Justice Tew on December 8, 1925, when the Attorney-General for Nigeria took a preliminary

* Reported by Sir W. J. Soulsby, Barrister-at-Law.

objection that a similar application based on the same material had been made by the appellant, and had been dismissed by the acting Chief Justice, and that in view of that refusal the application could not be entertained. On December 14, 1925, the Judge gave judgment upholding the objection and dismissing the motion on that ground.

The appellant appealed against this decision and, on the hearing of the appeal, took the point that there was no evidence that the previous application had been made or that it had been based on the same ground. The Court directed that the case should be returned to the Judge that evidence might be filed on these points. Accordingly, on March 9, 1926, an affidavit was filed by the Solicitor-General for Nigeria, and on March 15, 1926, Mr. Justice Tew re-heard the motion and dismissed it on the same ground as before. From this decision the appellant again appealed, and on June 1, 1926, the Full Court, in a considered judgment, dismissed the appeal and upheld the view of Mr. Justice Tew that the preliminary objection prevailed and that he had no jurisdiction to entertain the application. It is from this decision that the present appeal is brought before the Board.

On the hearing before this Board the appellant contended in the first place that there never had been a decision on the merits of his application, and that the dismissal of the second motion for a *habeas corpus* by the acting Chief Justice had been merely on technical grounds. Even if this contention were relevant, it was not in fact made out. In their Lordships' view it is clear from a perusal of the judgment that the merits were most carefully considered by the acting Chief Justice, and that the refusal was based expressly on the Judge's view on the merits of the application.

But it was further contended on behalf of the appellant that by the common law of this country, which applies in Nigeria, it is the right of any imprisoned person to apply successively to every tribunal competent to issue a writ of *habeas corpus*, and that each tribunal must determine such an application upon its merits unfettered by the decision of any other tribunal of co-ordinate jurisdiction, even if the grounds urged are exactly the same.

On behalf of the respondents, Mr. Stafford Cripps admitted the existence of the right to make successive applications, but he argued that the applications must be to different Courts. He pointed out that in the present case each application had been made to the Supreme Court of Nigeria, and he contended that since that Court had determined the matter by dismissing the application on October 12, no fresh application based upon the same materials could be entertained by that Court. In support of this argument he cited the language of Lord Esher in *Ex parte Cox* (4 *The Times* L.R., 81 ; 20 Q.B.D., 1 at p. 13):—

"It is not correct to say that under the old system there could be an application to all the judges in succession. There could be an application to all the Courts in succession."

He (counsel) pointed out that, although the decision of the Court of Appeal had been over-ruled in the House of Lords, where the case is reported under the name of *Cox v. Hakes* (6 *The Times* L.R., 465; 15 App. Cas., 506), none of the Lords had dissented from Lord Esher's statement of the law, and Lord Bramwell's language at page 523 seemed to indicate that his view of the old practice was the same. Counsel further called attention to the fact that no instance could be found in the books of applications being made to successive Judges of the same Court, and he cited decisions in New Zealand in *Ex parte Bouvy* (18 N.Z.L.R., 601), and of the Court of Appeal in Canada in *In re Loo Len* No. 2 ([1924] 1 Dom. L.R., 910) to the same effect.

This constitutes a formidable body of judicial opinion, and their Lordships have thought it right, therefore, to examine with some care the earlier history of the writ. This will be found set out in Hale's Pleas of the Crown, Vol. II., p. 143; in Bacon's Abridgment under the title "Habeas Corpus, Section B"; in Sir William Blackstone's Commentaries, Vol. III., p. 131 *et seq.*; and in the discussion of Blackstone's Opinion appearing in Lord Eldon's judgment in *Crowley's* case (2 Swanston, 1 at p. 39 *et seq.*).

From these authorities it appears that the writ of *habeas corpus* was originally issuable out of the Court of King's Bench and out of the Court of Chancery; but that in very early days the Courts of Common Pleas and Exchequer had claimed the right to issue the writ in protection of their own officers and suitors, and that this practice had been gradually extended to other cases. In the 17th century the Habeas Corpus Act, 1640 (16 Chas. I., c. 10), expressly recognizes the right and duty of the Court of Common Pleas to order the writ to issue; and the Habeas Corpus Act, 1679 (31 Chas. II., c. 2), s. 9, enacts that it shall be lawful to move and obtain *habeas corpus* as well out of the High Court of Chancery or Court of Exchequer as out of the Courts of King's Bench or Common Pleas or either of them. This latter Act further provided that the Lord Chancellor or any one of His Majesty's Justices might grant a *habeas corpus* in vacation, and imposed heavy penalties on any Judge who wrongfully refused to entertain the application.

It was conceded for the respondents that under the terms of this statute application could be made in vacation to successive Judges of the same Court. This led to the curious result that on the respondents' argument if application were made in vacation it could be renewed to each Judge of the Court, but if it were made in term it could only be made once to the Court of Chancery and once to each of the three Courts of Common Law. But a far more serious consequence of the respondents' argument would be the effect on the right to apply for this writ of the Supreme Court of Judicature Act of 1873. That statute combined into one Court the old High Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas, and the Court of Exchequer, together with the Admiralty and Probate Courts and the Court for Divorce and Matrimonial Causes.

If, therefore, the respondents are right in contending that an application for a writ of *habeas corpus* can only be entertained once by any one Court, it necessarily follows that the effect of the Supreme Court of Judicature Act, 1873, must have been to deprive the subject of the right which he had previously enjoyed of applying successively to the Court of Chancery and to each of the three Common Law Courts, and to limit him in future to one application to the Supreme Court of Judicature. Their Lordships would be reluctant to reach such a conclusion unless compelled to do so by clear words. The writ of *habeas corpus* is a high prerogative writ for the protection of the liberty of the subject, and it would be a startling result if a statute, enacted primarily for simplification of procedure, should have materially cut down that protection. But, in fact,

their Lordships do not think that the Act has had this result, or that the contention of the respondents is well founded.

It is true that there is no reported case before the year 1873 of applications being made to successive Judges of the same Court, but it must be remembered that the Common Law Courts usually sat *in banco* so that an application to the Court was in effect an application to all the Judges of the Court sitting together. There is a precedent for application being made to a Judge of the Court of Exchequer sitting in Chambers and a subsequent application being made to the Court of Exchequer in the case of *Ex parte Partington* (13 M. and W., 679), where Baron Parke says:—

"This case has already been before the Court of Queen's Bench on the return of a *habeas corpus*, and before my Lord Chief Baron at Chambers on a subsequent application for a similar writ. In both instances the discharge was refused. The defendant, however, has a right to the opinion of every Court as to the propriety of his imprisonment and therefore we have thought it proper to examine attentively the provisions of the Statute without considering ourselves as concluded by these decisions."

If it be conceded that any Judge has jurisdiction to order the writ to issue, then, in the view of their Lordships, each Judge is a tribunal to which application can be made within the meaning of the rule and every Judge must hear the application on the merits. It follows that, although by the Supreme Court of Judicature Act, 1873, the Courts were combined in the one High Court of Justice, each Judge of that Court still has jurisdiction to entertain an application for a writ of *habeas corpus* in term time or in vacation, and that he is bound to hear and determine such an application on its merits, notwithstanding that some other Judge has already refused a similar application. The same principle must apply in the case of the Judges of the Supreme Court of Nigeria.

It follows that, in the opinion of this Board, the Judge was wrong in refusing to hear the application in the present case on its merits, and the appeal must be allowed. In expressing this view, their Lordships must not be taken to be offering any opinion on the merits of the application or upon the validity of the order impugned. These matters will be investigated by the Judge who hears the application and will be decided by him on the evidence already filed and any further evidence which may be placed before him. The appellant must have the costs of the appeal here and below; the costs of the application before Mr. Justice Tew must abide the result of the re-hearing. Their Lordships will humbly advise His Majesty accordingly.

[Solicitors—Mr. E. F. Hunt; Messrs. Burchells.]

Court of Appeal.
(Lord Hanworth, M.R., Lawrence and Russell, L.JJ.)

1928.
June 5.

IN THE ESTATE OF GATES, DECEASED.*

Probate—Will—Construction—"I leave all my money to X."

In the case of a will the operative part of which consisted solely of the words "I leave all my money to Alfred George Cabell," on an application by Cabell for a grant of administration with the will annexed, Lord Merrivale, P., held (44 *The Times* L.R., 353; [1928] P., 128) that the bulk of the deceased's estate passed to Cabell, including cash in the house, a credit on current account at the bank, and stocks and shares, but that the equity of redemption in certain freehold houses and the furniture in the deceased's house passed to the next-of-kin, and as there was no executor named in the will, and the deceased had died since January 1, 1926, leaving his property not wholly disposed of, the persons entitled under an intestacy took, in accordance with the Probate Rules (Non-Contentious Business), rule 119, a grant of administration with the will annexed, in priority to the legatee, Cabell. Certain additional assets were discovered after the date of the judgment.

On appeal that part of the order of the President which concerned the construction of the will was discharged by consent so that, in the event of there being no settlement, the construction of the will might be determined *de novo* in the Chancery Division.

This was an appeal from a decision of Lord Merrivale, President of the Probate, Divorce, and Admiralty Division (44 *The Times* L.R., 353; [1928] P., 128).

Alfred Gates, who died on April 21, 1927, in his very brief will stated: "I leave all my money to Alfred George Cabell." No executor was named in the will. Mr. Cabell moved for a grant of letters of administration and claimed to be entitled to the testator's whole estate. The next-of-kin also asked for a grant, and contended that Mr. Cabell was only entitled to cash in the testator's house and money to the credit of his current account.

The President held that the will disposed of the whole estate (including stocks and shares), except the testator's furniture and the equity of redemption in some freehold house property, but that Mr. Cabell's motion failed, as the estate was not wholly disposed of and the testator died after January 1, 1926, and therefore by rule 119 of the Probate Rules (Non-Contentious Business) the persons entitled on an intestacy took a grant of administration with the will annexed in priority to a legatee. Both parties appealed.

Mr. Spens, K.C., and Mr. G. C. Tyndale appeared for the next-of-kin; Mr. Gover, K.C., Mr. Clifford Mortimer, and Mr. W. Latey for Mr. Cabell.

Certain additional assets had been discovered since the date of the judgment, and by consent the order of the President was varied by omitting the words containing his ruling as to what portion of the estate passed to Mr. Cabell, the effect being that administration in common form with the will annexed would issue to the next-of-kin, and, failing a settlement, the proper construction of the will would have to be determined *de novo* in the Chancery Division.

[Solicitors—Messrs. Reynolds, Sons and Gorst; Messrs. Bartlett and Gregory, for Messrs. Bartlett and Sons, Sherborne.]

* Reported by G. T. Whitfield-Hayes, Esq., Barrister-at-Law.

Court of Appeal. (Scrutton, Greer, and Sankey, L.JJ.) 1928. June 11.

SYMINGTON AND CO. v. UNION INSURANCE SOCIETY OF CANTON, LIMITED.*

Insurance (Loss)—Clause in policy but not in slip—Warehouse to warehouse clause—Loss "reasonably attributed to fire."

The respondents, who were cork growers and had a factory and a warehouse near Algeciras, sent from the factory to Algeciras quantities of cork for shipment and allowed it to accumulate on the jetty till there should be enough for a cargo. While an accumulation on the jetty was awaiting shipment the respondents effected with the appellants an insurance by a slip. Before the policy was issued a fire broke out on the jetty, and to prevent its spreading to the cork the authorities jettisoned part of the cork and threw sea-water on the rest, with the result that a large portion was lost or damaged. The policy, when issued, contained a free of capture and seizure clause and a warehouse to warehouse clause and provided for payment of any loss "which may reasonably be attributed to fire," and a clause in the margin provided that shore risk against fire was not covered where the assured had fire insurance. The marginal clause was not in the slip. The respondents, who had another insurance against fire, claimed under the insurance effected with the appellants, and in an arbitration an award was given in the respondents' favour.

Held, (1) that as the goods at the time of the loss had reached the jetty in the ordinary course of transit they were covered by the warehouse to warehouse clause, (2) that the goods were lost by a peril insured against, (3) that the underwriters were not relieved from liability by the f.c. and s. clause, and (4) that the question whether the policy, so far as it contained a fire insurance clause, was or was not contrary to the usual form of marine insurance on goods, must be referred back to the arbitrator.

Decision of Roche, J. (44 *The Times* L.R., 392), varied.

This was an appeal from the decision of Mr. Justice Roche (44 *The Times* L.R., 392) on the award of an arbitrator, stated in the form of a special case, which raised a question of construction of a policy of insurance.

By an insurance effected in 1919 the appellants insured goods of the claimants, Symington and Co., at and from any port or ports, place or places between Bordeaux and Nice, both inclusive, to the United Kingdom and until delivered at destination inland . . . . in the vessel called the Hillhouse . . . sailing February, 1920. . . . Beginning the adventure upon the said goods and merchandises from the loading thereof on board the said ship. . . .

The claimants were cork growers, carrying on business in Spain. In 1919 they had a factory and warehouse at San Roque, which is about eight miles north of Algeciras and is connected therewith by railway. The cork was sent down from the claimants' warehouse at San Roque to Algeciras, where there was a jetty but no warehouse, and was either shipped from the jetty at Algeciras or was ferried across from the jetty to Gibraltar and shipped there. Owing to lack of railway facilities the cork was sent down to Algeciras in small quantities day by day, and was allowed to accumulate on the jetty till there was enough to be shipped to the United Kingdom.

On February 9, 1920, there was on the jetty at Algeciras awaiting shipment an accumulation of cork consisting of 1,105 bales of large grain and 1,006 of small grain. Some of the small grain had been lying on the jetty since August, 1919, and the rest of the cork had been sent down from the warehouse at San Roque in November and December, 1919, and January, 1920. The claimants expected to ship the accumulated cork on a steamer, the Hillhouse, about February 20, 1920.

On November 25, 1919, the claimants effected an insurance of £20,000 on the cork with the present appellants and other companies, the insurance to begin on January 1, 1920.

On February 9, 1920, before any declaration had been made under the insurance and before a policy had been issued, a fire broke out on the jetty at Algeciras, at some distance from the claimants' cork. To prevent the fire from spreading to the claimants' cork the port and military authorities decided to jettison part of it and to throw sea-water on the part which remained on the jetty. As a consequence 1,011 bales of large grain and 205 bales of small grain were lost or damaged. The claimants claimed under the policy, and the claim was referred to arbitration. The arbitrator awarded in favour of the claimants subject to the decision of this special case.

The policy contained material clauses as follows :—

"1. Warranted free of capture seizure arrest restraint or detainment. . . .

"6. The insured goods are covered subject to the terms of this policy from the time of leaving the shipper's or manufacturer's warehouse during the ordinary course of transit until on board the vessel . . . and from the vessel whilst on quays wharves or in sheds during the ordinary course of transit until safely deposited in consignee's or other warehouse at destination named in policy.

"9. Warranted free from particular average . . . but notwithstanding this warranty the assurers are to pay the insured value of any package or packages which may be totally lost in loading transhipment or discharge, also for any loss . . . which may reasonably be attributed to fire. . . ."

There was also inserted in the margin of the policy the following clause :—

"This policy not to inure to the benefit of any Fire Insurance Company. It is warranted and agreed by the assured that any shore risk against fire granted herein shall not cover where the assured or any carrier or other bailee has fire insurance which would attach if this policy had not been issued."

The claimants had another insurance against fire, but the arbitrator held that the policy should be read as not containing the above marginal clause, because it was not contained in the slip which represented the real contract between the parties.

* Reported by E. J. M. Chaplin, Esq., Barrister-at-Law.

Mr. Justice Roche held (1) that as the slip contained the real contract the marginal clause must be treated as non-existent ; (2) that as the goods at the time of the loss were in the ordinary course of transit, they were covered by the warehouse to warehouse clause ; and (3) that the loss might reasonably be attributed to fire, and, therefore, the award must be affirmed in favour of the claimants.

The insurance company appealed.

Mr. Le Quesne, K.C., and Mr. Simey appeared for the appellants ; Mr. Porter, K.C., and Mr. Somervell for the respondents.

Lord Justice Scrutton.—On one of the points in this case the Court is of opinion that further information is necessary, and they propose to send the case back to the arbitrator on that point ; but as the Court has made up its mind on the other questions which have been argued, it proposes to dispose of those questions leaving the ultimate result to depend on its decision when it has had the further information from the arbitrator.

This appeal comes before us from a decision of Mr. Justice Roche on a special case stated by an arbitrator in a claim by owners of goods against a marine insurance company. Messrs. Symington, who are the owners of the goods, are a firm who carry on the business of cork manufacturers and exporters. They grow the cork in Spain where they have a factory and warehouse at a place called San Roque, which is found by the arbitrator to be about eight miles to the north of Algeciras, a port on the coast, and connected with that port by railway. They grow the cork ; they then send it to their factory in order that it may go through some process to put it into a condition to be exported, and then bit by bit, because apparently they have not ready at one time in the factory enough to make a shipload, they send the cork down from their factory by the railway to Algeciras where it lies on the jetty increasing in quantity as further consignments come down until the ship that they have chartered arrives, there being enough cork then to make a ship-load, and it is then shipped to the United Kingdom. They had been carrying on this business for some years, and not unnaturally they desired to insure their cork against risks ; and it is pretty obvious to my mind that they desired to insure it from their factory, where it was put into an exportable condition, to various places in the interior of the United Kingdom, so that the insurance that they desired was not merely a marine insurance ; it was a marine insurance with land transit at the beginning and at the end.

In those circumstances, a good many years ago, I am sorry to say, in 1920, their broker in London took round a slip to marine companies stating the risk which he wanted to insure, and the particular slip that I have in my hand was underwritten by five companies for £15,000 in all. A loss occurred while the cork was on the jetty at Algeciras waiting for shipment, and the loss was of this nature. A fire broke out, not in the cork but close to it, and appeared likely to spread so that it would burn the stored cork. Persons described as the port and military authorities, desiring to stop the fire, came down and proposed to put a barrier in the way of the fire spreading, (1) by throwing some of the cork into the water so that at a particular place there would be a gap in the goods which the fire would not get over, and (2) by pouring sea water on some of the cork so that the fire would not be likely to light that cork by sparks, glowing cinders, or anything of that sort. The cork which was thrown into the water was, of course, damaged by sea water. The part which was wetted by sea water was also damaged. Thereupon the shippers claimed from the underwriters for the loss by fire, or by jettison, or under the general words under which perils *ejusdem generis* with the named perils are covered. There was not at first a policy. The matter went to arbitration, and apparently the arbitrator stated a special case and it came, as special cases do come, before a judge of the High Court, and the judge, according to his duty, said : You are making a claim on a policy of marine insurance and there is not one ; I cannot hear this special case. Thereupon the proceedings had to start over again ; and before they could start over again there had to be a policy, and the views of the underwriters and the assured as to what should be the policy issued on the particular slip differed, and so the arrangement was made that the company should issue a policy in the form which they say was the right form and that the arbitrator, among other things, should decide whether any clause in the policy issued by the company to which the assured objected should or should not be struck out of the policy as not being justified by the slip.

So there come before us, and there came before the arbitrator and Mr. Justice Roche, the questions : (1) What should the policy be; (2) when you have settled the form of the policy, what are the rights of the parties on the true construction of the policy?

Now, I say at once, although I will deal with it later, that we are sending back to the arbitrator the question of rectification to ask him to find the fact, and I proceed to deal with the case on the points which have been argued on the construction of the policy apart from the clause about fire insurance, which is the clause affected by the question whether there should be rectification or not.

The first point which was argued on which we propose to express an opinion is whether on the policy as drawn the risk had attached at the time when the loss occurred. Now the policy is the printed form by which the Union Insurance Society of Canton insure "At and from," and then there is a blank to be filled in, "of and in the good ship or vessel called the," and then there is a blank to be filled in, "Beginning the Adventure upon the said Goods and Merchandises from the Loading thereof on board the said Ship, and so to continue and endure, until the said Goods and Merchandises shall be safely delivered from on board the said Ship." That was the printed form from which the parties were starting, and it is quite clear that that printed form did not express what the parties intended to cover; and it is a pity, though it is the invariable practice of underwriters, that when they did fill up the form they did not scratch out the words which were not applicable to the risk that they were going to cover, because there is no doubt first of all that at the delivery end the insurance was intended to cover the goods not only until they left the ship but until they were delivered at destination inland in the United Kingdom; and, secondly, it is clear that before the goods got on to the ship it was intended to cover risks in transit by craft, raft and/or lighter to the vessel, because that is clause 7 of the Institute Cargo Clauses which the slip stated were to be incorporated in the policy ; and, further, by clause 6 of the Institute Cargo Clauses it was intended to cover the risk from the time of leaving the shippers' or manufacturers' warehouse during the ordinary course of transit until aboard the vessel; so that both a water transit by craft and a land transit from warehouse were intended to be covered before the loading on board

the ship which the printed form stated was the beginning of the adventure.

Now, what was done was to fill into the slip, after the words " at and from," " any port or ports, place or places between Bordeaux and Nice (both inclusive)," and the first question which was argued was what those words meant; and whether San Roque (where the warehouse was) was a place between Bordeaux and Nice; so that on those words the risk would begin on leaving the warehouse. Now I do not take, I think, quite the view that either the arbitrator or the Court below has taken of this point. " Any port or ports, place or places between Bordeaux and Nice " certainly does not mean as the crow flies or as an aeroplane would fly if it could; it does not mean anything like a straight line between Bordeaux and Nice. When it refers to any port or ports, I think it refers to the coast line, and I think it refers to that for the reason that it is primarily dealing with transit of goods in a steamer and the goods get on the steamer on the coast line ; and I am disposed to read " place or places " as analogous to " port or ports," to restrict both of them to shipping places and to treat " between Bordeaux and Nice " as along the coast line, including, of course, the banks of rivers between Bordeaux and Nice, going round the coast of Spain until in France you get to Nice. But it appears to me that to that shipping transit from the port or ports, place or places between Bordeaux and Nice there is added a land transit which is added by the words of clause 6 of the Institute Cargo Clauses which are expressly incorporated and which have nothing to do with the words " port or ports, place or places," except that the transit is from the warehouse to the port or ports, place or places, where the ship is to take on board the goods. Therefore, I should see no difficulty whatever in covering the transit from San Roque to the ship under the warehouse clause. The warehouse clause, to my idea, has been inserted because the shippers, the owners of the goods, want to cover their goods for the whole transit, including a period before they are on the ship, and including a period after they have been on the ship, whilst in each case they are completing the through transit on land. Therefore, I see no difficulty whatever in holding that the goods on the pier at Algeciras, having come in the ordinary course of transit from the shippers' manufactory at San Roque, were covered by the policy. That is not exactly the view that the learned Judge has taken; but it is the view which appears to me to be the proper construction of the policy and it has the same result as the view which the learned Judge has taken.

Then next, the goods being within the policy, the risk having attached, while they lay on the quay at Algeciras waiting to be shipped were they lost by a peril insured against ? Now, I leave out for the moment the question of the f.c. and s. clause. What happened to them ? Some of them were thrown into the sea to save the rest of them from destruction by fire. In my view, that risk is covered subject to the point about the f.c. and s. clause by the general words as a peril *ejusdem generis* with jettison. Jettison is throwing into the sea from the ship generally to save some part of the adventure. This jettison from the pier into the sea was also to save some part of the adventure. It was a jettison and appears to me to be covered subject to the point about the f.c. and s. clause by the general words as being a peril of the same character as jettison.

The rest of the goods for which the claim is made were damaged by water thrown on them in order to prevent the fire from spreading to them and to the other goods. Now, there has been considerable difficulty in English law about water used either to extinguish fire or to prevent fire from spreading. For a long time English average adjusters declined to admit any damage by water into general average. In cases to which I need not refer—*Schmidt v. Royal Mail SS. Co.* (45 L.J., Q.B., 646) is one of them—that view of English average adjusters was held to be erroneous ; and it has now been determined that it is a subject-matter of general average when, there being a fire, goods are damaged not by the fire but by the water used to extinguish the fire, or the water used to prevent the fire from spreading, and that such damage can be claimed as a damage resulting from fire, and, in my view, can be claimed under a marine policy as a damage caused by fire. There will be found a long discussion in Mr. Lowndes' book on General Average about the effect of that.

The test seems to be as is stated in *The Knight of St. Michael* (14 *The Times* L.R., 191 ; [1898] P., 30) and in *Kacianoff v. China Traders' Insurance Company* (30 *The Times* L.R., 546 ; [1914] 3 K.B., 1121). Is it a fear of something that will happen in the future or has the peril already happened and is it so imminent that it is immediately necessary to avert the danger by action ? Lord Reading, C.J., puts it in this way at page 1128 : " Was there at the time such a condition of things that there was an actually existing peril of fire and not merely a fear that it might break out ? " Mr. Justice Barnes in *The Knight of St. Michael* (*supra*) puts it in very much the same way. I refer to it without reading it.

I therefore take the view on the facts found in this case that, there being an existing fire and an imminent peril, the damage caused by water either used to extinguish the fire or to prevent it from spreading was a proximate consequence of fire and could be recovered under the general words as being *ejusdem generis* with fire, it does not matter which for this purpose.

Then there is this further question. It is said that this jettison, and this pumping of water on the bales, amounted to a restraint of Princes. I use " restraint of princes " to cover the collocation of words which appear in the f. c. and s. clause. As is well known, the original Lloyd's policy contained the language, " Arrests, restraints, and detainments of all kings, princes and people of whatever nation, condition or nationality whatsoever," and, when it was desired to exclude the loss covered by those words from the policy so that the underwriters were not liable for loss covered by those words, for some reason which I have never understood underwriters did not use those words, but they used a different set of words, and they framed the f.c. and s. clause, " Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations, whether before or after declaration of war." Like the Statute of Frauds, every word in that clause has been worth a ransom. I am bound to say that I think it would startle anyone if he were told that when a fire engine arrives and pumps water into a house that liability for the damage is excluded by the clause, " free of capture, seizure, arrest, restraint or detainment and the consequences thereof." It is difficult, I think, to conceive that that sort of operation can be contemplated either by the words " arrests, restraints, and detainments of all kings, princes and people," or by matters enumerated in the f.c.

and s. clause. The action of the port authority in saving a man's property, they being responsible for the safety of the whole port, does not appear to me to be a matter which is at all contemplated either by "restraint of princes" or by the f.c. and s. clause. It would be, I think, going much further than any case on the meaning of those words has yet gone; and I certainly decline to extend those words to a subject-matter which appears to me to be not in the contemplation of the parties who framed those words and who have used them for centuries.

It follows, therefore, that we are deciding these points. We are deciding that the policy attached to the goods as they lay on the quay at Algeciras, and that while on the quay at Algeciras they were lost by perils insured against and that the underwriters were not relieved from liability by the f.c. and s. clause.

There remains the question on which we propose to send the matter back to the arbitrator. It is said by the underwriters, although this slip says nothing about it: Our (the Canton Company's) usual form of policy has in the margin, "This policy not to enure to the benefit of any Fire Insurance Company. It is warranted and agreed by the assured that any shore risk against fire granted herein shall not cover where the assured or any carrier or other Bailee has Fire Insurance which would attach if this Policy had not been issued"; and it said that that marginal clause ought to be part of the policy granted under this slip. The assured has such a fire insurance; consequently though the policy attached and though but for that clause there would be a loss within the policy it is said that the assured cannot recover. Now this is undoubtedly a point of some difficulty, and I do not propose to say anything about the view which I at present take on it; but it appears to the Court material to know a fact which we might gather inferentially from some information that has been supplied to us but on which we think it desirable to have a finding of fact from the arbitrator, and the question which we want the arbitrator to answer is this: Whether the policy issued so far as it contains the fire policy clause is or is not contrary to the usual form of marine insurance on goods; that is to say, is it the usual form for a marine policy on goods to have this clause in it or a clause substantially similar? When we have heard the answer we shall then be in a position to discuss and to decide the view which we take on this particular point. I abstain from indicating what my view might be, or what the difficulties are, until we hear the answer to that question. The matter of costs will, of course, stand over until we finally decide the whole case.

Lord Justice Greer.—I agree with my Lord on the three points which it is desirable that we should decide at present, leaving out of consideration the question which has just been mentioned.

The claim before the arbitrator was a claim upon a policy of insurance, and, with the exception of one clause in the margin of the policy which has been referred to as the fire policy clause, it is not disputed that the policy, together with the clauses attached, is in accordance with the agreement of the parties of which the slip is evidence; and the questions we are now deciding depend upon the true interpretation and the right application of the words contained in this policy.

In the first place it is said that the risks covered by the policy did not begin, or, as it is usually expressed in marine insurance, the risks did not attach. At the time of the fire the goods were on the jetty at a port or place where it is conceded they would have been covered if they had come from a warehouse at that port or place—namely, Algeciras; but it is contended that as they came from a warehouse which is at a place called San Roque, which is eight miles away from Algeciras, the risk was not covered. Now, in my judgment, one has to read No. 6 of the Institute Cargo Clauses as an extension of the insurance beyond that which it would be if one had to read the policy only without the attached clause, and I read it as meaning that the further period to be covered in respect of fire, amongst other things, is the period of time, and also the operation which takes place, when the goods are coming from the shipper's or the manufacturer's warehouse during the ordinary course of transit until on board the vessel; and it is conceded that if that warehouse were in the port of loading the transit, however far the distance might have been from the warehouse to the ship, would have been covered by this clause extending the insurance. Now it seems to me that there is in the clause nothing which limits that extended insurance to the distance between the ship and a warehouse which is in the port of loading in contrast to a warehouse some few miles distant from the port of loading; and I am of opinion that the learned arbitrator was not wrong in concluding that the insurance covered the goods while they were on a stage in the transit from the manufacturers' or shippers' warehouse to the ship. It may be that the transit would not be included if the shippers' warehouse was so far away that no one would ever imagine that it was contemplated that the warehouse might be so far away and the transit might be so long, but at any rate it seems to me to be included, provided that it is not an unreasonable distance from the port, and provided that it is a place where it is not unusual or not unreasonable for a shipper to hold his cargo in readiness for shipment. I cannot find that the arbitrator was wrong in law in finding that the risk had attached.

Now the next question is whether or not the loss was caused by fire within the policy; and, in my judgment, it is right to say that the cause of the loss was the fire. It is quite true that fire never touched the goods; they were touched by the enemy of fire, that is to say, by water, and they were damaged by water. But it has long been decided, and for a long time acted upon in relation to fire insurance on land, that damage by water done to save the consequence of fire and damage by the destruction of property to save fire reaching that property can be held to be the consequence of the fire and within a policy of fire insurance. This matter was dealt with in *Stanley v. Western Insurance Company* (L.R., 3 Ex., 71). At page 74 Chief Baron Kelly says: "I agree that any loss resulting from an apparently necessary and bona-fide effort to put out a fire, whether it be by spoiling the goods by water, or throwing the articles of furniture out of window, or even the destroying of a neighbouring house by an explosion for the purposes of checking the progress of the flames, in a word, every loss that clearly and proximately results, whether directly or indirectly, from the fire, is within the policy." A similar question came up for decision in the case of *The Knight of St. Michael* (14 *The Times* L.R., 191; [1898] P., 30) before Mr. Justice Barnes. That was a case in which the question was concerned with a loss of freight by reason of coal heating but not

actually getting on fire. Fire had not taken place, but the loss of freight arose upon the master of the vessel taking a course which would enable him to prevent fire from destroying the ship and the goods on board, and Mr. Justice Barnes calls attention to the fact that though there was no actually existing fire there was an actually existing state of peril of fire. Those words apply to the present case. There was in the present case an actual peril of fire though no actual fire affected the claimants' goods. That view agrees also with what was said by Lord Reading, C.J., in the case of *Kacianoff v. China Traders' Insurance Company* (30 *The Times* L.R., 546; [1914] 3 K.B., 1121). I think, therefore, that the true view on that part of this policy is that it is right to say that this loss was within the insurance against fire.

The next question is whether or not the insuring company, the respondents to the arbitration, have proved themselves on the facts to come within the warranty contained in the policy, "free of capture, seizure, arrest, restraint or detainment and the consequences thereof." That must mean arrest or detainment of princes or people. It is not proved here that there was on the part of the Government, or of the executive, or of any public authority, an act of force contrary to the wishes of the owners of the goods, or of the captain of the ship; and I think, in order to bring the case within the restraint of princes, it must be shown somehow or other that force was exercised by the Government, or the officers of the Government, before it can be said that there was any arrest, detainment, or restraint of princes or people. It might have been proved here; it is possible that there was a law or regulation that soldiers and port authorities should, as soon as they saw a risk of fire, hurry to put into the water or to cover with water any goods which were likely to be damaged, or any property of their own which was likely to be damaged; but nothing of that sort has been proved here; and what has happened is consistent with the authorities, that is to say, the people who were there at the time were doing their best on their own motion for the benefit of all concerned to see that the fire did not do more damage than they could prevent. In those circumstances I think the restraint of princes does not apply.

Now with regard to the other question on which, as my Lord has said, we desire some further facts. The point put for the appellants may be put in one of two ways. It may be said, as has been said with considerable force in the argument, that the agreement which is contained in the slip means that the policy is to be issued in the form which is the usual form of the Union Insurance Society of Canton; and if the case had turned upon that, and turned upon that only, we have enough materials in the case as it stands to decide the point; but it may be that the slip means that there should be a policy or an insurance on the terms which are usual in the insurance world, if there are such terms, and it is in order that we may be able to decide that question that we desire some further information from the arbitrator. There is some indication in what we have been told, but not in the arbitrator's finding, that it will be very difficult to find a policy which may be described, or a number of terms which can be described, as the usual form of insurance; and it seems to me that if the arbitrator cannot find the usual form of insurance then he cannot say that this policy was contrary to the usual form of insurance. Be that as it may, it is a matter on which the Court desires some further information, and I agree that it should go back, though for my part I am not unwilling to consider anything which may be said by the parties or counsel as to what the right form of question should be.

LORD JUSTICE SANKEY.—I agree, and I only desire to add a few words on each of the three points, upon which I am in agreement with my Lord and my brother Lord Justice Greer.

Three points are taken for the insurance company: (1) that the risk had not attached at the time of the loss, (2) that the loss was not due to a peril insured against; and (3) that the loss was due to restraint of princes. One has in approaching those three points to consider what is the contract between the parties. The contract is contained not only in the body of the policy which provides that it is "from any port or ports place or places between Bordeaux and Nice (both inclusive) to the United Kingdom and until delivered at destination inland," but there are stipulations in the body of the policy which are, in my view, extended by clause 6 of the Institute Cargo Clauses, that the insured goods are covered subject to the terms of this policy from the time of leaving the shippers' or manufacturers' warehouse during the ordinary course of transit until on board the vessel. It is found that at the time of the loss these goods were in ordinary course of transit from the manufacturers' warehouse, and the distance from the manufacturers' warehouse at San Roque to Algeciras was not, in my view, an unreasonable distance. In this particular case I think there is material upon which the arbitrator could find, and indeed as I think ought to find, that the goods were in ordinary course of transit, that is, land transit.

With regard to the next point, that the loss was not due to a peril insured against, I agree with my Lord in thinking that part of the loss comes under the word "jettison" in the words in the body of the insurance policy and part of it comes under the word "fire."

With regard to the last point, I will not repeat what Lord Justice Greer has read from the judgment of Chief Baron Kelly in *Stanley v. Western Insurance Company* (L.R., 3 Ex., 71); but it is to be observed that in this case as in other cases similarly decided the peril had begun to operate. In *Kacianoff v. China Traders' Insurance Company* (30 *The Times* L.R., 546; [1914] 3 K.B., 1121) Lord Reading, C.J., said at page 1127: "It would have been a totally different state of things if the vessel had left and then, outside, had been met and threatened by a Japanese vessel, or if, approaching Nagasaki, she had been in some such danger. No doubt there may be circumstances in which judges may differ as to when the particular peril did begin to operate, but there must be the beginning before the judge can exercise his judgment upon it," and in discussing the case of *The Knight of St. Michael* (14 *The Times* L.R., 191; [1898] P., 30) afterwards he says: "The danger was present, and if nothing had been done spontaneous combustion and fire would have followed in the natural course. That means that the peril had begun to operate." I think those remarks apply in this case; the peril had begun to operate and the loss comes within the words which are expressed in the body of the policy.

With regard to the last point—namely, that the loss was really due to restraint of princes under the Institute Cargo Clauses, No. 1, "warranted free of capture, seizure, arrest, restraint, or detainment"—I

desire to repeat the words used by the learned Judge in the Court below, with which I am in entire agreement. He says: "I am concerned to say in my judgment that this"—that is, the facts in this case—"is not a restraint of princes. It seems to me a very far-reaching use of language to say that a fireman when he is pouring water upon goods which are within the ambit of the fire is using restraint of princes or anyone else. He is putting out a fire; he is dealing with a fire, and he is, I think, no more within the capture or restraint clause if he happens to be employed by the State than if he happens to be employed by the district authority or if he happens to be a volunteer member of the fire brigade."

For these reasons I am in agreement on the three points, and with regard to the point which we are sending back to the arbitrator I desire to say nothing until we know what the exact facts of the case are.

[Solicitors—Messrs. Waltons and Co.; Messrs. Parker, Garrett and Co.]

K.B. Div.
(Lord Hewart, C.J., Avory and Shearman, JJ.)
1928. May 14.

THOMAS v. THOMAS BOLTON AND SONS, LIMITED.*

Factories — Dangerous machinery — Fencing—Guard provided by employer not replaced by workman — Fatal accident—"Neglect" to observe provisions of Act—Factory and Workshop Act, 1901 (1 Ed. VII., c. 22), ss. 10 (1) (*c*), 136, 141.

The duty to fence securely dangerous machinery under s. 10 of the Factory and Workshop Act, 1901, is absolute, and it is no answer to a charge under s. 136, where a person has been killed or injured in consequence of the neglect to observe that provision, that the occupier provided proper guards and placed on the workmen the responsibility of using them. "Neglect to observe" does not import any element of wilfulness: mere non-observance is "neglect" within the section, and the occupier is liable unless he has recourse to the provisions of s. 141 (1), and brings the actual offender before the Court.

This was a case stated by Doncaster Justices.

An information was preferred by Henry Hawke Crosthwaite Thomas, the appellant, under section 136 of the Factory and Workshop Act, 1901, against Messrs. Thomas Bolton and Sons, Limited, the respondents, for that they, on August 16, 1927, were occupiers of a certain factory within the meaning of the Factory and Workshop Acts, 1901 to 1920, at Mersey Copper Works, Widnes, in the county of Lancaster, and that on the said day they neglected to observe a certain provision of the above Acts in that certain mill-gearing—that was to say, the coupling gear on a certain rolling mill, was not securely fenced or in such a position or of such construction as to be equally safe to every person employed or working in the factory as it would have been if it had been securely fenced, contrary to the requirements of section 10 of the Factory and Workshop Act, 1901, and that in consequence of such neglect one William Calder was killed. The information was heard on December 8, 1927, when the justices dismissed the information.

The following facts were proved or admitted:—

1. That the respondents were, on August 16, 1927, the occupiers of a certain factory within the meaning of the Factory and Workshop Acts, 1901 to 1920, and on that day certain mill-gearing—namely, a certain coupling gear on a certain rolling mill—was not securely fenced, inasmuch as a guard had not been fixed at the said mill-gearing, and in consequence one William Calder was killed.

2. That on August 16, 1927, four of the respondents' workmen were engaged at the said rolling mill, and for the purpose of setting the rollers before they were set in motion nine guards which effectually guarded the gearing when in motion had been removed, eight of which had been replaced before the rollers were set in motion, and that the said coupling gear had been in motion for about one hour when the said William Calder was killed.

3. That it was the duty of the workmen engaged in the said work, including the said William Calder, to replace the whole of the said guards in position before starting the rollers, and that owing to their neglect in not replacing one of the guards, the said William Calder, who slipped and fell, was dragged into the coupling gear, receiving injuries from which he died.

4. That the respondents had provided adequate guards for securely fencing the mill-gearing, and employed a manager over the department in which the machinery was working to supervise the work and to see that the machinery was duly fenced, and further had exhibited in the works printed notices of rules, one of which prohibited workmen from removing any guard from machinery without special instructions.

The appellant contended that due diligence had not been exercised by the respondents in seeing that the mill-gearing was fenced and that notwithstanding that the respondents had provided guards to fence the same it was incumbent on them to provide some person or persons to see that the same was securely fenced.

The respondents contended that having provided the guards for effectually fencing the mill-gearing and having placed the responsibility of seeing that the same was securely fenced when in motion on the workmen engaged thereon, and having taken all reasonable precautions to see that the said mill-gearing was adequately and securely fenced, they had not contravened section 136 of the Act. And, further, it was contended by the respondents that the appellant should have taken proceedings under section 141 (2) of the Act against the respondents' workmen.

The justices' attention was directed to the case of *Groves v. Lord Wimborne* (14 *The Times* L.R., 493; [1898] 2 Q.B., 402).

The justices being of opinion that the respondents having provided the guards necessary for effectually fencing the said mill-gearing had taken all steps that could reasonably be expected of them to see that the said mill-gearing was properly fenced and, in view of the admission of the respondents' workmen that it was the fault of the workmen employed on the said mill-gearing that the same was not fenced on the day in question whereby

* Reported by J. W. HALL, Esq., Barrister-at-Law.

the said William Calder was killed, that the respondents could not be said to have contravened section 136 of the said Act, dismissed the information.

By the Factory and Workshop Act, 1901, section 10 (1) (*c*), "All dangerous parts of the machinery and every part of the mill-gearing must either be securely fenced, or be in such position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced."

By section 136, "If any person is killed or dies or suffers any bodily injury or injury to health, in consequence of the occupier of a factory or workshop having neglected to observe any provision of this Act or any regulation made in pursuance of this Act, the occupier of the factory or workshop shall be liable to a fine not exceeding £100. . . ."

By section 141, "(1) Where the occupier of a factory or workshop is charged with an offence against this Act, he shall be entitled upon information duly laid by him, to have any other person whom he charges as the actual offender brought before the Court at the time appointed for hearing the charge; and if, after the commission of the offence has been proved, the occupier of the factory or workshop proves to the satisfaction of the Court—

(*a*) that he has used due diligence to enforce the execution of this Act; and

(*b*) that the said other person had committed the offence in question without his knowledge, consent, or connivance,

that other person shall be summarily convicted of the offence and the occupier shall be exempt from any fine. The person so convicted shall, in the discretion of the Court, be also liable to pay any costs incidental to the proceedings.

(2) When it is made to appear to the satisfaction of an inspector at the time of discovering an offence—

(*a*) that the occupier of the factory or workshop has used all due diligence to enforce the execution of this Act, and

(*b*) by what person the offence has been committed; and

(*c*) that it has been committed without the knowledge, consent, or connivance of the occupier and in contravention of his orders,

the inspector shall proceed against the person whom he believes to be the actual offender without first proceeding against the occupier of the factory or workshop."

Mr. Giveen appeared for the appellant; Mr. R. K. Chappell for the respondents.

Mr. Giveen contended that the obligation to fence dangerous machinery was absolute, and an employer could not be heard to say "I provided guards, and told my workmen to use them; the responsibility is theirs." If such a defence were open, no limited company could ever be convicted. The course open to the employers was to bring the workmen before the Court under section 141 (1), in which case they would escape the fine.

Mr. Chappell contended that in section 136, imposing more serious penalties for breaches of the Act resulting in death or injury, the wording had deliberately been changed from that of section 135: "If a factory or workshop is not kept in conformity with this Act." To impose the more serious penalties it was necessary to show "neglect" to observe a provision of the Act. That imported something more than mere failure or omission.

The Lord Chief Justice.—We need not trouble you, Mr. Giveen.

This is a case stated by justices. The information was preferred by the appellant against the respondents who were occupiers of a certain factory, and who neglected to observe a certain provision of the Factory and Workshop Acts "in that certain mill-gearing, that is to say, the coupling gear on a certain rolling-mill, was not securely fenced or in such a position or of such construction as to be equally safe to every person employed or working in the factory as it would have been if it had been securely fenced." The justices having heard the information dismissed it. The question for this Court is whether in so doing they came to a correct determination in point of law.

The facts may be very shortly stated. In this factory there was, among other things, a certain coupling gear on a certain rolling mill, and it is found as a fact that that was not securely fenced inasmuch as a guard had not been fixed at the said mill-gearing and in consequence one William Calder was killed. That is expressly stated in paragraph 1 of the findings of fact, but it is also found that four of the respondents' workmen were engaged at the mill, and for the purpose of setting the rollers before they were set in motion nine guards which effectually guarded the gearing when in motion had been removed, eight of which had been replaced before the rollers were set in motion, and the coupling gear had been in motion for about an hour when Calder was killed. In other words, the rollers were in motion for the space of one hour with one out of the nine guards not in position. The case goes on to say: "that it was the duty of the workmen engaged in the said work, including the said William Calder, to replace the whole of the guards in position before starting the rollers, and that owing to their neglect in not replacing one of the guards the said William Calder, who slipped and fell, was dragged into the coupling-gear, receiving injuries from which he died"; and, finally, it is found "that the respondents had provided adequate guards for securely fencing the mill-gearing and employed a manager over the department in which the machinery was working to supervise the work and to see that the machinery was duly fenced, and further had exhibited in the works printed notices of rules, one of which prohibited workmen from removing any guard from machinery without special instructions." The contention that was made below on behalf of the respondents was that they, having provided guards for effectually fencing the mill-gearing, and having placed the responsibility of seeing that the mill-gearing was securely fenced when in motion on the workmen engaged thereon—not a workman or a superintendent but "the workmen" in the plural—and having taken all reasonable precautions to see that the mill-gearing was adequately and securely fenced, had not contravened the section. The justices accepted that contention. They say they were of opinion "that the respondents having provided the guards necessary for effectually fencing the mill-gearing and having taken all steps that could reasonably be expected of them to see that the said mill-gearing was properly fenced and in view of the admission of the respondents' workmen that it was the fault of the workmen employed on the said mill-gearing that the same was not fenced on the day in question whereby William Calder was killed, the respondents could not be said to have contravened section 136 of the Act, and we therefore dismissed the information." Mr. Chappell in his ingenious argument on behalf of the respondents has laid stress on the word "neglected" in section

136 of the statute, a word which is not to be found in section 135. His argument is that section 135 deals with the case where the factory or workshop is simply not kept in conformity with the Act, whereby the employer, or the occupier, incurs or may incur certain penalties. On the other hand, section 136, which is dealing with more serious penalties in case of death or injury, uses the words "if any person is killed or dies or suffers any bodily injury or injury to health in consequence of the occupier of a factory or workshop having neglected to observe any provision of this Act or any regulation made in pursuance of this Act, the occupier of the factory or workshop shall be liable to a fine not exceeding one hundred pounds"; and the argument is that that expression "having neglected" involves of necessity some act of negligence, and that that is further to be seen by the terms of proviso (*a*), and of proviso (*b*) where one gets the somewhat different expression "the occupier shall not be liable to fine under this section if an information against him for not observing the provision or regulation to the breach of which the death or injury was attributable has been heard and dismissed." There a contrast is pointed between the phrases "not observing" or "failing to observe" or "omitting to observe" on the one hand, and, on the other hand "neglecting to observe." It seems to me that that distinction, however ingenious, is faulty, for the purposes of this statute. One begins here with a statutory duty. What, then, is meant by the proposition that somebody has neglected to observe the statutory duty? I think the words used by Mr. Justice Patteson in the case of *King v. Burrell* (12 Ad. and E., 460) are in point. There it was held that an overseer who neglected to sign the burgess list delivered by him under the section incurred the penalty imposed by the section although his neglect was not wilful. At page 468 Mr. Justice Patteson said this: "Then it is contended that the qualification of wilfulness must be imported into the section. Every day I see the necessity of not importing into statutes words which are not to be found there. Such a mode of interpretation only gives occasion to endless difficulties. What then is neglect? It is the omission to do some duty which the party is able to do. The defendant could have signed the list: that is not denied; but he did not sign. He has therefore neglected to sign. No discretion or option was left to him." I think, therefore, it is apparent here that the evidence was all one way. The statute says that the dangerous part of the machinery shall be securely fenced, which is quite a different thing from saying that guards shall be provided for dangerous parts of the machinery or that persons shall be appointed to see that the dangerous parts of the machinery are securely fenced. Mr. Chappell, I observe, has not seriously relied upon the other limb of the defence that, after all, these employers did appoint somebody to see that the fencing was adequate and, indeed, that the workmen themselves had *ex concessis* neglected that duty. If serious reliance were sought to be placed upon such a contention as that, then I think recourse should have been had to section 141. If at the time of the discovery of an offence it was not made to appear to the satisfaction of the inspector that somebody other than the occupiers of the factory was to blame, then if the occupiers desired to excuse themselves they should have had the blameworthy person brought before the Court under subsection 1 of that section; and it is to be observed that even if they had taken that course, which admittedly they did not take here, the only beneficial consequence that would have occurred to them would have been that they would have been exempt from a fine; "and if, after the commission of the offence has been proved, the occupier of the factory or workshop proves to the satisfaction of the Court—(*a*) that he has used due diligence to enforce the execution of this Act; and (*b*) that the said other person had committed the offence in question without his knowledge, consent, or connivance, that other person shall be summarily convicted of the offence and the occupier shall be exempt from any fine." No such course was taken here. The respondents produced nobody upon whom they expressly sought to put the blame. The question therefore is: Was this the consequence of a failure or omission, the same thing as neglect, to observe the provisions or one of the provisions of this statute? The answer clearly is that it was due to the failure at the critical time to have this dangerous machinery in fact securely fenced, and, the fact being that it was not securely fenced, it mattered not that somewhere upon the premises there was a guard which had been removed.

It seems to me, therefore, that these magistrates misdirected themselves in point of law, and that this appeal ought to be allowed.

MR. JUSTICE AVORY.—I am of the same opinion. I think that section 136, in using the words "having neglected to observe," is merely saying the same thing as if it had said "where the occupier has not observed the provisions of the Act" as in section 135 which provides: "If a factory is not kept in conformity with this Act, the occupier thereof shall be liable to a fine." Section 136 merely imposes additional penalties in case there has been injury to health or anybody is killed. The point taken in the case on behalf of the respondents—namely, that the informant should have taken proceedings under section 141, subsection 2, of the Act—appears also to have been misconceived, because there is no power to compel the inspector to take proceedings under section 141, subsection 2: it is only when certain things are made to appear to his satisfaction at the time of discovering the offence that it is provided that he shall proceed against the person who is believed to be the actual offender without first proceeding against the occupier of the factory; and in default of the inspector being satisfied at the time of discovering the offence that some other person is the actual offender, then it is clear that it is open to the occupier to take proceedings under subsection 1 of section 141.

In this case, therefore, it appears to me that no reliance can be placed on section 141. For these reasons I am of opinion that the magistrates ought to have convicted, the question of the penalty to be imposed being a matter entirely for them in view of the circumstances of this particular case.

MR. JUSTICE SHEARMAN.—I am of the same opinion. Section 10 (1) with its four paragraphs (*a*), (*b*), (*c*), and (*d*) imposes upon the owner or occupier of a factory the absolute obligation when there is any danger from machinery, not only to provide adequate fencing but to keep it in position during the whole of the time that the machinery is working. Then section 135 makes it an offence if the occupier does not observe that obligation. In my judgment where section 136 says: "neglected to observe" it means exactly the same thing. "Neglected to observe" and "failing to observe" and "not observing" in the case of a duty, mean exactly the same thing. I agree, as has been pointed out by my Lords, that the only protection left for the occupier against a fine is, if

he can establish to the Court that there being a breach of that duty he is not responsible but somebody else is the real offender; he then has to rely upon the procedure indicated in section 141. He did not choose to rely upon it in this case, and therefore he cannot avail himself of its provisions. This matter must go down to the magistrates to convict.

[Solicitors—The Treasury Solicitor; Messrs. Gregory, Rowcliffe and Co.]

Chan. Div. (Clauson, J.) 1928. June 25.

IN RE FORD—EX PARTE HAWKINS.*

Bankruptcy—Goods in possession, order, or disposition of bankrupt—Goods on sale or return or on approval—Custom of antique furniture trade.

His LORDSHIP, in dismissing this motion by the trustee in the bankruptcy of Mr. Alfred Ford, a dealer in antique furniture, who carried on business at 4, Bruton-street, W., held that there was a custom in the antique furniture trade for dealers or private individuals to send goods to retailers either on sale or return, or on approval, on the terms that the property did not pass to the retailer unless and until the retailer elected to purchase them or a sale was effected to a third party.

The trustee, Mr. Ebenezer Henry Hawkins, claimed on the motion a declaration that certain goods were part of the property of the bankrupt divisible among his creditors and vested in the applicant as trustee of the property of the bankrupt on the ground (1) that the goods belonged to, or were vested in, the bankrupt at the beginning of the bankruptcy; and (2) alternatively, that the goods were, at the beginning of the bankruptcy, in the possession, order, or disposition of the bankrupt in his trade or business by the consent and permission of the true owner in such circumstances that he was the reputed owner thereof. The trustee asked for an order that the respondents, Restall, Brown and Clennell, Limited, of 103, Great Russell-street, W.C., should deliver up the goods to him as trustee.

The respondents, who were manufacturers of English period furniture and general dealers in antiques, had supplied the bankrupt with goods on approval. As soon as they received notice of the bankruptcy they claimed the goods which had been sent on approval, alleging that, by a custom of the trade, the goods did not pass to the retailer until he purchased them or sold them, and that any person who might lend money to the bankrupt on the faith of the display of goods in his shop ought to find out that such was the custom of the trade.

Mr. Edward Clayton, K.C., and Mr. J. Flowers appeared for the trustee; Mr. Schiller, K.C., and Mr. W. N. Stable for the respondents.

Evidence was called as to the existence of the custom.

MR. JUSTICE CLAUSON said that, in view of the evidence, he must hold that the custom of the trade had been proved, and that the motion must be dismissed, with costs.

[Solicitors—Mr. W. Goodwin; Messrs. Rye and Eyre.]

* Reported by C. P. LANGWORTHY, Esq., Barrister-at-Law.

K.B. Div. (Wright, J.) 1928. June 20.

JAMES FINLAY AND CO., LIMITED v. KWIK HOO TONG HANDEL MAATSCHAPPIJ.*

Contract—Sale of goods—C.i.f. contract—Resale by buyers—Bill of lading—Date of shipment incorrectly stated—Repudiation by sub-purchasers—Measure of damages payable by vendors to original buyers.

In 1920 the plaintiffs bought from the defendants a quantity of sugar in Java, the sale being c.i.f. Bombay, and shipment was to be made in September, 1920. The sugar was not loaded on the steamer till October. The bill of lading, which was dated September 30, stated that the sugar had been shipped, and the plaintiffs, being unaware of the true facts, took up the shipping documents on presentation and paid the price. The plaintiffs then resold part of the sugar by a contract which stated that the bill of lading should be conclusive evidence of the date of shipment. The market was falling, and the sub-purchasers, having discovered that the sugar was not of September shipment, refused to carry out their contract, and the plaintiffs sold the sugar by auction at a lower price. In an action by the plaintiffs against the defendants for breach of contract,

Held, that it was an implied condition of the contract that the bill of lading should correctly state the date of shipment, and the plaintiffs were not bound to enforce against their sub-buyers a statement which they (the plaintiffs) knew to be untrue, and the measure of the damages to which the plaintiffs were entitled was the difference between the contract price which they had paid on taking delivery and the market price of the sugar.

This dispute between buyers and sellers raised questions as to the right construction of certain contracts and as to the proper measure of damages for breach of contract.

Mr. Le Quesne, K.C., and Mr. Somervell appeared for the plaintiffs; Mr. Jowitt, K.C., and Mr. van den Berg for the defendants.

Mr. LE QUESNE, in opening the case, said that early in 1920 three contracts were made between the parties for the purchase and sale of sugar in Java. The sales were c.i.f. Bombay and shipment was to be made of stated quantities during July, August, and September. The July and August shipments took place as required, and no question arose as to them; but the September shipment was not in fact made in September, although the bill of lading was dated September 30.

The documents were presented to the plaintiffs in due course, and believing them to be in order they took them up and paid the price. They had resold part of the sugar to Indian purchasers; but those purchasers discovered that the sugar was not, as it was described to be, of September shipment, and refused to carry out their contract. If the plaintiffs

* Reported by W. B. THOMPSON, Esq., Barrister-at-Law.

had known the true facts they would not have accepted the sugar and would not have parted with their money. They now brought an action for breach of contract, and the question was what was the proper measure of damages.

The defendants had put in a defence denying the plaintiffs' allegations. They also contended that on the true construction of the contract the sugar had been shipped in September as required; for it had been put into lighters even if it had not actually been loaded on to the steamer in that month. Alternatively, they pleaded that the loading actually began on September 30 and was finished in October, and that there was a custom of the port that goods the loading of which had begun in a particular month were considered goods of that month's shipment, even if the loading were not completed until a later month.

The contract for sub-sale contained a clause as follows:—

"7. The bill or bills of lading shall be conclusive evidence of the date of shipment."

The bill of lading began:—

"Shipped in good order and condition by N. V. Kwik Hoo Tong Handel Mij. on board the steamship Sealda, lying in the port of Cheribon for carriage to Bombay. . . ."

At the end of the bill of lading were the words: "Dated at Samarang this 30th day of September, 1920."

Evidence which had been taken on commission was read, and a witness was called who said that the plaintiffs had had no reason to doubt the correctness of the bill of lading, and that they had accepted the date in it as correct. The market was falling at the time, and if they had known that the statement that shipment had been made in September was incorrect they would have refused to accept delivery of the sugar. When they did find out the truth it was impossible to obtain in the market sugar which would comply with the description in their contract with their sub-buyers.

Cross-examined, he said that as the contract with the sub-buyers provided that the statement as to date in the bill of lading should be conclusive, the sub-buyers could not have disputed their liability. But as soon as the plaintiffs discovered that the date was in fact wrong they did not press their claim against the sub-buyers because they did not think it right to do so. The question whether the sub-buyers were or were not solvent had nothing to do with their decision.

Mr. JOWITT proceeded to cross-examine with reference to the alleged custom, and MR. JUSTICE WRIGHT allowed an amendment of the pleadings, as follows:—

"By the custom of the port of loading, should a steamer which has contracted to take cargo for shipment during a particular month arrive at the loading port at which such cargo has been declared ready for shipment by the shippers at any date during the month, and the cargo to be loaded on such steamer is ready in lighters during the month and loading takes place within a reasonable time after the vessel's arrival, then notwithstanding that such cargo may not be loaded during the contract month it is accepted that the shipper fulfils his engagement in respect to the shipment period, and therefore all bills of lading for the cargo may bear the date of the month of the contract notwithstanding the fact that the steamer may not have loaded during such month."

The witness said that he had never heard of such a custom.

Mr. LE QUESNE submitted that the first question for consideration was what was the law which governed this contract. That question had really been settled by the House of Lords in earlier proceedings in this case ([1927] A.C., 604), and the law applicable must be English: Dicey, Conflict of Laws, 4th Ed., page 628; *Jones v. Oceanic Steam Navigation Company* (40 *The Times* L.R., 847; [1924] 2 K.B., 730, at p. 733). Whether the shipment was made in time must therefore be decided by English law. Even if, as was contended, the law of Java applied, the result would be the same, for the expert lawyers called on commission had stated that, by Java law, if a custom contradicted the provisions of a contract the contract must prevail.

As to the custom, the evidence failed to establish it, either as originally pleaded or as now stated in the amendment. It had been shown that the steamer arrived on September 30, and was ready to begin loading at 1.30 that afternoon, and could have loaded the whole of the sugar before midnight on that day. But the sellers did not load, and apparently had not even put the sugar into lighters within the required time. The inference must be that in fact they had not the sugar ready. Whether the custom existed or not was, therefore, immaterial. Also, the buyers did not know of the existence of the alleged custom, and were consequently not bound by it, even if it existed. *Kirchner v. Venus* (12 Moore P.C., 361, at p. 399); *Robinson v. Mollett* (L.R., 7 H.L., 802, at p. 838); Scrutton on Charterparties, 12th Edn., pp. 30-31; *Bowes v. Shand* (2 App. Cas., 455, at pp. 464, 473, and 480).

As to damages, the plaintiffs were entitled to recover the money which they had paid for the sugar as money paid under a mistake of fact induced by the sellers. They paid on documents presented by the sellers, and they were not prevented from recovering the money, less the value of the goods actually received, by the fact that they could not now return the goods. (Smith's Leading Cases, 12th Edn., 430; *Durrant v. Ecclesiastical Commissioners*, 6 Q.B.D., 234). Alternatively, they were entitled to the difference between the contract price and the market price, which was all that they could have realized. There was an implied term in contracts of sale that the date on a bill of lading should be correct. (*United Baltic Corporation* case, 8 Ll.L., 190; *Suzuki v. Burgett*, 10 Ll.L., at p. 225). And as a third point he submitted alternatively that the plaintiffs were entitled to the difference between the sum which they would have received from their sub-buyers if the subsale had been completed and the sum which they actually received on selling the goods which they had received from the sellers. On the sub-buyers' refusing to accept, the plaintiffs disposed of the goods by auction, and the sum realized was much less than that which the sub-buyers had agreed to pay. When the plaintiffs first discovered that the sellers had not complied with the contract there were no goods of the contract description obtainable in the market which the plaintiffs could have supplied to their sub-buyers.

It was contended that the clause in the sub-contract, saying that the date stated in the bill of lading was conclusive, enabled the plaintiffs to insist that the sub-buyers should accept the goods whatever the actual date of shipment. If that was so, as the plaintiffs were bound to minimize the damages against the sellers, they would be obliged to take the point against the sub-buyers. But that was not the right construction of the clause; it could not force a buyer to accept something which he had not

bought, *Vigers v. Sanderson* (17 *The Times* L.R., 316 ; [1901] 1 Q.B., 608, at p. 610-11).

Mr. VAN DEN BERG, for the defendants, submitted that there were two questions:—(1) Whether there was any breach of contract at all ; and (2), if so, whether the damages were more than nominal. He contended that on the evidence there was no breach.

MR. JUSTICE WRIGHT said that he found as a fact that none of the sugar was loaded in September.

Mr. VAN DEN BERG said that it was necessary to consider the meaning of the word "shipment" ; at the port the practice was that the bill of lading might be dated for a particular month provided that during that month the goods had been put into lighters. It was not necessary that they should actually be put on board the steamer. The plaintiffs were aware of the practice, and so were all the material parties in the case. The law of Java should be enforced by the English Court in this contract (*Chatenay v. Brazilian Submarine Telegraph Company, Limited* ; 7 *The Times* L.R., 1 ; [1891] 1 Q.B., 79, at p. 82), and by the law of Java the plaintiffs would be bound by any custom which was material, whether they knew of it or not.

On the question of damages, he submitted that if the plaintiffs were to recover damages at all they should only be nominal. So far as the plaintiffs' claim for the loss of profit on their sub-sale was concerned, he submitted that the plaintiffs could have enforced their sub-sale because the sub-sale contract expressly provided that the bill of lading should be conclusive as to the date of shipment. The sub-buyers therefore could not refuse to perform their contract on the ground that the date in the bill of lading in fact turned out to be inaccurate. The clause was in perfectly unambiguous language, and the only way in which the sub-buyers could have escaped liability would have been to prove fraud on the part of the plaintiffs, and no one could suggest anything of that sort. It had long been usual in order to avoid disputes to provide expressly that a statement in a document should be conclusive. (*Bowes v. Shand supra,* at p. 482 ; Scrutton on Charterparties, 12th Edn., p. 73 ; *Lishman v. Christie,* 3 *The Times* L.R., 710; 19 Q.B.D., 333). So far therefore as the resale was concerned the plaintiffs had brought their loss upon themselves by not enforcing their claim against their sub-buyers. The plaintiffs said that they felt it would be discreditable after they knew the truth to insist on their rights against their sub-buyers ; but a man must be just before he was generous, and if a party could mitigate damages by insisting on his rights against other parties he was bound to insist on them. Further, there was nothing to indicate that at the time of the sale to the plaintiffs a sub-sale was in the contemplation of the parties.

The true principle on which the damages in this case should be assessed was set out in *Taylor v. Bank of Athens* (27 Com. Cas., 142). The value of the goods was the same whether the shipment was actually made in September or in October, and the damages must, therefore, be nominal.

The claim as for money paid under a mistake of fact must fail, because, apart from fraud, such a claim could only succeed where there had been a total absence of consideration, and here the plaintiffs had accepted the goods and dealt with part of them by way of resale. Moreover, on the facts, there really was no payment under mistake of fact ; the plaintiffs' local agents who actually made the payment knew all the circumstances. There was no duty on the seller under a c.i.f. contract to tender accurate documents, apart from fraud.

Mr. LE QUESNE replied, and at the conclusion of the argument judgment was reserved.

MR. JUSTICE WRIGHT delivered the following considered judgment :—The plaintiffs in this case are a company carrying on business as merchants in India and elsewhere, having a house in London, and the defendants are merchants in Java, dealing in particular in the sale and shipment of sugar from Java.

The plaintiffs claim damages for breach of three contracts for the sale of sugar. These contracts were dated in January and February of 1920. The first was January 30, 1920, the second February 2, 1920, and the third February 24, 1920. They were all made at Samarang through the intervention of a broker called R. Butterworth. The contracts were c.i.f. contracts ; each contract was for 300 tons of white Java sugar of a specified quality, and the defendants as sellers contracted to sell and deliver this sugar at various prices. According to the first contract the price was 76s. 3d. a cwt. ; according to the second the price was 76s. 10½d. a cwt. ; and according to the third contract 79s. 9d. a cwt., cost, insurance and freight, Bombay. Shipment was to be during the months of July, August, and September, 1920—100 tons monthly in each of those months. As to payment, it was provided : "Buyers are to open a credit (or credits) on Messrs. James Finlay and Co., Limited, London, which credit is to be confirmed by the Bank at buyers' expense by cable, if necessary, and the sellers or their agents are to draw thereunder in three months' sight drafts, for the due payment of which drafts at maturity the buyers remain responsible."

The portions of these contracts which are here in question are the 100 tons under each of the contracts which the contracts provide shall be for shipment during September of 1920. The defendants, in their ordinary course of business as merchants, made three sub-contracts with certain buyers in Bombay. These contracts were also c.i.f. contracts, and they provided for shipment in July, August, and September, equally, at various prices in Bombay, the prices being slightly higher than the prices in the contract between the plaintiffs and the defendants, and in respect of those sub-contracts there was appropriated by the plaintiffs to the contracts between them and the defendants the quantity of 150 tons.

I need not refer in detail to the terms of those sub-contracts, with this exception, that under clause 7, which is identical in each of these contracts, it is provided that "The bill or bills of lading shall be conclusive evidence of the date of shipment." Under these contracts the defendants, who had duly delivered the July and August instalments, took steps with reference to the third instalment—that is the September instalment, which is the one in question—and they arranged to ship the sugar from a port called Cheribon in Java by the steamship Sealda, a vessel of about 8,000 tons belonging to the British India Steam Navigation Company.

The first question of fact which I have to determine is whether any of the 300 tons of sugar was actually shipped in the month of September. On that the defendants, while objecting to the admissibility of the log-book in evidence, strenuously contended that I ought to accept in evidence certain documents which I shall refer to a little more in detail later, which

they said evidenced the shipment of the 300 tons in September.

I was not, however, left merely to decide this question on the documentary evidence, because the plaintiffs called as a witness the captain of the Sealda, who had retired from the sea, a gentleman called Captain Holyoak. He gave evidence as to his arrival at Cheribon, and as to what happened when he did arrive at Cheribon. His evidence convinced me that no cargo was in fact loaded on September 30 at Cheribon, and that, therefore, none of the contract goods were shipped in September. He had a quite clear and specific recollection of what had happened. He stated that the ship arrived in the roads at Cheribon about half-past 1 on the afternoon of September 30 ; that the ship lay out in the roads about a mile and a half from the shore at the usual anchorage ; that he was ready to receive cargo as soon as he arrived, but that he received no cargo on that day. He did not go ashore himself that day, and no launch came from the shore to him until the evening, when a launch came with the stevedores' men, and he said that no cargo was loaded until 7 o'clock in the morning of the following day, October 1, and that the loading went on thereafter and during October 1 and 2, and that the ship sailed on October 3. I accept that evidence. I am perfectly satisfied that he is a witness of truth, and that he is speaking from independent recollection ; and he seemed to be somewhat annoyed at having been compelled to proceed with some speed down the coast in order to reach Cheribon on September 30 in time, and then to have wasted the rest of the day without loading any cargo. I find, therefore, as a fact, that the 300 tons which were tendered by the defendants as under this contract were not a September shipment, and so far were not in accordance with the contract.

The defendants asked me to rely on certain documents. They were the mate's receipts, which were dated September 30. How the mate, who was well spoken of by the captain, came to sign documents which, although they do not state a date of shipment, may anyhow be construed, and would naturally be construed, as evidence of shipment by September 30, I do not know and I do not further conjecture. The other documents relied on by the defendants were certain Customs documents called certificates of origin, which were documents to be delivered, and which were in fact delivered as part of the documents against which payment was required, and these documents also purported to show a shipment on September 30. I do not, however, find myself able to attach any evidential value to those documents. They are apparently prepared by the Customs authority on the basis of boat notes which are endorsed by the shipper, and the Customs do not take any part in or exercise any personal oversight over the act of shipment ; they simply act in effect on information obtained from the shipper. There is also, of course, a most important document to be considered : that is the bill of lading. The bills of lading have been produced ; they are signed by the agents for the ship, Messrs. McNeill, who fill various capacities at the port of Samarang—they had not a branch at the actual port of shipment, Cheribon—and these bills of lading are "shipped" bills of lading. They bear date at Samarang September 30, 1920, and they purport to show this: "Shipped in good order and condition by the defendants on board the steamship Sealda lying in the port of Cheribon for carriage to Bombay." Then they set out the particulars of the voyage and the character of the sugar, and they are on the form of the British India Steam Navigation Company, Limited, and must have been filled up by the ship's agents, Messrs. McNeill and Co., at Samarang. In view of the fact that I am satisfied that the shipment did not take place until after September 30, I can only regard all these documents as false, incorrect and inaccurate documents.

The contract, as I have stated, provided for the opening of a credit. The plaintiffs, a concern of very high financial standing, were not in fact asked to open, and did not in fact open, a credit in respect of the first two shipments; it was not until the end of September that they were asked to cable a credit, and that they did by a cable, which was sent on September 30 and addressed to the brokers, Messrs. Butterworth, at Samarang, guaranteeing acceptance at three months of the drafts in respect of the sugar contracts, and duplicate documents to be attached to the drafts. The method which was adopted was that the drafts were accordingly drawn; they were drawn by the defendants payable to the Hongkong and Shanghai Banking Corporation, whose agents, Messrs. McNeill, also were at Samarang. They are dated September 30, 1920; they cover the total amount of the contract price, they are addressed to Messrs. James Finlay and Co., Limited, London, and they refer severally to the appropriate quantity of sugar as shipped per the steamship Sealda from Cheribon to Bombay against the specified contracts, and they purport to be drawn under a telegraphic credit dated London, September 30, 1920.

The course of business was, as I have said, to attach to these drafts one set of shipping documents, the bills of lading, the policies and the other documents, and to send the remaining copies of the relevant documents to the plaintiffs' house at Bombay in order to enable them to obtain delivery of the goods on arrival.

No question arises as to any delay in cabling the credit. It is quite clear, however, that the drafts cannot have been drawn on September 30, as they purport to have been drawn, anyhow in the form in which they now appear, because it is obvious and is certain that the cabled credit had not been received at Samarang until October 2, and the ship, as I have said, sailed on the 3rd. She arrived at Bombay on November 9, the documents addressed to Bombay having arrived there some days before—about October 25—and the discharge immediately commenced and was finished on November 15. I gather that the drafts with the accompanying documents which had been sent to London had been discounted with the Hongkong and Shanghai Banking Corporation—that seems to be assumed—and reached London in November, and were duly presented by the Bank to the plaintiffs' house in London with the accompanying documents. They were accepted accordingly on November 12, 1920, and payment was due on February 15, 1921.

The discharge having been completed, the next thing that happened was that the sub-buyers began to raise objections to the goods, alleging that they were not satisfied that the goods which were tendered were a September shipment. As it turns out, they were perfectly right, although how they ascertained it is not clear. The market had fallen very considerably, and buyers would, in cases such as that, naturally be prepared to exercise their legal right, and would certainly not be too willing to accept a shipment which did not correspond to the contract, and which they were not bound to accept.

The sub-buyers accordingly persisted in these objections. The plaintiffs, however, who had no reason to suspect the accuracy of the documents, pressed them to take delivery, and, indeed, exercising the right which they had under the sub-contracts, sold the goods by auction early in December. The amount realized by that sale appears on the sale account. It was very substantially less than the amount payable under the contract, and the actual figures which I have are limited to some 250 tons, because in this action, for some reason, the plaintiffs are only claiming damages in respect of 250 tons and not in respect of the whole 300 tons. The difference between the contract price for the 250 tons and the value of the goods as realized on the auction sale is this: the contract price between the plaintiffs and the defendants was £19,481 17s. 6d., and the amount realized for the 250 tons at the auction sale was £10,064 9s. 3d., showing a difference of £9,417 8s. 3d.

Mr. Geddes, the Bombay manager of the plaintiffs, gave evidence as to market prices and values, and there is no other evidence before me. I accept his evidence; he is a witness of very high standing. He says that the amount realized at the auction represents the fair market price of that sugar, whether taken at the actual date of the auction early in December, or at a date in November when the cargo was discharged.

So things remained for some time, the plaintiffs pressing the sub-buyers to take delivery, and at the same time making inquiries from the brokers in Java —Messrs. Butterworth—as to the facts of the shipment, and being assured that the shipment was in order. In February, 1922, however, they came to the conclusion from information which they had received that the shipment was not a September shipment. They accordingly served a notice of arbitration upon the defendants, because the contracts contained an arbitration clause. The importance of that arbitration clause is that it carries with it the result that the contract must be construed by English law. The clause is in these terms: "Any dispute arising out of this contract is to be settled by arbitration of London brokers in the usual manner, and this submission may be made a rule of the High Court of Justice or any Division thereof."

It was held in the House of Lords in the somewhat prolonged proceedings between the parties in this case ([1927] A.C., 604), that the contracts in question must be construed according to English law. There is a qualification attached to that which does not seem to me to be material for any purpose in this case.

The arbitration resulted in an award dated January 18, 1923. That award was ultimately set aside by a judgment of the Divisional Court dated November 22, 1923. Thereupon the plaintiffs and the defendants agreed that the matter in dispute between them, namely, whether the defendants had fulfilled their contracts by making a good tender, or whether the plaintiffs were not entitled to damages or compensation for breach of contract, should be determined by an action in the Courts, the arbitration clause being waived. That action was limited to the 150 tons, part of the 300 tons, which was alone relevant to the sub-contracts. After the writ was issued it was desired by the plaintiffs to include in the action 100 tons, leaving out 50 tons for some reason which was not material. The result of that was that leave had to be obtained to serve an amended pleading out of the jurisdiction. That led to the matter going to the House of Lords in the case to which I have already referred, where the House of Lords affirmed the order of the Courts below, giving leave to serve out of the jurisdiction on the ground I have stated, that the contract was a contract to be construed by English law.

Then further delays arose because the defendants obtained an order for a commission to Java to take evidence. The main, if not the sole, ground of that commission was an allegation by the defendants that, though the shipment was not made in September, they were still entitled to maintain that they had fulfilled their contract by reason of a custom. That custom, as alleged originally in the pleadings delivered on February 11, 1926, was alleged in these terms: "By the custom of the port of loading should a steamer which has contracted to take cargo for shipment during a particular month arrive at the loading port at which such cargo has been declared ready for shipment by the shippers at any date during the month, and shipment of such cargo commences during the month and continues the work of loading till complete, it is accepted that the shipper fulfils his engagement in respect to the shipment period, and therefore all bills of lading for the cargo may bear the date of the month on the contract notwithstanding the fact that the steamer may not have completed the loading of the cargo by the last day of that month." Then there is a further allegation that, "By the law of Java the said custom is binding on the plaintiffs." I need not consider that custom so alleged any further, because on the second day of the trial, when it became clear that the loading by the Sealda of these parcels had not commenced at all in the month of September, the defendants asked leave, which I granted, to amend their pleadings. Thereupon the custom appeared under a different guise, and in these terms: "Further, or in the alternative, by the custom of the port of loading, should a steamer which has contracted to take cargo for shipment during a particular month arrive at the loading port at which such cargo has been declared ready for shipment by the shippers, at any date during the month and the cargo to be loaded on such steamer is ready in lighters during the month and loading takes place within a reasonable time after the vessel's arrival, then, notwithstanding that such cargo may not be loaded during the contract month, it is accepted that the shipper fulfils his engagement in respect to the shipment period, and therefore all bills of lading for the cargo may bear the date of the month on the contract, notwithstanding the fact that the steamer may not have loaded during such month"; and then: "By the law of Java the said custom is binding on the plaintiffs." That is a somewhat extraordinary custom. The bills of lading in question to which it is said the custom applies are bills of lading which state in terms, according to their obvious tenor, that the cargo was shipped on or before the date of the bill of lading—that is, on or before September 30—and the custom apparently is that notwithstanding the form of the bill of lading it is a perfectly good bill of lading, though it purports to state that the cargo was loaded in September, whereas in fact no such cargo was loaded at all in September.

A good deal of evidence, however, was given on commission. I have read that evidence with some regret. The evidence is confused, obscure and conflicting, and it conveys to my mind an impression that neither the witnesses nor those who conducted the inquiry had any clear conception of what was meant by "custom," or what custom they were seeking to eestablish, or how a custom can or should be established. I do not intend to deal with the evidence in detail. It is enough for me to say that I am quite satisfied that the amended custom has not

been proved, and the defence based on any such custom is, I think, not made out. In any case, by English law, which, I think, is the relevant law, and so far as I can follow the evidence, by Java law, if it applies at all, such custom would not receive effect, as being contrary to the express terms of the contract. There is some suggestion also that a mate's receipt or a bill of lading stating that the goods have been shipped on the vessel in terms can be properly given in respect of the goods if they have been merely delivered into lighters; that, again, would be, if a custom or practice were established at all, which, I think, it is not, contradicting the terms of the actual documents, and, I think, would not receive legal effect. But no such custom or practice, in my judgment, is established, nor indeed is it established in fact that these 300 tons of sugar were in lighters at any time in the month of September. So far as I have been able to ascertain from the difficult and voluminous evidence, all that happens in practice has been that ships' agents in Java have been induced, by receiving letters of guarantee, to sign bills of lading bearing a false date of shipment. They may have thought that the letter of guarantee or indemnity was a sufficient protection for them, and may not have felt any conscientious scruples. What those responsible for the conduct of the affairs of the British India Steam Navigation Company would have thought of such proceedings, I do not stop to inquire.

The only other fact I need mention is that it appears that this practice, or custom, whatever it was, was abolished or discontinued some time in 1921, apparently because the banks, or the American banks, had become aware of it and had protested with that effectiveness which banks can exercise. I find that the parcel of sugar in question was not shipped in September, and that no custom has been established. That being so, there is a default on the part of the defendants, because they have not fulfilled their contract.

As I have held that the defendants have broken their contract, I have to consider what are the damages which the plaintiffs ought to recover. The defendants' case is that the plaintiffs cannot recover more than nominal damages. They contended that the plaintiffs having accepted the sugar in question and disposed of it cannot reject it, and the only relevant consideration is that the market value of the sugar, considered simply as sugar solely from the standpoint of quality, was in no way affected by the breach of contract. The plaintiffs contended that even if that were a true argument on the limited question of a failure to deliver goods answering to the contract description, there were other relevant and vital considerations, which I now consider. A c.i.f. contract, such as those in question, is a contract for the sale and delivery of goods which must be shipped as called for by the contract description, but it is also a sale of documented goods. The c.i.f. seller is bound to procure and tender to the buyer shipping documents, that is, in particular, a bill of lading which will, among other things, show the date of shipment, that being a condition of the contract. In my judgment it is an implied condition of the contract that the bill of lading so to be tendered shall be a true and accurate document and correctly state the date of shipment. Such a condition seems to me to be absolutely necessary to give to the transaction such business efficacy as the parties must have intended. It is on the faith of the bill of lading that the buyer is called upon to pay the price if he has to pay cash against documents, or to make himself liable for the price if he has opened a credit or otherwise agreed to give his acceptance against documents, and it is on the faith of the bill of lading that he accepts the goods, so far as the essential fact of shipment date is concerned. He is, indeed, entitled to a reasonable time to inspect the goods after discharge from the ship, but he has, as a rule, no independent means of checking the accuracy of the bill of lading date, at least in any reasonable time, or before he has so acted as to have accepted the goods. In any case the buyer is, I think, entitled to rely on the accuracy of the bill of lading date, and to regard the seller as impliedly guaranteeing its accuracy, unless there are express terms in the contract to the contrary. If that were not so, the buyer would in most cases be left without any effective remedy in respect of most serious losses sustained by him through misdated bills of lading. There may be no difference in market value (quality being identical) between an October and a September shipment, and if the goods only are looked at and their actual quality, it may be said that the buyer has not suffered damage and is only entitled to nominal damages, as the defendants say here. But I think such a view has little regard to the business realities of the position. The buyer under such a contract as those in question has the right to reject the tender of documents and refuse to pay the cash or accept the draft, if the shipment is not made in the contract month. The effect of misdating the bill of lading is to deprive him of that right by rendering its exercise impossible, if he relies, as in practice he generally must rely, and in law is entitled to rely, on the accuracy of the bill of lading date. He takes delivery of the goods and pays for them because on the face of the bill of lading he is bound to do so under the contract, whereas if the bill of lading showed because it was a true bill of lading that the sellers could not enforce the contract, because the shipment was out of date, the buyer could and would refuse the tender and could obtain the same goods at their market price, which I assume to be lower than the contract price, that is, at a great saving to himself. Mr. Geddes, the plaintiffs' Bombay manager, in evidence, which evidence I accept, said that if the bill of lading had borne an October date he would have stopped payment or acceptance of the draft by cabling to the London office, and would not have taken up the sugar, because it was not in accordance with the contract. In the same way the manager of the plaintiffs' London office said that before accepting the drafts they would look at the documents to see if they corresponded. In such a case the difference between the market price and the contract price, the latter being higher than the former, represents, in my judgment, the measure of damages in favour of the buyer for breach by the seller of his obligation to deliver a correct bill of lading. The obligation is in its nature, I think, a condition, and if the breach were known in time the buyer could reject the documents; but from its very nature the breach is often only ascertainable when it is too late to reject the documents or treat the contract as repudiated, and no remedy is possible to the buyer except a claim for damages, as on the footing of a breach of warranty. The measure of damages in such a case, in my judgment, is that which I have explained, and it seems to me exactly to fall within the language of section 51, subsection 2, of the Sale of Goods Act, 1893, namely, "the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract." I apply once more the language of Lord Justice Fry, recently quoted by Lord Dunedin in *Hall v. Pim* (30 Lloyd's List, 159, at page 161), from *Hammond and Company v. Bussey* (4 *The Times* L.R., 95; 20 Q.B.D., 79, at page 100));

"What may the Court reasonably suppose to have been in the contemplation of the parties as the probable result of a breach of the contract, assuming the parties to have applied their minds to the contingency of there being such a breach?" In the present case it seems to me clear that the parties must have contemplated that the buyers would, by taking up the documents and accepting the goods on the faith that they were bound to do so, pay the higher contract price and lose their right to reject and suffer damage accordingly.

I may add that where the sellers are shippers it is almost inconceivable that such a breach of contract can be other than designed by them, since only the sellers in such a case have any motive to procure from the ship the misdating of the bill of lading, which can scarcely be accidental. I do not deal with the case on the basis of fraud since fraud is not alleged, but I must not be taken to agree with the contention that the defendants must be deemed to have acted in good faith on the basis of an alleged custom or practice, about which I have expressed my opinion. Nor can I attach any weight to the contention that the incorrectness of the date is a technical breach, since the sugar is the same sugar whether shipped on September 30 or October 1. In a business sense it is not the same; the date of shipment is of primary commercial importance; on it, in any case, depends the legal position of the parties, since the date of shipment is a condition of the contract (*Bowes v. Shand*, 2 App. Cas., 455) and on that legal position depend serious financial consequences.

As I have not been referred to any express decision on the point, I have to decide the question on principle. *Taylor v. Bank of Athens* (27 Com. Cas., 142) has given me no guidance, because Mr. Justice McCardie there had merely to decide a limited question put before him in a special case stated by arbitrators, in which the only question was whether the sellers committed a breach of contract in not shipping the goods within the proper period. No question was there raised as to the breach of contract in not tendering correctly dated documents.

The high standard of correctness which is almost universally, as I am convinced, observed all over the world in the dating of bills of lading is a matter of the utmost commercial importance, and I should be sorry to think that it can be departed from with impunity.

The defendants also raise another point as regards the 150 tons which were resold on the contract above referred to, namely, that the plaintiffs suffered no damage, because by reason of clause 7 in that contract they were entitled to force the goods on the buyers even after they ascertained that the bill of lading dates were not correct, and hence could have recouped themselves for the money they had paid on the misdated bills of lading. That contention assumes that the sub-buyers were solvent, of which no evidence is forthcoming, but where the proper measure of damages has been *prima facie* established, it is for the "defendant to show circumstances that would entitle him to a mitigation" (*Roper v. Johnson*, L.R., 8 C.P., 167). But there is a wider objection. No doubt a plaintiff is bound to take steps to minimize damages, but that doctrine must be construed reasonably. The principle is thus stated by Lord Haldane (Lord Chancellor) in the *British Westinghouse* case ([1912] A.C. 673, at page 689): "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of Lord Justice James in *Dunkirk Colliery Company v. Lever* (9 Ch.D., 20, at p. 25): 'The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business.'"

In the present case I have had the evidence of Mr. Geddes, the manager of the plaintiffs at Bombay, a witness of the highest standing, who says that in no case would his company seek to enforce a misdated bill of lading on their buyers as soon as they knew it was incorrect. I fully accept his statement, and can appreciate not only why they would regard it as a dishonourable act, but also why it should affect their business standing in the East.

In addition I have heard arguments on both sides, though I do not think it necessary to express a final opinion, on the question whether the plaintiffs would succeed in any action against their sub-buyers. In any case the proceedings, even if successful, might be prolonged to the Privy Council through the Indian Courts, and finally fail in securing them fruits, but, on the contrary, leave the plaintiffs saddled with heavy costs. I do not think the defendants are entitled to impose on the plaintiffs this burden, or make it a condition of the recovery of damages, to which the plaintiffs are, if my judgment is right, *prima facie* entitled. I do not think they have sufficiently established circumstances which would entitle them to a mitigation of damages.

I think the plaintiffs are entitled to judgment for £9,417 8s. 3d., being the difference between the contract price, which they paid to the defendants, and the market value of the actual goods; that is limited to the 250 tons.

I do not deem it necessary to discuss further the two alternative forms in which the plaintiffs claim damages, namely, those set out in the first part of paragraph 7 and in paragraph 8 of the points of claim. I leave those claims, which were argued before me, undiscussed, since I decide the case in the manner I have already explained. There will, accordingly, be judgment for an amount to be fixed on the basis that I have indicated, and for costs.

[Solicitors—Messrs. Sanderson, Lee and Co.; Messrs. Ballantyne, Clifford and Co.]

Prob., Divorce, and Adm. Div. (Bateson, J.) 1928. June 12.

THE HARKAWAY.*

Ship—Damage caused by anchor—Obstruction in fairway of navigable river—Duty to buoy or mark anchor.

Persons who drop an anchor in a navigable river, where at a certain state of the tide it will form an obstruction in the fairway, owe a duty to warn other persons navigating up and down the said river of the presence of the obstruction, by buoying or otherwise marking the same,

* Reported by A. W. Grant, Esq., Barrister-at-Law.

and if they fail in that duty they render themselves liable for any damage resulting therefrom.

This was an action brought by the owners of the motor-vessel Harkaway against the Associated Portland Cement Manufacturers, Limited, to recover the damage sustained by the Harkaway by running upon the anchor of the defendants' sailing barge Louisa.

The facts were shortly as follows: At about 7 p.m. on April 1, 1927, the Harkaway, a wooden motor-vessel of 27 tons gross, 53ft. 1in. in length, and drawing 4ft. 3in. forward and 5ft. 3in. aft, was proceeding up the River Medina in the Isle of Wight, bound from Cowes to Newport, Isle of Wight. The tide at the time was "lay tide"; *i.e.*, the water was swelling in the river but not running up. The Harkaway was proceeding up in the best water and had a depth of about a foot of water under her. The defendants' sailing barge Louisa was lying aground on the east side of the river, opposite the West Medina Cement Works, to which she was bound. She was made fast by a rope from her starboard quarter to a tree on the east shore, she was heading down and across the river, and her anchor was down with the cable leading from forward right ahead. There was nobody on board the Louisa, but she was exhibiting a proper anchor light. In these circumstances when the Harkaway was passing up at a distance of about 100ft. from the Louisa she ran upon the anchor of the Louisa and sustained such damage that she sank. It was contended by the plaintiffs that the anchor of the Louisa caused an obstruction in a public navigable river and that the defendants were guilty of negligence in not buoying it or otherwise giving warning of its presence and position to those using the river.

Mr. H. C. S. Dumas appeared for the plaintiffs; Mr. Alfred T. Bucknill for the defendants.

Mr. Justice Bateson.—I have no doubt that the plaintiffs are entitled to judgment in this case. The Harkaway, a wooden vessel, belonging to the plaintiffs, of 27 tons gross, 53ft. 1in. long, with a beam of 16ft. 5in., and fitted with engines of 35 b.h.p., was coming up the River Medina in the course of a voyage from Cowes to Newport, Isle of Wight. She had some general cargo and a crew of three hands. It was a perfectly fine evening and there was not any wind. The tide was what is called "lay tide," which means that the water was swelling in the river but not running up, and this motor-boat was proceeding up on the swelling water. She was drawing 5ft. 3in. aft and 4ft. 3in. forward, and she had about a foot of water under her as she was going up river. She passed a similar but slower motor-boat going up, and the master was taking her up in the best water that he knew. He could not get farther than a little above the West Medina Cement Works, because he would not have had water, and he would have to have water there because of the obstruction caused by the mud in the river. As he was going up in the best of the water he saw the defendants' sailing barge Louisa ashore, that is to say, on the mud on his port bow. The River Medina at this place is, at low water, a mere gut-way, about 30ft. wide, and then when the tide rises to high water there is a considerable amount of water extending to some 200ft. on one side of the middle line of the river and this gut-way, and 100ft. on the other side. The master of the Harkaway was going up, using the lay tide for his boat in what was the best of the water, when suddenly he found his vessel bumping over what turned out to be the anchor of the Louisa, as to which he had had no warning of any sort at all, except that there was a chain hanging out from the bow of the Louisa on to the mud, and then presumably going on some distance. It might be 10 or 15 fathoms; it might be more; it might be less; some vessels have different lengths. It might have been in one direction, following the hawse pipe, along the mud, and it might have been in a different direction under the water, and, unless there was some indication, the master would not know where the anchor was. At any rate he would not expect to find it in the best water which he had to navigate.

In truth and in fact this anchor was sticking up out of the bed of the river, forming an obstruction in the river, either on the edge of this gut-way or just within it—in my opinion in the one position in which an anchor ought not to be from the position of the Louisa, and certainly a position in which the master of the Harkaway would not expect it to be. Having, as I say, bumped over it, his vessel having sustained considerable damage, he found when the tide had ebbed this anchor on his port quarter, about 18in. behind him, and his vessel was so injured that she sank.

These are the short facts of the case. The Louisa was on the mud, and she had a rope from her stern tied to a tree, in order to keep her from floating on to her own anchor (so the mate said), so that evidently the possibility of her slipping on to her own anchor was present in his mind. Having thus secured her, the mate and crew went away, and there was nobody on board the Louisa to warn persons coming up the river as to the position of the anchor. The Harkaway gave the Louisa a perfectly proper berth, passing at a distance which her master thought to be perfectly safe. The anchor might have been driven farther into the river subsequently, but there is evidence to show that at that time it was sufficiently projecting to catch the Harkaway in this shallow water, and in the circumstances, in my view, the case is really an undefended one.

In the olden days, from 1663 (earlier perhaps) and thereabouts, cases of this sort were quite common where light draught vessels were going about in shallow places and anchors were being used to keep them in position. It was laid down so far back as 1663, in *Clarke v. Scattergood: The Warewell and the Susan* (Marsden's Admiralty Cases, 243), that it was neglect to leave an anchor in a navigable river without a buoy. I think that is good sense and it has stood for several centuries. I have consulted the Elder Brethren, and they also think it good sense that if people put an anchor down in channels which are shallow at low tide, it ought to be buoyed. It is said that if a buoy had been put down, a piece of wood or a tin can, the hang of the buoy would only have been 15ft.; but it would have been sufficient to give anybody warning, and no sort of warning was given in this case. It is said that in this river buoys are not used because they get cut away by the motor-boats—but that only means that they have not strong enough moorings—and it is said that if they put out stronger moorings the motor-boats would find possibly that their propellers were cut away instead of the mooring buoys. That, however, to my mind, is no reason why the anchors should not be buoyed, or, if not, some other means of warning people should be used if anchors are put in such places as this. In my view a warning ought to have been given of this obstruction and the defendants' servants had no right to put it in a public navigable river.

Mr. Dumas said that his clients had a right to pass and repass in any navigable water without obstruc-

tion. Mr. Bucknill, in reply, said, "So they have, and my clients have a right to put an anchor down." That is so, but they have no right to obstruct, and if they do put an anchor down they ought to give a warning. In the circumstances of this case I think there was a trap, and a trap which unfortunately worked very successfully. Then Mr. Bucknill said that there was ample warning of the position of the trap; but the fact that a ship is aground 90ft. from her anchor does not show where the anchor is or where it may be; and how could the master obtain a knowledge of the actual position of the anchor from the position of the Louisa? If a person puts an anchor down in such a place as this he ought to buoy it. At low water it is necessary that he should do so or use an anchor which does not stick up. If he uses an anchor that sticks up like a spike in the river I think he must pay for any damage that results. Mr. Bucknill said that to have to buoy such anchors would put a serious burden upon the defendants' vessels. It does add a little to the care required, but the number of places in which it would be required is not great, and the time during which there is any danger from an anchor is of course very limited, and it cannot cost much properly to buoy an anchor and it certainly cannot cost much in the case of an anchor such as the one in this case.

Then it is said that no bye-law has been made with regard to this matter, but I do not think that any bye-law is required to prevent people from being negligent. That is a matter of common law. Mr. Bucknill then asked:—What is to happen when these things take place at night? When that case arises I will direct my attention to it. My attention has been called by Mr. Dumas to the case of *Jolliffe v. Wallasey Local Board* (L.R., 9 C.P., 62), and to the case of *Harmond v. Pearson* (1 Campbell, 515), in which Lord Ellenborough said: "It is a peremptory law of navigation, that when any substance is sunk in a navigable river, so as to create danger, a buoy shall be placed over it for the safety of the public. This is the proper and specific notice, which all understand and are bound to attend to." That seems to be good law fairly applicable to this case, with the exception that there Lord Ellenborough was speaking of a barge and here I am speaking of an anchor, but it seems to me that where an anchor or the fluke of an anchor sticks up out of the bottom of a channel it is perhaps more dangerous than a larger object like a barge. Although it does not cover such a wide area it might do greater damage from the sharpness of its point. Mr. Dumas also referred to Mr. Marsden's work, "Collisions at Sea" (7th Edition), where he says at page 105: "Before the days of floating docks, damage to ships by grounding upon unbuoyed anchors in the Thames and elsewhere was a very frequent cause of action. The ship whose anchor was unbuoyed was invariably found in fault." Down to the case of *The Warewell and the Susan* (*supra*) there is a series of similar cases in Admiralty from 1648 to 1840. Mr. Marsden goes on to say: "and 'ordinances' of the Admiralty—which appear to have been presentments of juries at Admiralty sessions—were issued against leaving anchors unbuoyed. In an American case, it was held that in ordinary anchorages ground it is not necessary to buoy the anchor. That is the case of *Baxter v. International Contracting Company* (65 Fed. Rep., 250) which Mr. Bucknill quoted to me. I have not actually got the report, but it seems that in that case the learned Judge, Mr. Justice Brown, said that it was a case which happened in an ordinary anchorage ground, and he seemed to think that it was a case of a shifted anchor and that the plaintiff had failed to make out his case; so it does not help very much in this case. Mr. Bucknill referred to Coulson and Forbes, "Law of Waters," on pages 453 and 458 with regard to rights in navigable waters, and to *Attorney-General v. Wright* (13 *The Times* L.R., 480; [1897] 2 Q.B., 318). That deals only with the right to moor in navigable rivers and about that right there is no question.

I think, in the circumstances, that the plaintiffs are entitled to succeed. There must be judgment for the plaintiffs with a reference to the Registrar to assess the damage.

[Solicitors—Messrs. J. A. and H. E. Farnfield; Messrs. Ince, Colt, Ince, and Roscoe.]

Judicial Committee of the Privy Council.
(Lord Hailsham, L.C., Viscount Haldane, Lord Buckmaster, Lord Wrenbury, and Lord Warrington of Clyffe.)

1928. June 19.

ATTORNEY-GENERAL FOR ALBERTA v. ATTORNEY-GENERAL FOR CANADA.*

Canada — Alberta — Escheated lands — *Bona vacantia*—Title of Crown—Whether in right of Dominion or of Province—Alberta Act, 1905 (Dominion statute) (4 and 5 Edw. VII., c. 3), s. 21—Ultimate Heir Act, 1921 (Alberta statute), s. 1.

In Alberta the Crown possesses the title to escheated lands in right of the Dominion and to *bona vacantia* in right of the province. The Ultimate Heir Act, 1921, of the province of Alberta, so far as it affects the Crown's right to escheated lands, is *ultra vires* by reason of section 21 of the Alberta Act, 1905, of the Dominion Parliament.

Decision of the Supreme Court of Canada ([1927] S.C.R., 136) affirmed.

This was an appeal by the Attorney-General for Alberta from a judgment of the Supreme Court of Canada ([1927] S.C.R., 136) relating to the claim of the Dominion of Canada to the title to escheated lands and *bona vacantia* within the province of Alberta. There was also a cross-appeal by the Attorney-General for Canada.

Mr. O. M. Biggar, K.C. (of the Canadian Bar), and the Hon. Geoffrey Lawrence, K.C., appeared for the province of Alberta; Mr. H. P. MacMillan, K.C. (of the Scottish Bar), Mr. Theobald Mathew, and Mr. Boyd McBride (of the Canadian Bar), for the Dominion of Canada.

LORD BUCKMASTER delivered their Lordships' judgment as follows:—The questions raised on these appeals are whether the Crown possesses in the right of the Dominion of Canada the title to (1) escheated lands and (2) *bona vacantia* within the province of Alberta. The Supreme Court of Canada has decided the first question in the affirmative and the second in the negative. The appeal by the Attorney-General for Alberta is against this judgment on the first point and the cross-appeal of the Attorney-General for Canada upon the second.

The province of Alberta was created in pursuance of the British North America Act of 1871 by a statute

* Reported by SIR W. J. SOULSBY, Barrister-at-Law.

of the Dominion passed in 1905 (4 and 5 Edw. VII., c. 3, called the Alberta Act). Before its constitution and apart from the effect of the Land Titles Act of 1894 there is no real dispute on this appeal as to the title of the Crown in right of the Dominion to escheated properties and *bona vacantia* in the territories that now form part of the province. The main features of the present dispute are, first, the effect of the Land Titles Act of 1894; secondly, that of the Alberta Act; and thirdly, whether the province had power to deal with the property in question. The actual statute by which the province has purported to exercise the rights which it claims is an Act entitled the Ultimate Heir Act, passed in 1921, the essential provision of which is section 3 (1), and is in the following terms:—

"When any person dies intestate in fact in respect of lands situate in the province of Alberta, or being domiciled in Alberta dies intestate in respect of any moveable property or chose in action, and no person or corporation is otherwise than under the provisions of this Act entitled thereto as the heir or next-of-kin of the intestate, then the latter shall be deemed to have made a duly executed and entirely valid will, devising or bequeathing such land, moveable property, or chose in action" to the body corporate known as the Governors of the University of Alberta. It is this provision that has been held *ultra vires* so far as it relates to lands by the Supreme Court of Canada.

The facts that have given rise to this dispute are the deaths of three persons named Wudwud, Malesko, and Stevenson, who were domiciled in the province of Alberta, and died respectively on June 24, 1918, April 24, 1921, and November 8, 1919, leaving both lands and goods without heirs or next-of-kin. The administrators of the several estates made applications to the Supreme Court of Alberta for advice as to their distribution, alleging that no heir, next-of-kin, or other person entitled to the property of the deceased had been found.

The three applications having been consolidated, the Appellate Division of the Supreme Court of Alberta, Mr. Justice Ives dissenting, declared (22 Alb. L.R., 186) the Ultimate Heir Act to be valid and to apply to the real and personal property of any intestate such as Malesko, who died after that Act came into force. In respect of the estates of Wudwud and Stevenson, who died after the constitution of the province on September 1, 1905, and before the Ultimate Heir Act came into force, the Court directed (*a*) that personal property was to be distributed as *bona vacantia* to His Majesty in the right of the province, and (*b*) that lands granted by the Crown after September 1, 1905, were to be distributed to His Majesty in the right of the Dominion. The Court also declared that, apart from the provisions of the Ultimate Heir Act, lands such as Stevenson's, granted before September 1, 1905, and escheating after that date, were distributable to His Majesty in the right of the province. The question of the property being chargeable with the debts of the deceased was left undecided with liberty to apply. On appeal to the Supreme Court of Canada this judgment was affirmed only as to (*b*) and as to the personal estate.

It follows from this statement that the Land Titles Act of 1894 first needs consideration. This Act replaced earlier legislation on the same subject and was, after the constitution of the province, repealed as to Alberta, its terms being reproduced in a provincial statute known as the Land Titles Act, 1906. It was an Act for the registration of title, and provides that a certificate of title granted in pursuance of the statute shall be conclusive evidence as against His Majesty and all persons whomsoever that the person named on such certificate is entitled to the land included therein. It also provides that upon death of the owner of any land for which a certificate has been granted, the land shall vest in the personal representative of the dead owner, who upon a memorandum of probate or letters of administration being entered in the Register shall be deemed to be the owner of the land, and by section 3 it is enacted that the land should descend to the personal representative in the same manner as personal estate and be dealt with and distributed as personal estate. The argument of the appellant upon this Act is that the ownership effected by grant from the Crown followed by registration destroys the right of the Crown to escheated lands, and, further, that in order to assimilate the descent of real and personal estate it is necessary to exclude the right of escheat. Their Lordships think that this argument cannot be sustained. There is nothing in the statute to support the theory that on the registration of the title to land for the first time the character of the tenure under which it was originally held was changed, so that in case of the Crown being the grantor the effect of the Act was to enlarge the ordinary ambit of the grant.

The reasoning of Mr. Justice Anglin, in *Trusts and Guarantee Company v. The King* (54 S.C.R., 107, at pp. 126 and 127) upon this point, with which their Lordships agree, renders further elaboration unnecessary.

It is obvious that the title of the personal representative can be no greater than that of the owner whose estate he holds, and the provision as to the descent of land as personal estate does not affect the question, for escheated lands have not descended, and the question whether they can be sold and used for payment of debts, which has been left open, is not material, for even if they were so liable, to the extent to which they were not needed for this purpose they would still remain the subject of escheat, and though they might have been actually converted they would for this purpose retain the quality of real property by analogy to the doctrine of *Ackroyd v. Smithson* (1 Bro. C.C., 503).

Turning now to the Alberta Act of 1905, it is necessary to consider this in relation to the British North America Act of 1867. This Act of 1867 united the provinces of Canada, Nova Scotia, and New Brunswick, each of which possessed separate Legislatures at the time of the Union. It divided the province of Canada into two provinces, Ontario and Quebec, and gave to each provincial Legislature the right to make laws with regard to property and civil rights within the province. By section 109 it was provided:—

"All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same."

The territory out of which the province of Alberta is constituted was unaffected by this section and remained subject to the laws of the Parliament of Canada. It therefore followed that the province could never, apart from statute, be in the position of owning lands, mines, minerals and royalties. Section 3 of the Alberta Act of 1905, however, made the

provisions of the British North America Acts applicable to the province of Alberta in the following words:—

"The provisions of the British North America Acts, 1867 to 1886, shall apply to the province of Alberta in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion, as if the said province of Alberta had been one of the provinces originally united, except in so far as varied by this Act and except such provisions as are in terms made, or by reasonable intendment may be held to be specially applicable to or only to affect one or more and not the whole of the said provinces."

By section 21 an exception in favour of Crown lands was made in the following terms:—

"All Crown lands, mines and minerals and royalties incident thereto, and the interest of the Crown in the waters within the province under the North-West Irrigation Act, 1898, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act, which shall apply to the said province with the substitution therein of the said province for the North-West Territories."

"Royalties," within the meaning of section 109 of the British North America Act of 1867, have been held in the case of *Attorney-General for Ontario v. Mercer* (8 App. Cas. 767) to include escheats. The reasoning of that case was this: that an escheat is essentially a royalty, and the only difficulty lay in deciding whether the interposition of the words "mines and minerals" after the word "lands" was not sufficient to deprive the word "royalty" of its proper force. It was there declared that these words did not have that effect, and, in consequence, the escheated lands were included in the provisions of section 109 of the British North America Act, 1867, and belonged to the Crown in the right of the province. The difference in the language between section 21 of the Alberta Act, 1905, and section 109 of the British North America Act, 1867, is not, in their Lordships' opinion, sufficient to warrant any real distinction in effect. The royalties must in the latter, as in the former, case be taken to include escheats, and these are reserved to the Crown for the purposes of Canada. This conclusion applies to all lands whenever granted, for the argument that the royalties reserved were only those in relation to lands then held as Crown lands cannot be maintained. In the words of Mr. Justice Duff: "Crown lands, mines and minerals" does not necessarily import "lands, mines and minerals" held by the Crown in full proprietorship; it may be read as including all interests of the Crown "in lands, mines and minerals within the province," and this their Lordships think is the correct interpretation.

Considering now the case of *bona vacantia*, it is plain that they are unaffected by this argument. They are not incident to Crown lands, mines or minerals, and are therefore not included in the reserved property mentioned in section 21. The Attorney-General for Canada, however, argues that they cannot belong to the province, since they never had so belonged before the province was constituted, and there is nothing in the Act of 1905 to confer such a title. Their Lordships think that this argument does not do justice to the fundamental provisions of section 3 of the Alberta Act, 1905. Reading the whole Act together they regard the effect of this section as putting the province of Alberta in the same position as the other provinces in regard to property, except as varied by the statute, either by express terms or reasonable implication. Section 21 is only sensible on this hypothesis, for unless it was assumed that it was required for the purpose of preserving the Crown rights in the property to which it relates, it would be meaningless, but if that be once assumed it follows that the property to which it does not relate is vested in the Crown, not for the purposes of Canada, but for the purposes of the province of Alberta.

They therefore are of opinion that the cross-appeal of the Attorney-General for Canada fails.

There remains the question of the power of the province to affect the title to the escheated lands by virtue of its authority to make laws relating to property and civil rights within the province. This right confers no power to deal directly with public property, which is expressly reserved by section 91 (1) of the British North America Act, 1867, to the Parliament of Canada. An Act, therefore, to declare that such property should vest in his Majesty in his right of Alberta would be void. This direct attack was indeed made by the Legislature of Alberta by an Act of 1915, c. 5, which was declared to be *ultra vires* by a judgment of the Supreme Court in *Trusts and Guarantee Company v. The King* (*supra*). This judgment was a majority judgment, from which Mr. Justice Idington and Mr. Justice Brodeur dissented, but their Lordships think that the decision of the Supreme Court was right. The argument against the Act was most accurately stated at page 110 in the following words of Chief Justice Fitzpatrick: "Judgment for the respondent on this appeal does not involve any decision as to the right of the Legislature of the province to change the laws of inheritance. Lands escheat to the Crown for defect of heirs and this has nothing to do with the question who are a person's heirs. But altering the law of inheritance is one thing and appropriating the right of the Dominion on failure of heirs is quite another."

The Act now in dispute, passed in 1921 by the provincial Legislature, proceeded on different lines to reach the same goal. It provided that the University of Alberta should be the ultimate heir to all property where descent failed. This it is sought to justify upon the ground that the province had power to alter succession and could impinge upon the Crown rights by introducing illegitimate or adopted children into the line of succession; that as to the former this had been done, and the provision had been held valid so far as Saskatchewan was concerned, a province with similar rights to the province of Alberta, in the case of *Attorney-General for Canada v. Stone* ([1924] S.C.R., 682).

Their Lordships think that the conclusion in *Attorney-General for Canada v. Stone* (*supra*) may be safely accepted. The provincial Government's power to control succession may be thus exercised provided that the statute is, when fairly regarded, designed solely for this end, but when under user of this power the Legislature attempts to defeat the Crown rights expressly reserved (section 21) they have passed on to forbidden ground and cannot justify their intrusion by a colourable pretext for their acts.

The cases summarized in the judgment of Mr. Justice Duff in the case of *Attorney-General for Ontario v. Reciprocal Insurers* (40 *The Times* L.R., 273; [1924] A.C., 328, at p. 337) show that where collision between the rights of the provincial and

Dominion Parliaments arises under any statute the real purpose of the Act must be regarded in forming an opinion as to the validity of the statute. To use the words of the judgment referred to: "Where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the Legislature is really doing."

In the present case, while the University of Alberta exists, and it is to be hoped it will continue for a time that knows no measurable limit, the right of the Crown is completely defeated.

It is not by varying or extending the ordinary rules of succession that this is accomplished, but by introducing outside all natural, lawful or conventional descendants or relatives of a deceased person an entirely foreign beneficiary and one, in part, at least dependent on the provincial revenues. There is no real difference in substance, and only partially in effect, between this and the Act of 1915, and in their Lordships' opinion it is equally open to objection. For these reasons they are of opinion that the appeal must fail and both the appeal and the cross-appeal should be dismissed without costs, and they will humbly advise His Majesty accordingly.

[Solicitors—Messrs. Blake and Redden; Messrs. Charles Russell and Co.]

Judicial Committee of the Privy Council.
(Lord Hailsham, L.C., Viscount Haldane, Lord Buckmaster, Lord Wrenbury, and Lord Warrington of Clyffe.)

1928.
June 12.

GRAY AND OTHERS v. PERPETUAL TRUSTEE COMPANY, LIMITED, AND ANOTHER.*

Will—Mutual wills by husband and wife—Whether evidence of an agreement to constitute equitable interests.

The mere fact that two wills have been made simultaneously by husband and wife in identical terms does not of necessity imply any agreement beyond an agreement so to make them, and is no evidence of an agreement that after the death of one spouse the other will not revoke his or her will.

This was an appeal from an order of the High Court of Australia reversing a finding of the Supreme Court of New South Wales.

Mr. H. P. MacMillan, K.C. (of the Scottish Bar), and Mr. A. C. Nesbitt appeared for the appellants; Mr. Wilfrid Greene, K.C., and Mr. Louis H. Gluckstein for the second respondent, Mrs. Hudson.

LORD HALDANE delivered their Lordships' judgment as follows:—

In this case the question is whether the appellants are entitled to the reversal of a judgment of the High Court of Australia, delivered by a majority on appeal from a decision of the Supreme Court of New South Wales (Mr. Justice Harvey, Chief Judge in Equity), which was reversed by the High Court. What was held by the High Court was that Mrs. Hargrave, the testatrix in this case, was entitled to revoke her will of October 29, 1914, and to make a different will of July 18, 1923. It was further held that the latter will was a good execution of a general power of appointment contained in a settlement dated January 25, 1879, and made between her and her husband, Lawrence Hargrave, who predeceased her. The settlement was a postnuptial one, consisting entirely of the husband's property. That was vested in a trustee, (1) upon trust for such persons and purposes as the wife should, with the consent of her husband during his life and afterwards at her own discretion, by deed or will appoint; (the wife had thus, in case of her surviving her husband, an unrestricted general power of appointment); (2) upon trust for the wife for life; and after her death and in default of appointment by her, (3) upon trust for such persons and purposes as her husband should by deed or will appoint, and in default and subject thereto; (4) on trust for the husband for life and after his death; (5) on trust for the child or children of the marriage of Mr. and Mrs. Hargrave absolutely, with an ultimate trust in default of children for her husband in fee.

The trusts of this settlement are stated above in outline. The wording is quite clear. The main trust, stated more precisely, was for such ends, intents and purposes as Mrs. Hargrave, should at any time or from time to time, with the consent of her husband during his life, and after his decease at or in her uncontrolled discretion, notwithstanding any future coverture, by deed or deeds, or by will appoint, and in default of and until and subject to any and every such appointment, upon trust during her life for her separate use, and after her decease, and in default of and subject to any and every such appointment by her as aforesaid, upon such trusts as the husband should by deed or will appoint, and subject to such appointment by him as aforesaid for him during his life and after his death for the children of the marriage absolutely, and in default of such children for the husband absolutely.

No appointment by deed was made, but on October 29, 1914, the husband and wife both made wills, and these were contemporaneous. By the husband's will he left all his property, including all his "estates, real and personal," over which he had a power of appointment by virtue of the settlement of January 25, 1879, to trustees for sale, conversion and investment, and to pay the income to his wife, Margaret Hargrave, for her life, and after her death to pay such income until the death of the last of his children equally between his surviving children and the issue surviving them of those that were dead; and after the death of the last of his children the trustees were to distribute the trust funds among all the grandchildren then living *per capita* and not *per stirpes*. It must be borne in mind that the husband's power under the settlement was subordinate to that of the wife, which had been made paramount.

The will of the wife, made on the same date, was in some points different. She appointed the respondent company to be her trustee and executor. She expressly refrained from exercising the power of appointment vested in her by the settlement of 1879. She left all her real and personal estate (excluding what she could appoint under the general power just referred to, which she had declared her intention not to exercise) to her trustee, upon trust, for conversion and investment, and to pay the income to her husband for his life, and then to her children surviving her (with representation), and after the death of the last of her children to distribute the *corpus* among her grandchildren then living *per capita*, with substitution of the issue of any of them

* Reported by SIR W. J. SOULSBY, Barrister-at-Law.

who had died before the period of distribution leaving issue.

It is clear that the general power remained intact in her, although she had not exercised it, subject, of course, to any questions to which its subsequent exercise by her might give rise. So far there was no complication. In 1915 she made a codicil leaving two annuities to be paid by her trustee out of what she had vested in the trustee by her will. In July, 1915, her husband died, and henceforward Mrs. Hargrave took the benefits conferred on her by his will. On September 15, 1919, Mrs. Hargrave made another will, in which she again expressed an intention not to exercise the general power given to her by the settlement of 1879, but gave out of her own estate annuities, including one of £250 a year to her daughter Margaret, the second respondent. For the rest this new will did not interfere materially with the provisions of the will of 1914.

But on July 18, 1923, Mrs. Hargrave made a further will, which did interfere with these provisions completely. She had moved to London, and when there by this new will she "devised and bequeathed all her real and personal estate" to her daughter the second respondent, Margaret Hudson, absolutely, and appointed her the sole executrix.

Mrs. Hargrave died in October, 1923, and letters of administration with the will annexed were granted at Sydney to the respondent company.

There is no doubt that the terms of this final will were such as to amount to an exercise of the general power conferred on Mrs. Hargrave by the settlement of 1879. It is not in controversy that, although no intention to include the exercise of the power was expressed in this will, it must be taken to have been exercised under the general words of disposition, by virtue of either section 23 of the Wills, Probate and Administration Act of New South Wales, or by virtue of section 27 of the English Wills Act, 1837, if she was domiciled at her death in England. On this assumption the will disposes of property comprised in the settlement, amounting to over £12,000.

Their Lordships have to decide two questions which have been brought before them. The first is whether the simultaneous wills of Mr. and Mrs. Hargrave were mutual wills made in such circumstances that neither the husband nor the wife could revoke or modify them without the assent of the other. The second question is whether a case of election has arisen. As to the first question, it is necessary to turn to the evidence of the circumstances in which the wills of 1914 were made. The evidence is somewhat meagre. But it appears that by September, 1914, the respondent company had been appointed sole trustee of the settlement of 1879, and that Mr. and Mrs. Hargrave went to the office of the company to express their desire that their disposable property should go in the same way among their children and grandchildren. They had then four children and two grandchildren. Mr. Bennett, an official of the respondent company, gave evidence that on September 22, 1914, Mr. and Mrs. Hargrave came to the office of the respondent company and discussed how they should make their wills so that the property disposed of should go among their children after their deaths. Mr. Bennett had no exact recollection of what passed, but he thought that something was said by Mr. Hargrave to the effect that if he made a will leaving everything to her for life, with remainder to the children for life, and then to their children, would she not do the same, and that she said she would. Mr. Douglas, another official of the company, gave evidence to much the same effect, adding that it was arranged that the husband should make an appointment of the funds in the settlement, and that his wife should by her will negative any intention on her part to exercise her power.

This last provision appears to be the result of a belief in the minds of the parties that the non-exercise by the wife of her power might effect a saving of death duty.

The Chief Judge in Equity (Mr. Justice Harvey), who tried the case, was of opinion that it could not be said that the evidence established that there was an actual bargain between the husband and the wife that they should make wills in identical terms, in the sense that each refused to make a will unless the other agreed to do so. On this point of fact Chief Justice Knox, on the appeal to the High Court, agreed with him, although he felt constrained by the authorities to dismiss the appeal. Mr. Justice Isaacs, however, took a different view and held that the arrangement made amounted to an actual agreement. He was in favour of allowing the appeal, but on different grounds. Mr. Justice Higgins held that there was no agreement to make the wills irrevocable, and was for allowing the appeal. Mr. Justice Rich held that, as the wife when she succeeded had bound herself in equity to give effect to her husband's appointment and not to exercise her own power, a ground which did not depend on the mere effect at law of the establishment of a contract such as Mr. Justice Harvey had discussed, but on equitable interests which he thought had arisen, the appeal should be dismissed. Mr. Justice Starke thought that the husband and wife were not making stipulations binding either in law or in equity, but were only settling the division of their property in the measure which seemed fair to them at the moment. He was therefore in favour of allowing the appeal.

Mr. Justice Harvey had decided for the appellants on the ground that although no binding contract was proved, still it was established by authority that where mutual wills are made by two persons as the result of some understanding or arrangement between them, this was enough, although it might not amount to a binding contract in law, to give rise to equities.

Their Lordships are in agreement with Mr. Justice Harvey and the other learned Judges in Australia who have held that no binding contract was established by the evidence. What they have to consider is the proposition as to the effect in equity laid down by Mr. Justice Harvey, as stated.

There was a particular authority which was relied on by the appellants for the proposition that if two persons simultaneously make wills to the same effect, and in that sense mutually, a second will made by one of them after succeeding to the other's estate under the originally made will, is precluded from being treated as effective to interfere in equity with the existing disposition. This authority was the well-known case of *Dufour v. Pereira,* decided by Lord Camden in 1769 (Dickens 419). The decision has been fully discussed in a book of authority, Hargrave's "Juridical Arguments," Vol. II., at p. 272. The volume last named contains a very full account by the learned editor of a discussion of the case in its early stages by Lord Loughborough, who in 1797 finally decided the very question in *Lord Walpole v. Lord Orford* (3 Ves. Jun. 402). In *Dufour v. Pereira* (*supra*) the conclusion reached was that if there was in point of fact an agreement come to that the wills should not be revoked after the death of one of the parties without mutual consent, they were binding. That they were mutual wills to the same effect was

at least treated as a relevant circumstance, to be taken into account in determining whether there was such an agreement. But the mere simultaneity of the wills and the similarity of their terms do not appear, taken by themselves, to have been looked on as more than some evidence of an agreement not to revoke. The agreement, which does not restrain the legal right to revoke, was the foundation of the right in equity which might emerge, although it was a fact which had in itself to be established by evidence, and in such cases the whole of the evidence must be looked at. It was upon this ground that Lord Loughborough, in the later case of *Lord Walpole v. Lord Orford* (*supra*), dismissed the claim founded on the principle of Lord Camden's judgment, holding that no sufficiently definite agreement had been proved.

The most recent judgment on the effect of mutual wills made by husband and wife, without independent evidence of any contract, is that of Mr. Justice Astbury in *In re Oldham* ([1925] Ch. 75). That learned Judge subjected the authorities to a careful examination, and came to the conclusion that the mere fact that two wills were made in identical terms does not of necessity imply any agreement beyond an agreement so to make them. In the case before him he found that there was not sufficient evidence of any further agreement, and that there was in the authorities referred to in the argument nothing that constrained him to decide otherwise.

Their Lordships agree with the view taken by Mr. Justice Astbury. The case before them is one in which the evidence of an agreement, apart from that of making the wills in question, is so lacking that they are unable to come to the conclusion that an agreement to constitute equitable interests has been shown to have been made. As they have already said, the mere fact of making wills mutually is not, at least, by the law of England, evidence of such an agreement having been come to. And without such a definite agreement there can no more be a trust in equity than a right to damages at law.

This disposes of the first of the contentions which were put forward at the Bar for the appellants. The second contention was that Mrs. Hargrave was put to her election either to take under her husband's will, or to reject it if she desired to retain the general power of appointment, and that having elected to take under his will, she could not afterwards create new interests under the power which could prevail in equity. This contention is, in the opinion of their Lordships, untenable. They are unable to find language in the husband's will which either puts the wife to her election, or puts her in the position of seeking at the same time to approbate and to reprobate its provisions. The husband's will disposed of his own property and also purported to exercise his own power of appointment under the settlement. But under the settlement his power was subordinate to the paramount power of the wife, who was enabled to override everything. This paramount power the wife expressly refrains from exercising in her will of 1914. But not the less she abstained from extinguishing it, and confines the operation of her will to her own property. Their Lordships, therefore, find no reason for holding that she was in any way precluded from exercising her general power subsequently, or for doubting that in law she must be taken to have done so by her final will of 1923. This being so, there is no inconsistency, and there is no room for any question of election arising.

For these reasons they will humbly advise His Majesty that the appeal should be dismissed. They are always reluctant to give unsuccessful appellants their costs. But in this case the questions which have arisen are so obviously the result of the obscure and unusual procedure of the husband and wife in relation to the settlement of 1879, that they think that the costs of all parties as between solicitor and client should be paid out of the settled funds.

[Solicitors—Messrs. Light and Fulton; Messrs. Bartlett and Gluckstein.]

Judicial Committee of the Privy Council. (Lord Hailsham, L.C., Lord Blanesburgh, and Lord Atkin.) — 1928. June 25.

RECTOR AND CHURCHWARDENS OF ST. NICHOLAS ACONS v. LONDON COUNTY COUNCIL.*

Ecclesiastical Law—Disused churchyard—Erection of electric transformer chamber—Whether a "building"—Refusal of sanction—Disused Burial Grounds Act, 1884 (47 and 48 Vict., c. 72), s. 3.

By s. 3 of the Disused Burial Grounds Act, 1884, "After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting-house, or other places of worship."

By reason of this enactment the Board refused to sanction an agreement for the construction, by an electric lighting company, of a transformer chamber in a disused churchyard, holding that the proposed structure, although not substantially raised above the ground level, would be a building "erected upon" the churchyard and therefore came within the prohibition.

In re St. Nicholas Cole Abbey ([1893] P. 58) not followed.

Decision of the Court of Arches (44 *The Times* L.R. 241; [1928] P. 102) affirmed.

This was an appeal by the rector and churchwardens of the parish of St. Nicholas Acons, in the City of London, against an order made on January 24, 1928, by the Dean of the Arches (44 *The Times* L.R. 241; [1928] P. 102) dismissing an appeal of the present appellants from an order made by the Chancellor of the Consistory Court of London refusing to decree a faculty authorizing the appellants to enter into a proposed licence agreement with the City of London Electric Lighting Company, Limited, for the purpose of granting to the company the user of further portions of the churchyard of the parish for the enlargement of an existing transformer chamber and entrance under the churchyard. The Board sat with the Archbishop of Canterbury and the Bishops of Rochester, Norwich, and Chichester as Ecclesiastical Assessors.

Mr. Stafford Cripps, K.C., Mr. G. Wightman Powers, and Mr. G. G. Honeyman appeared for the appellants; the Hon. Sir Malcolm McNaghten, K.C., and Mr. Sidney G. Turner for the respondents.

The sole question for determination in the appeal was whether the Consistory Court had jurisdiction to decree the faculty prayed in view of the provisions of

* Reported by Sir W. J. Soulsby, Barrister-at-Law.

section 3 of the Disused Burial Grounds Act, 1884, which are in the following terms :—

"It shall not be lawful to erect any buildings upon any disused burial ground except for the purpose of enlarging a church, chapel, meeting-house, or other places of worship."

The churchyard of St. Nicholas Acons, situated in Nicholas-lane, in the City, was closed for burials by an Order in Council in 1854, and since that date it had been kept as a private open space enclosed by railings.

The City of London Electric Lighting Company, Limited, supplied electricity for lighting and other purposes in the City of London, and supplied the large majority of the parishioners in the parish of St. Nicholas Acons. It was stated on the part of the appellants that by a faculty under the seal of the Consistory Court of London, dated April 6, 1892, the company was granted a licence to use for a period not exceeding 21 years a portion of the ground within the churchyard at a yearly rent of £20 for the purpose of affording an entrance to the company's transformer chamber, situate in Nicholas-lane, and the company constructed the entrance and railed it in. By a further faculty granted by the Consistory Court in March, 1914, a further licence was granted to the company to use the same portion of ground for the purpose for a further period of 21 years from May 12, 1913, at the yearly rent of £30.

Faculties authorizing the user of other churchyards for similar purposes had been decreed by the Consistory Court—namely, St. Benet Sherehog, on April 6, 1892; St. Nicholas Cole Abbey, on September 2, 1892; and St. Benet Fink, on September 2, 1892. Further faculties were decreed in respect of those three churchyards on March 18, 1915, March 2, 1914, and June 28, 1915, respectively.

Relying on the validity of the faculties, the company had continued to use the transformer chambers and the entrances attached thereto from 1893 down to the present date and had planned their network of mains for distributing electricity on the faith of the faculties so granted.

To comply with the recommendations of the Electricity Commissioners and to satisfy the increasing demand for electricity, both in the parish and in the further area supplied through the existing transformer chamber, it was necessary for the company to extend the transformer chamber. As the only possible method of extension was by carrying the transformer chamber under the churchyard the company applied to the appellants for permission to use for a term not exceeding 30 years further portions of the churchyard, in addition to that covered by the two former faculties for the extension of the transformer chamber. That application by the company was considered at a meeting of the parochial church council on March 28, 1926, when it was sanctioned and approved and the appellants were requested to petition the Consistory Court of London for the necessary faculty. The application was further considered by the vestry of the parish at meetings held in April and July, 1926, and at the last meeting a resolution was passed authorizing the appellants to petition the Consistory Court of London for the necessary faculty to enable the appellants to authorize the company to carry out the proposed works.

On April 6, 1927, the appellants petitioned the Chancellor of the Consistory Court of London to decree a faculty to issue sanctioning a proposed licence agreement and authorizing it to be entered into and carried into effect. The petition came on for hearing before the Chancellor on June 25 and July 16, 1927, and evidence was adduced on behalf of the appellants to show—

"(*a*) That the amenities of the churchyard would not be affected, but would be improved. (*b*) That the rent of £150 proposed to be paid by the company was fair and reasonable. (*c*) That in view of the expenditure involved the proposed term of 30 years was fair and reasonable. (*d*) That the machinery which would be installed in the transformer chamber would be noiseless. (*e*) That it was impossible to enlarge the existing transformer chamber in any other direction. (*f*) That the area proposed to be used was the minimum consistent with an efficient supply of electricity to the parish and the rest of the area supplied from the transformer chamber. (*g*) That there was no trace of the names of the persons buried in the churchyard. (*h*) That if any human remains were found in the course of carrying out the works notice would forthwith be given to the Registrar of the Consistory Court of London, and such remains would be reverently and decently re-interred in such cemetery or place as the Court should direct."

An appearance was entered on behalf of the respondents, the London County Council, who, by virtue of the Metropolitan Board of Works (Various Powers) Act, 1885, and the Local Government Act, 1888, were the authority for enforcing the observance of the provisions of the Disused Burial Grounds Act, 1884. It was contended on their behalf that the proposed transformer chamber would constitute a building erected on a disused burial ground within the meaning of section 3 of the Disused Burial Grounds Act, 1884, and that therefore the Chancellor had no jurisdiction to decree the faculty prayed.

The appellants contended that the proposed extension of the transformer chamber would not constitute a building erected on the disused burial ground, as it would lie wholly beneath the ground (with the exception of a small ventilation shaft). It was also contended by the appellants that, in view of the decisions of the Consistory Court of London 36 years ago in the case of this and other disused burial grounds in the City of London, which decisions had never been reversed, the company had constructed sub-stations and transformer chambers, and that, if those decisions were to be reversed after so long a lapse of time, it would now be a matter of the greatest difficulty to find any alternative places available for the construction of transformer chambers in the necessary parts of the City of London, and the whole population of the City of London would suffer as a consequence.

The Chancellor delivered judgment on July 16, 1927, holding that the proposed transformer chamber would be a building erected on a disused burial ground within the meaning of the Act, and that he had no jurisdiction to decree the faculty prayed, and ordered that the petition be dismissed.

From the decision of the Chancellor the appellants appealed to the Arches Court of Canterbury, and the appeal was heard before the Dean of Arches (Sir Lewis T. Dibdin), who delivered judgment affirming the order of the Consistory Court of London and dismissing the appeal, with costs.

The appellants now appealed to the Judicial Committee of the Privy Council.

It was argued in support of the appeal that the Chancellor had jurisdiction to decree the faculty as prayed, and that the proposed extension would not constitute a building erected on a disused burial ground within the meaning of the Disused Burial Grounds Act, 1884.

At the close of the arguments for the appellants,

Their LORDSHIPS did not call upon counsel for the respondents, the LORD CHANCELLOR (Lord Hailsham) saying that their Lordships would consider the advice which they would tender to his Majesty.

The LORD CHANCELLOR (Lord Hailsham) delivered the considered judgment of the Board as follows:— This is an appeal by the rector and churchwardens of the Parish of St. Nicholas Acons, in the City of London, against an order made on January 24, 1928, by the Dean of the Arches, dismissing an appeal from an order made by the Chancellor of the Consistory Court of London, and refusing to decree a faculty authorizing the appellants to enter into an agreement with the City of London Electric Lighting Company, Limited, for the construction of a transformer chamber in the churchyard of the parish. There was no opposition to the application on its merits, but the respondents, the London County Council, objected to the grant of the faculty in pursuance of their statutory duty on the ground that the proposed transformer chamber would infringe the provisions of section 3 of the Disused Burial Grounds Act, 1884, and that on that ground there was no jurisdiction to grant it.

From the evidence it appears that the parish church of St. Nicholas Acons was destroyed in the Great Fire and has never been rebuilt; and that the churchyard was closed for burials by Order in Council in the year 1854 and has since that date been kept as a private open space enclosed by railings. It further appears that the City of London Electric Lighting Company, Limited, is an electricity undertaking supplying electricity for lighting and other purposes to a large number of persons in the City. For the purpose of its undertaking the company had erected a transformer chamber in Nicholas-lane, and in the year 1892 the company was granted a licence to use a portion of the churchyard for the building of an entrance to the transformer chamber and for railing off the entrance from the rest of the churchyard. This licence was granted for a period of 21 years by virtue of a faculty decreed by Chancellor Tristram on April 6, 1892, and was renewed for a further period of 21 years by virtue of a faculty granted in March, 1914. Since the grant of the licence the use of electricity has very largely increased, and evidence was called to prove that it was essential in order to supply the public need that the transformer chamber should be enlarged and that there was no site available for the enlargement except the churchyard.

The transformer chamber which it is proposed to place in the churchyard is described in the judgment of the Chancellor as:—

"A brick-built structure with a roof of asphalt supported by wrought steel girders and by reinforced concrete. That roof is under the surface of the churchyard and the only parts of the transformer chamber which will, so to speak, emerge in the churchyard are two ventilators, which are something like nine inches above the surface of the churchyard, and they will be practically concealed from sight by certain beds of flowers which the company undertake to place there.

"So far as noise is concerned, there will be no noise connected with the machines which are used in the transformer chamber. They are, in fact, motionless machines. . . So what is contemplated is a chamber mainly under the churchyard, but with two ventilator lights just above the surface, and containing noiseless machinery, machinery which is simply used for transforming current."

The relevant section of the Disused Burial Grounds Act, 1884, is in these terms:—

"Section 3: After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting-house, or other places of worship."

It was not disputed that the churchyard in question is a disused burial ground within the meaning of the Act. For the appellants it was contended that the construction of this transformer chamber would be of great public advantage; that it was so designed as not to interfere with the use of the churchyard as an open space; that the grant of the licence would add materially to the revenue of the church; and that a necessary consequence of the decision appealed against, if upheld, would be that the faculties already granted in this and other cases were *ultra vires*, a conclusion which might lead to much public inconvenience.

Many of these considerations are matters eminently proper to be considered by Parliament on an application to amend the law; but they can have very little relevance to the question of law which their Lordships have to determine. The first question which has to be considered is whether the proposed transformer chamber is a building. Having regard to the nature of the structure as described above, their Lordships can entertain no doubt that that question must be answered in the affirmative, and, indeed, this was not seriously contested on behalf of the appellants. But the appellants' counsel contended that even if the chamber were a building it would not be a "building erected upon" the churchyard. It was argued that this expression must be limited to buildings raised substantially above the ground level and interfering with the use of the churchyard for the purposes of an open space. In their Lordships' view the language of the statute cannot be so limited. The erection of the building is begun as soon as the foundation has been excavated, and a building is erected on the site on which it is built none the less because no part of it is raised above the ground level as existing at the date of its erection.

It was argued that this view was inconsistent with the decision of the House of Lords in the case of the *Mayor of Paddington v. Attorney-General* (22 *The Times* L.R., 55; [1906] A.C. 1). In that case the borough council sought to erect a screen in a disused burial ground to prevent adjoining houses from acquiring an easement of light. The House of Lords held that a screen erected for such a purpose would not necessarily be a building; but their Lordships find nothing in the language of the judgment to support the limited construction sought to be put on the statute by the appellants in the present case.

It was further contended for the appellants that, since faculties had been granted in the year 1892 in this and other cases, their Lordships ought to treat the law as settled by these decisions and ought not now to disturb them. The cases in which faculties were granted are reported in the Law Reports under the heading *In re St. Nicholas Cole Abbey* ([1893] P. 58, and in the note to that case on p. 66). These were all unopposed petitions, and in none of them was the Disused Burial Grounds Act, 1884, referred to, either in argument or in the judgment.

The Chancellor appears to have treated the grant of the licence in the case of St. Nicholas Acons as being equivalent only to the grant of an easement of a right of way, and to have held that on that ground there was jurisdiction to make the order. The question whether the entrance to the transformer

chamber then sanctioned constituted a building erected on the churchyard was never discussed or decided. Their Lordships are quite unable to treat a decision, given in an unopposed case without any reference to the Act of Parliament, authorizing the grant of a licence for a limited period as a decision which determines the construction to be put on the Act of Parliament, or as a factor which should in any way affect their Lordships' judgment on the question of construction now that it is before them.

It follows that, in their Lordships' opinion, this appeal fails, and should be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

[Solicitors—Messrs. Phillips, Son, and Rollinson; Mr. T. Bullivant.]

Court of Appeal. } 1928.
(Scrutton, Greer, and Sankey, L.JJ.) } June 15.

SMITH, HOGG AND CO., LIMITED v. LOUIS BAMBERGER AND SONS.*

Ship — Charterparty — Discharge of cargo — Meaning of "alongside"—Discharge on to quay and into lighters—Custom of Port of London — Respective obligations of shipowners and receivers.

The plaintiffs' steamer was chartered for the conveyance of a cargo of timber from Archangel to London, the charterparty providing, "The cargo to be brought to and taken from alongside the steamer at the charterer's risk and expense as customary." The defendants were indorsees of bills of lading which incorporated the terms of the charterparty. On arrival the plaintiffs discharged part of the cargo on to the quay and stacked it there and discharged part of it into lighters and stowed it in the lighters, and they brought this action, alleging that as the defendants did not take the cargo from alongside the steamer they (the plaintiffs) had had to incur the expense of stacking on the quay and of stowage in the lighters. The defendants pleaded that by the custom of the Port of London the shipowners were bound to bear the cost of unloading and stacking timber on the quay alongside the ship, and, in the case of overside discharge, the cost of delivery and stowage in the lighters.

Held, that by the custom in question the shipowners were under an obligation to bear all costs of unloading and stacking on the quay and of delivery and stowage in the lighters, and as there was no inconsistency between the custom and the charterparty the action failed.

Appeal from decision of Wright, J. (44 *The Times* L.R., 320), allowed.

This was the defendants' appeal and the plaintiffs' cross-appeal from the judgment of Mr. Justice Wright (44 *The Times* L.R., 320).

The action was brought by the plaintiffs, Smith, Hogg and Co., Limited, of Victoria-terrace, West Hartlepool, claiming from the defendants, Louis Bamberger and Sons, of Broad-street-buildings, E.C.2, £102 9s. 3d. in respect of the discharge of a quantity of timber from the plaintiffs' steamship Fernhill, in Surrey Commercial Dock, London.

Under bills of lading of various dates in September and October, 1926, which incorporated the terms of a charterparty dated September 13, 1926, made between the plaintiffs and the White Sea Timber Trust, it was provided that a quantity of deals, battens, and boards shipped at Archangel should be delivered at Surrey Commercial Dock to the order of the Russian Wood Agency, Limited, or their assigns. The charterparty contained, *inter alia,* the following clause:—

"The cargo to be brought to and taken from alongside the steamer at the charterer's risk and expense as customary."

The property in part of the cargo passed to the defendants as indorsees of the bills of lading. The cargo was discharged in part on to the quay and in part into lighters.

The plaintiffs pleaded that the defendants in breach of their obligations under the bills of lading did not take the cargo from alongside the steamer, and that in consequence they (the plaintiffs) carried the cargo to and stowed it in the usual place in the docks for discharged timber at a cost of £102 9s. 3d.

The defendants contended that the cargo was to be discharged according to the custom of the port of discharge, and pleaded that by the custom and practice of the Port of London the shipowner was, in the case of timber, bound to unload and stack it on the quay alongside the ship. In the case of overside discharge they alleged that the custom was to provide only sufficient open lighters to receive the goods from the ship's tackle, and that the shipowner was bound to do the whole work of delivering the goods into the open lighters. They contended that they were under no liability in respect of the money claimed by the plaintiffs, since, by the above custom, the shipowner was under an obligation to bear all costs of the unloading and stacking on the quay and the delivery and stowage in the lighters.

The defendants admitted that the plaintiffs discharged part of the cargo on to the quay and stacked it, but said that it was unsorted to marks or bills of lading. They alleged that the timber was subsequently removed and sorted by the Port of London Authority, labour in respect of which they (the defendants) were charged.

MR. JUSTICE WRIGHT held that, under a contract of the kind in question, when discharge was on to the quay, the cargo was "alongside" when it was available for release from the ship's tackle on the quay, and the obligation of the receivers to take it "from alongside" arose at that moment; but when the discharge was into lighters, it was the duty of the shipowners to place the cargo in the lighter, and the receivers' obligation only began after that had been done. The plaintiff shipowners, therefore, succeeded in their claim against the defendant receivers in respect of the cargo discharged on to the quay, but their claim failed as regarded the cargo discharged into lighters.

The defendants appealed, and the plaintiffs cross-appealed.

Mr. Raeburn, K.C., and Mr. J. Dickinson appeared for the defendants; and Mr. Le Quesne, K.C., and Sir Robert Aske for the plaintiffs.

The following considered judgments were read:—

LORD JUSTICE SCRUTTON.—This is an appeal in a test case intended to raise the question of the proper

* Reported by T. W. MORGAN, Esq., Barrister-at-Law.

distribution of the costs of discharging timber in the Surrey Commerical Dock, London, as between shipowner and receiver. The s.s. Fernhill was chartered in 1926 in the well-known Merblanc (White Sea) Charter Form, which has been in existence since 1899. The material terms are that "the ship shall load a full and complete cargo of deals and/or battens and/or ends, &c., and proceed to a safe port (which was ultimately fixed as London) and there deliver the same. Cargo to be discharged with customary steamship dispatch, but according to the custom of the respective ports. The cargo to be brought to and taken from alongside the steamer at charterer's risk and expense as customary." The Fernhill carried timber cargo under 63 bills of lading, 31 of which were held by the present defendants. These bills only identified the subject-matter by number of pieces and sizes, not by marks. The goods shipped under each bill were separated on ship by a paint line, and a painted number, corresponding to the number of the bill of lading. But one batten of a given size is as good as another, and after the goods passed the ship's rail no attempt was made to keep them separate. So long as the receiver got his number of pieces of the right sizes, all was well. Timber goods at the Surrey Commercial Dock are discharged in two ways: (1) On to quay; (2) over side into lighters. As regards lighters, there has been litigation both before and after the Merblanc Charter as to the amount of work the shipowner must do in the barge by way of discharge or delivery at his own expense. As regards the quay, the discharge or delivery has proceeded on an agreed custom during all the time the Merblanc Charter has been in existence, the shipowner doing a recognized amount of work at his own expense, and until the present case no attempt has been made to disturb this custom or to impose less work on the shipowner, or alter the way in which by the custom of London the shipowner delivers or discharges, in regard to the cost of such work. The present attempt is made in consequence of a decision of the House of Lords in the case of *The Turid* (38 *The Times* L.R., 423; [1922] 1 A.C., 397) in respect of timber discharge in the port of Yarmouth, followed by a similar decision as to the port of Hull in the case of *W. N. Hillas and Co., Limited v. Rederi Aktiebolaget Acolus* (43 *The Times* L.R., 67). The question is whether on the facts of the discharge in London these decisions are applicable or not, and whether the agreed customs of the Port of London are excluded by the terms of the Merblanc Charter in that they contradict these terms. Discharge of timber cargoes in London under the Merblanc Charter has proceeded, so far as the discharge on the quay is concerned, in accordance with the customs, for over 25 years without objection. The question is whether the decisions of the House of Lords in *The Turid* (*supra*) and *W. N. Hillas and Co., Limited v. Rederi Aktiebolaget Acolus* (*supra*) compel an alteration of this old-established practice. Mr. Justice Wright has decided that the practice of discharge on the quay is to be altered as regards incidence of expense, and the receivers appeal. He has also decided that the practice of discharge into lighters is not to be altered as to incidence of expense, and the ship appeals.

The respective customs for quay and lighter discharge in London are agreed, reserving the question of their applicability in law to the Merblanc Charter. In practice they have always been treated as applicable to that charter until this case.

The agreed custom as to the quay discharge is set out in the correspondence and in the Judge's judgment. In substance it amounts to this. Though the goods in the ship are stored in separate parcels and leave the ship in separate parcels, they are not delivered to the receivers in separate parcels from the ship or sorted on the quay to sizes, marks or parcels. Largely for the convenience of the ship and to avoid delay, the whole cargo for the quay is discharged continuously on to the quay by the ship's gang and stacked on the quay by the ship's gang into two large stacks, one opposite the forward holds, one opposite the after holds. These stacks come up to the edge of the quay, and project over it towards the ship some 3ft. to 5ft. The timbers are of considerable lengths. In the bill of lading given me, out of 1,783 pieces, 688 range from 20ft. to 27ft. in length. They are at first handed out and rest one end on the quay and the other end on the ship's rail, for the convenience of the workmen on the quay lifting them. When the ship's winches are clear the timbers are lowered in slings, the distance of the lowering place from the edge of the quay being about 3ft., and again rest at an angle on the ship's side. The ship's gang then build them up into a stack, which may go back 30ft. from the edge of the quay, of which it will be seen 25ft. may be one piece at right angles to the ship. The stack will extend the whole length of the ship, except for the central gangway, and may be 12ft. to 15ft. high. It could be made higher and narrower, so extending less far back on the quay, but would in that case be less convenient to work. The whole cargo is thus discharged at once on to the quay, and stacked with one side of the stack almost touching the ship, by the ship's gang at the ship's expense. The ship has then finished with the cargo, and the Port of London Authority for the receivers, and at their expense, removes it to sheds, sorts it to sizes, and delivers it to individual receivers. This customary method of delivering on quay has prevailed for many years without objection under charters under which the receiver is bound to take from alongside at his risk and expense.

In respect of lighters, the custom which is agreed in this case has been proved in actual cases, and will be found stated in the judgment. The lighters receive the bill of lading parcels, quantities and marks. The receiver provides the lighters but no men to receive the cargo. The ship's men at the ship's expense hand or lower the timber in slings into the lighters. Releasing the slings, they move and stow the timber so as to fill the lighters with reasonable stowage. The receiver has nothing to do with the matter until the barge is loaded, when he takes it away.

Apart from authority, I should have held that these customs defined the duty of discharge or delivery at the port which the shipowner had contracted to perform; that the stack and the barge were respectively "alongside" the ship, and that the receiver had only to remove the stack or barge when completely erected or loaded alongside. The custom seems to me an eminently reasonable and businesslike arrangement, as is evidenced by its working without objection for so many years. It enables the ship to be quickly discharged; it avoids friction and delay by two different gangs of men working in a confined space, and by numbers of receivers each coming, or delaying to come, to receive their parcels.

It is said, however, that the decisions of the House of Lords in *The Turid* (*supra*) and *W. N. Hillas and Co., Limited v. Rederi Aktiebolaget Acolus* (*supra*) have disturbed this working arrangement. I take those decisions to lay down that the ship cannot be compelled to bear the expense of work in removing cargo to a place which is not "alongside" in the

ordinary meaning of that term, and that custom is not available to make such a place "alongside." I should myself have held differently, and should have thought that the custom of the port could make a place "alongside" which was not ordinarily "alongside," just as custom can make twelve mean thirteen, or a hundred mean a hundred and twenty. But it is clear from the decision of the House of Lords that I was wrong in that view. It remains, therefore, to ascertain what facts the House of Lords was considering when it held that such places could not be made "alongside" by custom.

The import of timber into the port of Yarmouth has given rise to a great deal of litigation—see *The Nifa* ([1892] P. 411) and *The Turid* (*supra*) and a number of County Court cases. Anyone who has seen the Yarmouth river will understand why. The banks of the river slope so that the ship cannot lie near the bank and remain afloat, and cargo may not be deposited on the edge of the quay or bank. The result is that a considerable stretch of water and then of land intervenes between the ship's rail and the first place where the cargo can be deposited. In *The Nifa* case (*supra*) there was 15ft. between the ship's rail and the quay edge, and 15ft. to 20ft. from the edge of the quay to the first place where the cargo could be stacked; 30ft. to 35ft. had to be traversed from the ship's rail to the cargo stack. In the case of *The Turid* (*supra*) the distance was 22ft. to 23ft. The custom of Yarmouth proposed to put the expense of bridging this by a stage, and a gang carrying over it, on the ship. The House of Lords, as I understand the decision, has held that a place at such a distance from the ship cannot be "alongside" it, and custom is not admissible to extend the meaning of the word "alongside" to such a state of facts. The position at Hull is rather more severe on the ship; a distance which may be from 30ft. to 60ft. has to be covered before the cargo is placed upon bogies or near to the railway line on which the bogies run, and the custom of Hull proposes to put the cost of bridging this space on the shipowner. Again, I understand the House of Lords to have decided that a space 30ft. to 60ft. off cannot be "alongside" the steamer or be made so by custom. Following these decisions in the case of *Aktieselskabet Dampskibsselskabet Primula (In Liquidation) v. George Horsley and Co., Limited* (40 *The Times* L.R. 11) relating to Sunderland, where the shore crane with a very wide range discharged on to a railway line, and then the goods were moved still farther off, sometimes up to 87ft. from the ship, it was held that this again could not be "alongside" the ship, even by custom. In a similar case relating to West Hartlepool and Sunderland no custom was proved, but no timber was stacked within 4ft. of the edge of the quay and the stacks went back 40ft. or 50ft. from this 4ft.

The difference in London, where a custom is admitted, is that the stack begins quite close to the ship's side overhanging the edge of the quay, and extends back 30ft., being a little more than the length of timbers which are delivered by the custom at right angles to the ship's side, and which, therefore, when entirely clear of the ship's rail reach nearly to the end of the stack. I see no difficulty in holding that such a stack of which one edge almost touches the ship, and which leaves no space of land, and no appreciable space of water between the ship's side and the edge of the stack, is "alongside" the ship without any extension of the term "alongside" by custom. I understood the objection of the shipowner was not to his gang's doing the work, which was obviously very convenient to him, but to his bearing the expense of it. Indeed, as I have said, he had been both doing the work and bearing the expense of it for 25 years under this charter without objection. There has been litigation in London as to the discharge into lighters over side and the work to be done by the shipowner. In 1895, in *Petersen v. Freebody and Co.* (11 *The Times* L.R., 459; [1895] 2 Q.B., 294) no custom of the port was proved, and it was held that the receiving of logs of timber was a joint operation; the shipowner must put the end of the log so that the receiver could get hold of it, and the receiver must then help the ship to get the log out of the ship and into the lighter. The "alongside" clause was in the charter.

In 1897, in *Aktieselskab Helios v. Ekman and Co.* ([1897] 2 Q.B., 83), where also there was an "alongside" clause in the charter, a custom was proved that the receivers need have no men in the barge, but that the shipowner was bound to have men there to release the slings and stow the barges, though the exact extent of the stowage was not determined. The custom was upheld as explaining the customary mode of delivery which the shipowner had to perform.

In 1910, in *Glasgow Navigation Co. v. Howard* (26 *The Times* L.R., 247) the custom was further defined, after an exhaustive hearing of witnesses. The shipowner was held bound to do the whole work of stowing the barge to a reasonable extent, the receiver not being required to have any men in the barge. When the barge provided by the receiver is stowed fully, the receiver takes it away. The barge is alongside and all the timber in it is treated as alongside, though the shipowner has to move it after the slings are released. All these cases were cited to the House of Lords in *The Turid* (*supra*) and were treated as distinguishable and as explaining the customary method of discharge or delivery.

In these circumstances, the learned Judge below has declined to interfere with decisions which the House of Lords has treated as not affected by their decision in *The Turid* (*supra*) and has dismissed the claim of the shipowner to recover the expenses of his work in the barge. I agree with this decision and am not disposed to interfere with a custom which the House of Lords has not treated as affected by their decision, and which is quite explicable as defining what the ship must by custom do to deliver or discharge in the Port of London in a barge which is alongside the ship.

But the learned Judge has thought himself bound by the decision of the House of Lords to interfere with the long-established practice of delivery on to the quay in the Port of London, which has never before been questioned under this charter, though delivery into lighters has been questioned.

The Judge has decided that the receiver must bear the cost of work on the quay, after the timber is within the consignee's reach in the ship's slings. I am not sure that he has decided who is bound to do the work, only who is to pay for the work; and I think the shipowner rather wants to do the work, in order to release his ship more quickly.

The counsel for the shipowner at once argue that the two decisions of the Judge are inconsistent. If the ship need not pay for the work on the quay after the timber is slung overboard, why need it pay for the work in the barge after the timber is lowered into the barge in slings? I think the two decisions are inconsistent, and that the result is that the decision as to work on the quay cannot stand. Both the timber in the barge and the timber on the quay are, in my opinion, in London "alongside" the ship. One side of the barge is some way from the

ship, but the other is touching the ship; the same is true of the stack. The work to be done by the ship appears to me to be on the quay, as it has been held to be in the barge, explained by the customary method of delivery or discharge in London.

In these circumstances, in my opinion the decision below as to work on the quay must be reversed; the custom of London held applicable to the Merblanc charter, and the shipowner held bound to do the work specified in the custom at his own expense. I have the more satisfaction in coming to this conclusion as it upholds the method in which shipowners and receivers have done work on the quay under this custom for over 25 years without objection, because I think it is a way of discharging the ship with businesslike advantages to both parties.

The cross-appeal of the ship must be dismissed with costs; the appeal of the receivers allowed, the judgment against them set aside, and judgment entered for them in the action with costs here and below.

LORD JUSTICE GREER.—I agree that the defendants' appeal should be allowed, and the plaintiffs' cross-appeal dismissed, with the usual consequences as regards costs.

The facts of the case are fully stated by Mr. Justice Wright in his judgment, and they have been conveniently summarized by Lord Justice Scrutton in the judgment which he has just read. The only fact to which I desire to call special attention is, that the relevant term of the charterparty incorporated in the bill of lading is a term that applies to the cargo as a whole, and not to each separate piece of wood that is lifted out of the hold of the ship. The words are : "The cargo to be brought to and taken from alongside the steamer at charterer's risk and expense as customary."

In the case of the Oresund (*Rederi Aktiebolaget Acolus v. W. N. Hillas and Co., Limited* (41 *The Times* L.R., 546), which was originally tried by me, and went through this Court (42 *The Times* L.R., 69) to the House of Lords (43 *The Times* L.R., 67), I used these words in giving judgment (41 *The Times* L.R., at p. 549) : "To put the goods over the rail is thus the *prima facie* limit of the obligation of the ship to discharge and deliver the cargo. If there be nothing in the charterparty about the consignee taking from alongside, it may well be that a custom such as is alleged in this case might impose the further duty of delivering into bogies 18½ft. from the ship's side. It has been decided that the ship's obligations, even where there is an alongside clause, may be extended and the receiver's duties diminished by an established custom of the port (*Aktieselskab Helios v. Ekman and Co.* ([1897] 2 Q.B., 83) and *Glasgow Navigation Company v. Howard* (26 *The Times* L.R., 247)), so long as the added duties of the ship are being performed while the goods are still alongside. But if the added duties of the ship imposed by the custom extend to taking the goods beyond a place that can properly be described as alongside, the custom is inconsistent with the contract made by the express words of the charterparty and is not binding on the parties to the contract." I see no reason to alter the view thus expressed as to the law applicable to cases like the present.

I think the point to be decided in the present case is whether, when the cargo had, in accordance with the custom of the port, been placed in a position extending from the quay edge to about 30ft. from the quay edge, it was still in a position that could reasonably be said to be "alongside" the ship ? I think if anyone had been asked where the cargo of the Fernhill was after discharge, he would not have been misusing the English language if he had said, as to the part on the quay, that it was alongside the ship on the quay, and as to the part discharged into lighters it was alongside the ship in lighters. In my judgment this case, so far as it is concerned with the part of the cargo discharged on to the quay, is distinguishable from *The Turid* (38 *The Times* L.R., 423 ; [1922] 1 A.C., 297), on the ground that in that case no portion of the cargo was placed on the quay at a less distance than eight yards from the rail of the ship. As Lord Sumner says in the concluding part of his judgment, 13ft. of water plus 10ft. of quay is too far away from the ship's side to be within the meaning of the words "alongside the steamer."

In the other case, *W. N. Hillas and Co., Limited v. Rederi Aktiebolaget Acolus* (*supra*), the custom involved the carriage of the whole of the cargo at least 18½ft. to the bogies and loading it in the bogies and it was held by all the Courts that when in the bogies at this distance from the ship's side the cargo could not be said to be "alongside the steamer."

In my judgment the facts of this case take it outside the decisions of the House of Lords in the two cases referred to.

As regards the part of the cargo delivered into lighters, I agree with my Lord that the case is within the decisions in *Aktieselskab Helios v. Ekman and Co.* (*supra*) and *Glasgow Navigation Company v. Howard* (*supra*), and that the learned Judge was right in his decision with regard to the cargo so delivered, but wrong in his decision with regard to the part delivered on the quay.

I only desire to add that I am not myself satisfied that there is any inconsistency between the decisions in *The Turid* (*supra*) and *W. N. Hillas and Co., Limited v. Rederi Aktiebolaget Acolus* (*supra*) and the cases where it has been held that the customary meaning of a dozen in a particular trade can be proved to be thirteen, and the customary meaning of 100 may be proved to be 120. Those are cases in which the customary meaning of a word was established, and as pointed out in my judgment in *W. N. Hillas and Co., Limited v. Rederi Aktiebolaget Acolus* (*supra*) and by the Lord Chancellor in the House of Lords, the attempt to prove a customary meaning of the word "alongside" entirely failed. It seems to me difficult to establish a customary meaning of the word "alongside" in a charterparty which involves the possibility of discharge at a variety of different ports, a customary meaning which will vary according to the port which may afterwards be selected as the port of discharge. The word "alongside" would then be like the sailor who is said to have a wife at every port. It would in effect be wedded to a different meaning with regard to each of the ports included in the words of the charterparty as the ports to which the charterer might order the vessel. In any event, it is right to say that neither in *The Turid* (*supra*) nor in *W. N. Hillas and Co., Limited v. Rederi Aktiebolaget Acolus* (*supra*) was it proved that the word "alongside" in contracts of affreightment such as those involved in those cases had acquired a customary meaning.

With this qualification I agree with my Lord's judgment, not only as regards its findings, but also with the reasons given by him and the observations made in the course of his judgment.

LORD JUSTICE SANKEY.—By the combined effect of thirty-one bills of lading, dated on various dates

from September 29 to October 14, 1926, and a charterparty dated September 13, the plaintiffs, as owners of the s.s. Fernhill, agreed to deliver certain pieces of deals, battens, and boards at the Surrey Commercial Dock, London, the charter providing that the cargo was to be brought to and taken from alongside the steamer at charterers' risk and expense, as customary.

The defendants were the indorsees of the said bills of lading and receivers of the cargo in question. I shall refer in the course of this judgment to the plaintiffs as the ship and the defendants as the receivers.

The vessel duly arrived at the Surrey Commercial Dock and moored alongside the quay, part of the cargo in question being discharged into lighters and part being discharged on to the quay.

There has been for many years a custom of the Port of London (Surrey Commercial Dock), which was agreed as follows, with regard to the discharge of wood goods on to the quay. The goods are discharged from the steamer by the ship's stevedores with the ship's tackle, and stacked by the stevedores on to the quay, without sorting to bill of lading sizes or marks—the first pieces discharged are used to make a stage projecting over the quay for about 6ft. towards the side of the steamer, and as the cargo is discharged a stack is made varying in size with the quantity discharged on to the quay, but generally not exceeding the length of the steamer and extending back about 30ft. from the edge of the stage. The timber is later carried away from the stack by the Port of London Authority, and by them sorted to bill of lading sizes and marks and piled in the usual place for storing timber.

The ship's stevedores' charges for discharging the cargo and stacking it on the quay are paid by the shipowner, and the Port of London Authority's charges for carrying the cargo from the quay, sorting and piling are paid by the consignees.

With regard to the discharge into lighters, the custom was stated to be as set out in the case of *Glasgow Navigation Company v. Howard Brothers and Co.* (26 *The Times* L.R., 247 ; 15 Com Cas., 88) : "By the custom and practice of the Port of London in the case of cargoes of lumber (including both Baltic and pitch pine lumber) the receiver, instead of being liable to receive the goods from the ship's tackle alongside into craft, is liable only to provide sufficient craft alongside ready to receive the goods, and is under no obligation to have any men thereon to receive the goods from the ship's tackle or to stow the goods therein, and the shipowner is bound to do the whole work of delivering the goods into barges, whether dock company's barges or outside barges, and of stowing the goods therein in the reasonable and ordinary manner, so that the goods may not be damaged or imperilled, and so that the barges may be loaded to the usual and reasonable extent and may be safely and properly navigable."

Disputes arose between the parties as to whether the expense caused by these operations should fall upon the ship or should fall upon the receivers. There have been a great number of cases before the Courts dealing with both these points, which may be conveniently classified as quay cases and barge cases. With regard to the quay cases there have been two recent decisions of the House of Lords—namely, *The Turid* (38 *The Times* L.R., 423; [1922] 1 A.C., 397) and *W. N. Hillas and Co., Limited v. Rederi Aktiebolaget Acolus* (43 *The Times* L.R., 67). The former was concerned with unloading at Yarmouth, the latter with unloading at Hull.

With regard to the barge cases there have been several in connexion with unloading in London—for example, *Petersen v. Freebody and Co.* (11 *The Times* L.R., 459 ; [1895] 2 Q.B., 294) ; *Aktieselskab Helios v. Ekman and Co.* ([1897] 2 Q.B., 83) ; *Glasgow Navigation Company v. Howard* (*supra*). In this case the learned Judge has decided that in respect of the discharge on to the quay the cargo is alongside when it is available for release from the ship's slings, if discharged by the ship's tackle, and if discharged, as was the first portion of the deck cargo in this case, by being handed from the vessel, when it is laid with one end on the quay and the other resting against the ship. It is from this point, he continues in his judgment, that, in the case of cargo landed on the quay, the obligation of the receiver to take from alongside begins, and therefore all expense from that moment is expense which, by the contract, the receiver has to bear. From that part of the decision the receivers appeal.

In respect of the discharge into barges, the learned Judge has decided that it is the duty of the ship to move the cargo and put and stow it in the barge, and that the ship must bear the expense of doing so. From that the ship appeals.

I now deal with both points. The transaction of loading or unloading a ship is a composite one, and is performed by a joint operation of the ship and the receiver; the one delivers and the other receives the cargo, and in respect of the delivery and the receiving the law imposes obligations upon the parties. The principles are, perhaps, best stated in Lord Esher's classic judgment in *Petersen v. Freebody and Co.* (*supra*).

Although, however, as an abstract question, his decision is simple, when it comes to practical matters difficulties arise. In many charters, as in this one, a duty is imposed upon the charterer to take the cargo from alongside at his own risk and expense, as customary. In some ports a vessel cannot get close to the quay; for example, at Yarmouth she is moored at a distance of some feet from the quay. (See *The Nifa* [1892] P., 411, and *The Turid, supra*). Again, in some ports the cargo is taken from the ship and placed on a spot a little distance from the edge of the quay, and questions have arisen as to who is to bear the expense of carrying the cargo from the ship itself over an intervening space of water to the quay, and from the edge of the quay over an intervening space of land to the spot where it is usual to stack it. In many ports a custom has grown up with regard to this matter.

The decision in *The Turid* (*supra*), the leading case of the quay cases, which dealt with the custom of the port of Yarmouth, where the vessel could not come nearer than 13ft. out from the quay, was that a custom imposing upon the shipowners the obligation of making a stage between the ship and the quay, and then of carrying the timber over that stage to the quay, and then over another space of about 10ft. between the edge of the quay and the spot where the timber was stacked, was invalid, as inconsistent with the provisions of the charterparty, which was in the same form as in the present case, namely, that the cargo should be taken from alongside the steamer at charterers' risk and expense.

It would not be profitable to go through all the other cases, as they are dealt with in the House of Lords in the case of *The Turid* (*supra*), which was approved in *The Acolus* case (*supra*). As far as the quay discharge is concerned, in my opinion the question at stake here is whether, on the facts, the decision in *The Turid* (*supra*) is applicable. It must be taken that the

ratio decidendi of *The Turid* (*supra*) was that you cannot have the custom to explain and so enlarge the meaning of the word "alongside." I think, however, that before you apply the law you must carefully consider the facts.

At Yarmouth (*The Turid, supra*) the cargo has to be carried from the ship over a space of water to the quayside, and from the edge of the quay over a space of land to a place where it is stacked. At Hull (*The Acolus* case, *supra*) it has to be carried over a space of land to the spot where it was stacked. These intervening spaces range between distances of 10ft. and 70ft.

In the present case there is no such intervening space; the vessel is moored close to the quay, and although the cargo is discharged, at first some little distance from the quayside, when the discharge is finally completed the stack composed of the cargo is lying, not only absolutely at the edge of the quay against which the ship is moored, but some of it projects over the ship's rail. There is, therefore, no intervening space, either of water or land, between the ship's rail and the place where the cargo as a cargo is placed. On the facts, therefore, this case is entirely different from *The Turid* (*supra*), and I can see no distinction between this case and the barge cases.

The spot upon which the timber was unloaded in this case is comparable to the barge. It was actually alongside the steamer, as was the barge. No intervening space of water or of land, as was the fact in the quay cases, was between the ship and the unloading spot, just as there was no intervening space of water or land in the barge cases. I cannot see that the ship in this case had more to do than it was decided she was liable to do in the barge cases. Lord Sumner says in *The Turid* (38 *The Times* L.R., at p. 429; [1922] 1 A.C. at p. 416): "The fact is the steamer is the starting point. It is from her side that the extension is to be measured, which ultimately reaches the customary spot, and when that extension involves 13ft. of water, bridged by a staging, and at least 10ft. of quay, traversed by porters, I think the spot is too far away." That is not the fact in the present case.

For these reasons I am of the opinion that the custom is not inconsistent with the terms of the charterparty, that it is valid and that the appeal should be allowed, and I now turn to the question of the cross-appeal.

As far as the barge discharge is concerned, just as *The Turid* (*supra*) is the leading case on the question of the quay delivery so *Glasgow Navigation Company v. Howard* (*supra*) is the leading case on the question of barge delivery, although it must be remembered that in that case what was fought was the custom and not the point that the custom contradicted the charter. It was pointed out that in the decision of *Aktieselskabet Helios v. Ekman and Co.* (*supra*) the judgment did not apparently impose upon the shipowner a duty to stow the cargo in the barge, as distinguished from merely placing it there, and that the barge cases should be decided in the same way as the quay cases, but in my view the learned Judge in the Court below was right in the conclusion he arrived at on this point.

The Lord Chancellor in *The Turid* (*supra*) described the barge cases as easily distinguishable from the quay cases, and the barge cases upon which the receivers rely and which are in their favour were all before the House of Lords in *The Turid* (*supra*) and were not disapproved of.

In my view, if the barge cases are to be brought into a line with the decision in *The Turid* (*supra*) in the way suggested by the learned counsel for the ship, that is a matter which must be determined by their Lordships' House.

I think the cross-appeal should be dismissed.

[Solicitors—Messrs. William A. Crump and Son; Messrs. Botterell and Roche, for Messrs. Botterell, Roche, and Temperley, West Hartlepool.]

Court of Appeal.
(Lord Hanworth, M.R., Scrutton, Lawrence, Greer, Sankey, and Russell, L.JJ.) 1928. June 18.

HYMAN v. HYMAN.
HUGHES v. HUGHES.*

Divorce—Maintenance—Deed of separation—Covenant by husband to provide allowance—Covenant by wife not to sue for further support, alimony, or maintenance—Decree absolute for dissolution granted to wife on the ground of husband's adultery—Petition by her for maintenance—Covenant pleaded in bar—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo., V., c. 49), s. 190.

A woman who in a deed of separation covenants in consideration of certain benefits not to claim from her husband in the future maintenance or alimony and is afterwards granted a decree absolute of divorce, is not debarred from petitioning for maintenance after the dissolution of marriage, notwithstanding that the deed contained no provision for its termination on the marriage being dissolved.

So *held, per* Lord Hanworth, M.R., Scrutton, Greer, and Sankey, L.JJ.—Lawrence and Russell, L.JJ., dissenting.

Decisions of Hill, J. (44 *The Times* L.R., 466) and Lord Merrivale, P. (44 *The Times* L.R., 463) affirmed.

These were two appeals, the first from an order of Mr. Justice Hill (44 *The Times* L.R., 466), and the second from an order of the President (Lord Merrivale), (44 *The Times* L.R., 463). The two appeals, which involved the same question of law, were first heard by three of the Lords Justices and judgment was reserved; but in view of the general importance of the questions raised it was decided that the appeals should be reheard before the full Court of six Judges.

Both appeals raised the issue whether a wife who had entered into a deed of separation under which she covenanted not to endeavour to compel her husband "to allow her any alimony or maintenance" further than certain agreed sums in respect of maintenance, could, on a petition for divorce being presented or granted, claim to treat the previous agreement as ended and claim other sums, or such sums as the Court might allow.

HYMAN v. HYMAN.

In the first case, Mrs. Hyman, the petitioner, was granted a decree *nisi* of divorce on January 25, 1927,

* Reported by G. T. Whitfield-Hayes, T. W. Morgan, and H. C. Garsia, Esqs., Barristers-at-Law.

and she petitioned for maintenance. Her husband set up in bar the plea that in a deed of separation dated September 19, 1919, the petitioner covenanted that neither she nor any person on her behalf would at any time thereafter endeavour to compel him "to allow her any alimony or maintenance" further than the £20 a week and two sums of £200 and £2,000 provided in the deed. The husband set up the deed of separation with this covenant in bar, on the ground that he had complied with all his covenants therein, and he asked for a declaration that the deed was a valid answer to the petition for maintenance.

The deed contained no provision for its termination on the marriage being dissolved.

The matter was ordered to be tried as a separate issue.

Mr. Justice Hill decided that he was bound to follow the decision of the President in *Hughes v. Hughes* (*supra*), which had been given on the previous day, and to hold that the divorce proceedings had terminated the previous relationship and that the covenant in the deed was no bar. He therefore gave judgment for the petitioner. The husband appealed.

Sir Herbert Cunliffe, K.C., and Mr. H. Durley Grazebrook appeared for the appellant; Sir W. Schwabe, K.C., and Mr. G. Tyndale for the petitioner.

Sir Herbert Cunliffe, for the appellant, said that an agreement of the kind contained in the separation deed was not to be treated as a mere scrap of paper, but should be upheld as binding on the parties. On the authorities it was quite clearly established that in cases of judicial separation such an agreement was binding, and it had never before been decided that it would not be binding on the parties to it in the case of divorce. It had been suggested in some judgments that there might be a difference in the case of divorce, but such expressions of judicial opinion were merely *obiter*, and it would be curious if wives could "contract out" of their rights in one case and not in the other.

The onus of establishing that the agreement was not binding was on the wife, and it was not for the husband to prove that it was binding. Admittedly, if one of the parties to this agreement, either in terms or by conduct, repudiated it, that would release the other party and enable him or her to come to the Court to ask for an order. There had been no such conduct in the present case. The husband had carried out all his obligations under the deed, and there was no conduct on his part which could be said to amount to a repudiation. Further, there was in the deed nothing which limited it to the duration of the matrimonial tie, either expressly or by implication, and in the absence of express words or a necessary implication so limiting it, no such term ought to be implied. See *Charlesworth v. Holt* (L.R. 9 Ex., 38).

Lord Justice Russell said that if that decision were right, the foundation of the President's judgment was gone.

The Master of the Rolls.—It is not binding on this Court.

Sir Herbert Cunliffe.—But the reasoning of of that case is very sound.

Counsel then referred to *F. A. Tamplin Steamship Company, Limited v. Anglo-Mexican Petroleum Products Company, Limited* (32 *The Times* L.R., 667; [1916] 2 A.C., 397, *per* Lord Parker at p. 422.)

On the question of the binding character of an agreement of the kind in a case of judicial separation, counsel referred to *Besant v. Wood* (12 Ch.D., 605); *Marshall v. Marshall* (5 P.D., 19); *Gandy v. Gandy* (7 P.D., 168); *Morrall v. Morrall* (6 P.D., 98). The legal principle on which such an agreement could be set aside was that there had been conduct which amounted to a repudiation of the agreement, and that there must have been conduct on the part of the husband which disentitled him to the protection of the separation deed.

Lord Justice Scrutton referred to *Benyon v. Benyon and O'Callaghan* (1 P.D., 447).

Referring to *Bishop v. Bishop* and *Judkins v. Judkins* (13 *The Times* L.R., 366; [1897] P., 138), Sir Herbert Cunliffe said that these cases showed that there was no real foundation for the suggestion that, as regards the point at issue, there was any real difference between cases of judicial separation and cases of divorce. To enable a wife to flout her covenants there must be something in the nature of a vital change, altering the whole position of the parties, or else there must be conduct by the husband which was tantamount to a repudiation of the agreement.

It was said that in the case of judicial separation a wife could "contract out" of her claims for maintenance, not because any statute said that she could, but because no statute said she could not; and exactly the same reasoning applied to cases of divorce. In Halsbury's Laws of England (Vol. II., p. 404) such contracting out agreements were said to be good unless they were opposed to public policy.

Sir Walter Schwabe, for the petitioner, said that "maintenance" in the deed had a different signification from "permanent maintenance," as used in the Divorce Court. He relied on two submissions: (1) that by statute the Court had power to grant maintenance on any terms which it might think just; and (2) that it was not open to the parties, by antecedent agreement, to say that they had deprived the Court of that power. It was held in *Bishop v. Bishop* (*supra*) that the power to grant maintenance was very wide indeed, and it would not be right for any Court to seek to narrow it.

The object of the parties to the deed was not to prevent the Court from awarding such permanent maintenance as it thought proper. The short way of deciding this case was to say that *Morrall v. Morrall* (*supra*) directly applied. That decision was accepted in *Gandy v. Gandy* (*supra*) and *Bishop v. Bishop* (*supra*).

It was the alteration of status caused by the breaking of the marriage tie that was treated as freeing the wife from her obligation not to ask for further maintenance.

If the proper interpretation of the covenant in the deed of separation in this case was that the Court should not in the event of subsequent divorce have power to grant permanent maintenance, then the agreement was against public policy and void. That was supported by what was said by Lord Justice Lindley in *Bishop v. Bishop* (*supra*, at p. 164), in delivering the judgment of the Court.

Lastly, it had been suggested that, if the Court held that the covenant of the wife was not binding, then equally the deed of separation could not bind the husband or a guarantor under the deed. That point was not open for decision on the trial of the preliminary issue.

Mr. Tyndale followed on the same side, and argued that, on construction, "maintenance" was used in the deed of separation in a non-technical sense as meaning "any form of support."

Mr. Grazebrook, in reply, said that some stress had been laid on the fact that in the covenant in the deed of separation "maintenance," and not "permanent maintenance," was referred to. "Main-

tenance" was, however, a perfectly proper description of what was obtained after divorce. "Permanent maintenance" was no longer very permanent, as there had been a right since 1917 for the wife to apply for an increase. Further, there was no foundation for saying that there was in the deed of separation anything amounting to leave or licence to commit adultery. Again, there had been no change of circumstances. The existence of the adultery was continuous both before and after the separation.

Their LORDSHIPS reserved judgment.

HUGHES v. HUGHES.

The hearing of this appeal was then proceeded with.

Mr. Clifford Mortimer and Mr. A. Richard Ellis appeared for the appellant; Sir James O'Connor, K.C., and Mr. J. W. Morris for the petitioner.

Mr. MORTIMER said that the marriage in this case took place in 1892, and on July 27, 1903, the wife presented a petition in Ireland for divorce *a mensa et thoro*, which was settled. On January 14, 1920, she again petitioned in Ireland for divorce *a mensa et thoro*, and on November 15, 1920, two deeds were executed in settlement of that petition. In one of them the wife covenanted that she would not "at any time hereafter commence or prosecute any action or other proceeding for compelling the said George Edgar Hughes to cohabit with her, the said Lilian Garner Hughes, or to allow her any support, maintenance, or alimony." This deed contained no provision for its termination on the marriage being dissolved.

On September 25, 1926, the wife petitioned for divorce in this country, the husband having become domiciled here. Orders were made for decree *nisi* and decree absolute, and on November 15, 1927, the wife presented a petition for permanent maintenance.

On January 6, 1928, the husband took out a summons to stay the proceedings on the ground that the wife's covenant acted as a bar. The President (Lord Merrivale) held that that was not so. It was submitted that the appeal should be allowed. The wife did, on the construction of the deed, covenant not to apply for permanent maintenance, and the President's decision to the contrary could not stand.

The question was whether the covenant was enforceable against the wife after divorce. Reliance had been placed on the width of the statutory provisions for permanent maintenance after dissolution of marriage.

Dissolution of marriage was an entirely new remedy, and it was necessary in providing for permanent maintenance to state what general matters should be taken into account. There was, therefore, no ground for saying that there was wider jurisdiction to disregard a wife's covenant not to apply for maintenance in granting permanent maintenance after divorce than there would have been on an application for alimony after judicial separation. Until the Supreme Court of Judicature Act, 1873, the question whether the covenant was a bar would not have come before the Divorce Court, as the husband would have applied in Chancery for an injunction to prevent the wife from proceeding with an application for maintenance.

There was certainly no power in the Court to set aside the wife's covenant under the power given to vary the application of settled property originally conferred by section 5 of the Matrimonial Causes Act, 1859.

In *Williams v. Baily* (L.R., 2 Eq., 731) it was decided in a case of judicial separation that a covenant not to apply for alimony *pendente lite* was not illegal. Further provisions in deeds of separation were held not to be put an end to by divorce (*Worsley v. Worsley* (L.R., 1 P. and D., 648) and *Charlesworth v. Holt* (*supra*)). Again, in *Besant v. Wood* (*supra*) and *Marshall v. Marshall* (*supra*) it was held that there was nothing illegal in a wife's covenanting not to apply for restitution of conjugal rights.

It had been decided that no covenant by a spouse in a deed of separation could limit the power of the Court to make an order for the custody or maintenance of the children. It had also been established that if there was what amounted to repudiation of the agreement then the other party was no longer bound by it. With those limitations, a covenant in a deed of separation not to sue for alimony or maintenance was a covenant which remained binding notwithstanding a subsequent dissolution of the marriage.

In *Benyon v. Benyon and O'Callaghan* (*supra*) Sir James Hannen applied the same reasoning as he did in *Morrall v. Morrall* (*supra*) and *Gandy v. Gandy* (*supra*), and it was the wrong reasoning. It was that adultery created a different set of circumstances and that the wife was not, therefore, bound. The Court of Appeal in *Gandy v. Gandy* (*supra*) made short work of all the reasons given by Sir James Hannen for his decision. It was true that *Morrall v. Morrall* (*supra*) was not then under appeal, but he (counsel) suggested that the decision of the Court of Appeal in *Gandy v. Gandy* (*supra*) cut away the ground of the decision in *Morrall v. Morrall* (*supra*).

In *Rose v. Rose* (8 P.D., 98) a wife condoned cruelty and covenanted not to raise it in any subsequent proceedings. That was contrary to the whole doctrine of condonation. Condonation was always treated as conditional forgiveness and the offence revived on the commission of any further matrimonial offence. But the Court of Appeal held that the wife was bound by her covenant. *Bishop v. Bishop* (*supra*) was distinguishable because there was in that case no covenant not to bring proceedings for permanent maintenance. The Court did not then consider the effect of a covenant against having recourse to the Court.

Lastly, there was no ground for saying that the covenant not to have recourse to the Court for permanent maintenance was void as being against public policy.

SIR JAMES O'CONNOR, for the petitioner, said that it was admitted that no agreement could oust the jurisdiction of the Court so far as decrees for judicial separation and divorce were concerned. Could it be said that an agreement could oust most of the immediate consequences? The matters of divorce, maintenance, and provisions for the children were all inextricably mixed: *Bishop v. Bishop* (*supra*). A covenant not to sue for a further sum in the case of misconduct was bad, and yet it was suggested that a covenant not to do so in any event was good. Must it not be treated as bad, unless it could be construed as a covenant which was inapplicable in the case of divorce?

The present case was exactly covered by *Bishop v. Bishop* (*supra*). It made no difference that there was in that case no covenant not to sue for alimony.

The covenant by the wife not to have recourse to the Court for maintenance was against public policy. The authorities on this question were collected and discussed in *In re Hope Johnstone* (20 *The Times* L.R., 282; [1904] 1 Ch., 470, at p. 474). They showed, in principle, that, if the covenant in this case were made expressly to apply to a future divorce, it would be void. Lastly, *Gandy v. Gandy* (*supra*)

had been wrongly decided by the Court of Appeal, but this Court could depart from its previous decision, *Webster v. Ashton-under-Lyne Overseers* (L.R., 8 C.P. 306).

Mr. MORTIMER, in reply, said that he admitted that his contentions rested on *Gandy v. Gandy* (*supra*) having been rightly decided by the Court of Appeal. He suggested that this Court would not readily depart from that decision, especially as it had stood unquestioned for so many years. If *Gandy v. Gandy* (*supra*) stood, it disposed of the argument that the wife's covenant here was against public policy.

The following considered judgments were delivered.

The MASTER OF THE ROLLS :—*Hyman v. Hyman* comes before this Court on appeal from an order of Mr. Justice Hill made on March 27, 1928, on a preliminary issue which had been directed to be tried, the question being whether or not the petition by the wife for permanent maintenance on the dissolution of her marriage ought to be dismissed on the ground that any such proceedings taken by the wife are a breach of a covenant on her part not to endeavour to compel her husband to allow her alimony beyond the sum provided in a deed of separation entered into between the spouses on September 19, 1919. Mr. Justice Hill decided that the petitioner was not precluded from prosecuting her claim. In coming to this decision he relied upon the decision given by the President on the previous day in the case of *Hughes v. Hughes*. This appeal is prosecuted in order to bring that decision to the consideration of this Court.

In the case of *Hughes v. Hughes* an appeal was entered from the decision of the President already referred to, which had determined that the petitioner was at liberty to proceed in her petition for maintenance, and we have taken steps to hear that appeal before giving the decision of the Court in *Hyman v. Hyman*. This judgment will therefore deal with both appeals. The cases being of difficulty and importance, they have been re-argued before the full Court. It is necessary to state the facts in each separately, for there are some differences that may be important.

HYMAN V. HYMAN.

The marriage took place on September 14, 1912. There were no children of the marriage. In 1919 differences arose between the husband and the wife, and on September 19, 1919, a deed of separation was entered into whereby the husband "for himself, his executors and administrators" agreed to pay his wife immediately two lump sums which do not concern this case and covenanted "during the life of the said May Hyman to pay or cause to be paid to the said May Hyman . . . the weekly sum of £20 free of income-tax on the Monday of every week, without any deduction whatsoever, for her separate use and benefit and for her maintenance." The wife covenanted "that she would not molest or disturb the said Maurice Percy Hyman by any means, either by taking out citation or process or by instituting any action in England or elsewhere, or in any other manner compel the said Maurice Percy Hyman to cohabit with the said May Hyman or endeavour to enforce any restitution of conjugal rights or to compel the said Maurice Percy Hyman to allow her any alimony or maintenance" further than the said weekly sum of £20 and the lump sums already mentioned.

On January 11, 1926, the wife presented a petition praying for the dissolution of the marriage on the ground of her husband's adultery. This charge was admitted, and on January 25, 1927, a decree *nisi* was pronounced. On February 7, 1927, the wife presented a petition for permanent maintenance under section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, and alleged in the petition that the respondent (the present appellant) was possessed of large means. In his answer the respondent relied upon the covenant not to take proceedings to compel him to allow her alimony (above set out) and after some steps in the proceedings the order was made on October 31, 1927, directing the preliminary issue to be tried, and staying meanwhile all further proceedings on the question of maintenance. The hearing of the issue was begun before Mr. Justice Hill on February 10, 1928, but his decision was not given until March 27, immediately after the President's decision in *Hughes v. Hughes*, and in the meantime, on February 27, 1928, the decree *nisi* had been made absolute.

HUGHES V. HUGHES.

The spouses were married on June 8, 1892, in Ireland, where the husband was then domiciled. On July 27, 1903, the wife presented a petition in the Irish Court for divorce *a mensa et thoro*, and on June 8, 1904, the proceedings were compromised and determined by an agreement entered into between the husband and the wife, whereby the parties agreed to live separate and apart and the husband agreed to pay the wife £50 a year during her life by half-yearly payments and charged £25, part of this annuity, upon a house and premises at Dalkey in the County of Dublin; and the wife covenanted "not to commence or prosecute any action or other proceeding for compelling the said G. E. Hughes to cohabit with her or to allow her any support, maintenance or alimony except the said annual sum of £50."

On January 14, 1920, the wife presented in the Irish Court a second petition for divorce *a mensa et thoro* which was compromised and determined by a deed executed on November 15, 1920. The terms—which were carried into effect—were that the husband was to assign the house and premises at Dalkey to his wife absolutely, and the wife released the husband from the payment of the annuity of £50, and also covenanted that she would not commence or prosecute any action or other proceeding "for compelling the said G. E. Hughes to cohabit with her or to allow her any support, maintenance or alimony." In 1922 the husband left Ireland and acquired a domicile in England; and on September 25, 1926, the wife presented a petition for divorce in the English Court for dissolution of the marriage on the ground of adultery committed since 1923. This petition was heard on May 4, 1927. There was no defence, and a decree *nisi* was granted which was made absolute on November 14, 1927.

On November 15, 1927, a petition for permanent maintenance under section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, was presented by the wife. Thereupon a summons was taken out on the part of the husband to dismiss the petition on the ground that its presentation was prevented by the covenant contained in the deed of November 15, 1920. The Registrar held in favour of the husband and dismissed the petition for maintenance. The wife appealed, and on March 26, 1928, in a considered judgment, the President reversed the decision of the Registrar and held that the petitioner was at liberty to proceed on her petition. From this judgment the husband now appeals to this Court.

In both cases, therefore, the proceedings to obtain an order for permanent alimony have been taken

under section 190, already referred to, in defiance of a covenant not to institute proceedings to compel the husband to allow the wife any alimony or maintenance otherwise than had already been provided; and in neither case is any misconduct, in regard to breach of the terms of the covenants entered into on his part, charged against the husband.

The question to be determined is whether such a covenant in a deed of separation against taking further proceedings for maintenance or permanent alimony binds an innocent wife when, by the means of subsequent proceedings, the marriage has been dissolved by decree absolute.

The judgment of the learned President appears to take note of the particular circumstances under which the covenant of the wife in *Hughes v. Hughes* came to be entered into. It was in a deed compromising a suit for divorce *a mensa et thoro*, entered into between parties who were domiciled in Ireland, where there is no procedure leading to a divorce through the means of the Law Courts, and where, if a divorce is to be obtained, it must be through the means that prevailed in England before the Matrimonial Causes Act of 1857 was passed, namely, by an Act of Parliament. He held therefore that no covenant in such a deed could have contemplated the complete severance of the relation of husband and wife which has now supervened, and that the wife cannot be held to have covenanted not to do what she now seeks to do. He held that by such a covenant she is not debarred from seeking relief "under a statute applicable to her present plight" not contemplated previously. He adds that in his opinion if there were an express undertaking by a wife in this country that she would not sue her husband for maintenance, such a bargain would be evidence of collusion if he should be guilty of subsequent adultery; and, looking forward, I think he expresses an intention that he would not enforce it against her. The comment, however, appears to me to remain good—that the basis of the decision in the case of *Hughes v. Hughes* does not cover that of *Hyman v. Hyman* where the difference between the law as to divorce in England and Ireland is not relevant.

In reviewing the cases which have been cited to us in the argument, it is not unimportant to note that agreements providing for the prospective separation of the spouses have been held consistently to be invalid. See *Westmeath v. Salisbury* (5 Bligh's New Rep., 339), *Cartwright v. Cartwright* (3 De G.M. & G., 982), *In re Hope Johnstone* (20 *The Times* L.R., 282; [1904] 1 Ch., 470), *Harrison v. Harrison* (26 *The Times* L.R., 29; [1910] 1 K.B., 35, at p. 40). The principle of these decisions appears to be that provision for the disruption of the association in married life ought to be discouraged. But a deed of separation entered into at the time when the separation takes place and regulating the terms on which the spouses are to live apart is good. See the judgment of Lord Westbury in *Hunt v. Hunt* (4 De G.F. & J., 221—following *Wilson v. Wilson*, 5 H.L. Cas., 40)—where a covenant by a husband that he would not compel his wife to cohabit or live with him was enforced, and an injunction granted to prevent the husband from continuing proceedings for the restitution of conjugal rights.

In *Marshall v. Marshall* (5 P.D., 19) a wife was held bound by her covenant not to sue her husband for restitution of conjugal rights, contained in a deed of separation, and a suit instituted by her in breach of her covenant was dismissed. Sir James Hannen followed *Hunt v. Hunt* (*supra*) and applied it to prevent a wife from taking proceedings. In *Besant v. Wood* (12 Ch.D., 605), which was decided shortly after *Marshall v. Marshall* (*supra*) (which is referred to in it) Sir George Jessel took the same course, and also held that the husband was not disabled from enforcing the covenant of his wife by reason of trifling breaches of covenant on his part.

The recognition of covenants in deeds of separation was carried to a high point in *Charlesworth v. Holt* (L.R. 9 Ex. 38), where the Court of Exchequer enforced a covenant on the part of a husband to pay an annuity for his wife's support "during their joint lives and so long as they should live separate and apart," notwithstanding that the marriage had been dissolved subsequently in consequence of the wife's adultery. The Court construed the covenant as absolute in its terms. There were no terms limiting the liability to the period during which the marriage remained undissolved. It is to be observed, however, that the action in that case was brought by the trustees with whom the covenant was entered into, and who brought their action for non-payment to them. The plea setting forth the wife's adultery, and the dissolution of the marriage in consequence of it, was held bad, as affording no answer to the action by the trustees, for the liability of the husband was not limited by the terms of the deed to the duration of the marriage tie. It was thus held that his liability to the trustees was not determined. Whether that case would be, or ought to be, now decided in the same way appears to me to be open to grave question. It was decided in 1873, some fifteen years after the Matrimonial Causes Act, 1857, came into operation, and the decision appears to conflict with more recent decisions.

Three cases which involved the question as to the effect of a deed of separation upon the rights of the spouses to apply for permanent alimony came before Sir James Hannen at short intervals of time, and in all of them he decided that the deed did not prevent an order for permanent maintenance from being made on the usual basis. In *Benyon v. Benyon* (1 P.D., 447) the petitioner, who was the husband, had accepted a covenant by his wife in the deed of separation between them, dated December 30, 1872, to pay to him £100 a year. Afterwards the marriage was dissolved by a decree made absolute on July 31, 1874; and on December 2, 1874, the husband petitioned the Court for an order for a larger payment out of his wife's income under 22 and 23 Victoria, Chapter 61, section 5, which is now replaced by section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925. Sir James Hannen decided that he was to be paid out of his wife's income £300 per annum for his life. The objection was taken that after a sum had been fixed for his maintenance the husband was not at liberty to come to the Court and ask for a variation of the settlement and payment of an increased sum. The learned Judge overruled that objection, on grounds which he affirmed later in his careful judgment in *Gandy v. Gandy* (7 P.D., 77), and relied upon the change of conditions between the time when husband and wife live apart under the agreement, and the time when they are no longer husband and wife. It is true that there was no covenant by the husband in *Benyon v. Benyon* (*supra*) not to take proceedings to compel an allowance of a larger sum, but there was such a covenant in *Gandy v. Gandy* (*supra*), and Sir James Hannen decided the latter case and followed his previous decision in *Benyon v. Benyon* (*supra*) on

reasoning which does not lay stress upon the presence or absence of such a covenant. After *Benyon v. Benyon* (*supra*) *Morrall v. Morrall* (6 P.D., 98) was decided in 1881. The wife had covenanted in a deed of separation to accept certain sums as a provision for her support, and not to sue her husband for any further maintenance. Afterwards the marriage was dissolved on the ground of the husband's adultery. I have had the papers in that case brought from the Registry, as the report of the case is incomplete in some particulars. The adultery was committed with the wife's niece and so was "incestuous," giving the wife a right under section 27 of the Matrimonial Causes Act, 1857, to seek relief upon the ground of that adultery alone. The deed of separation was dated August 1, 1879, and the adultery charged was subsequent to the deed—in the later part of August and in the following months. There were, however, no facts which rendered the case peculiar as to the husband's misconduct, save only that the adultery was committed with a woman within the prohibited degrees of consanguinity or affinity to the husband. Sir James Hannen held that the wife was entitled to the usual order for maintenance in spite of her covenant in the deed, because a state of things arose "not in contemplation when the deed was executed, and the wife is not restrained by the deed. Circumstances now justify her in bringing a suit for dissolution of marriage, and she is entitled to all the incidents of that suit."

Then came *Gandy v. Gandy* (*supra*) in 1882, where there was a separation on the terms of a deed and there was a covenant in it by the wife not to take proceedings for a larger allowance of alimony than that provided by the deed. The husband subsequently committed adultery and the wife obtained a decree for judicial separation and asked for increased alimony. Sir James Hannen applied his observations in *Benyon v. Benyon* (*supra*), *mutatis mutandis*, to the case before him—namely, that the considerations which may have led to the acceptance of a smaller sum in a deed of separation did not disentitle the spouse to proceed to enforce a larger claim based upon new circumstances not contemplated when the deed was entered into. And he adds (7 P.D., at p. 82): "I held in *Morrall v. Morrall* (*supra*) that the deed was executed on the basis of the facts which existed at its date, and that the subsequent adultery of the respondent created a different state of facts, which was not in contemplation of the parties when entering into the deed, and that therefore the petitioner was no longer bound by it." This judgment was reversed in the Court of Appeal (7 P.D., 168). In the judgments attention is called to the fact that the decree of the Court was for a judicial separation, based no doubt on the husband's adultery after the separation deed had been entered into, but the decree was for a judicial separation and not for the dissolution of the marriage. Lord Justice Lindley propounded the question before the Court as being whether there had been any sufficient reasons given for holding the wife discharged from her covenant not to sue for further alimony. Further he added (7 P.D., at p. 175):—"This being only a suit for judicial separation, the power of the Divorce Court over these deeds is much less than it would be after a decree for dissolution of marriage. It is a much more restricted jurisdiction and power, and it appears to me that the cases, of which *Morrall v. Morrall* (*supra*) is one, where the Divorce Court has dealt with separation deeds after decrees for dissolution of marriage, are rather misleading, when they are applied, or sought to be applied, in a case where the Court has no such extensive jurisdiction."

It must be observed that, although *Morrall v. Morrall* (*supra*) is thus referred to, no suggestion is made that it was wrongly decided. The Lord Justice holds that it is not pertinent to a case of judicial separation. No comment is made that the reasoning of Sir James Hannen was wrong when he held, in the passage which I have already quoted, that a different state of facts arose out of the subsequent adultery of the husband, over which the separation deed exercised no restrictive power. I note that observations to the same effect as to the attitude of the Court of Appeal to *Morrall v. Morrall* (*supra*) were made by Sir Francis Jeune in *Bishop v. Bishop* and *Judkins v. Judkins* (13 *The Times* L.R., 366; [1897] P., 138, at pp. 144 and 145).

In *Wilkinson v. Wilkinson* (69 L.T., 459), decided in 1893, Sir F. Jeune made an order for permanent maintenance, and neglected a term in a deed on the same ground as expressed in *Morrall v. Morrall* (*supra*), that the wife was entitled to what follows from divorce.

I return now to the cases of *Bishop v. Bishop* and *Judkins v. Judkins* (*supra*), but I may, by way of preface, say that I do not think that sections 191 and 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, replacing the similar sections in the previous Acts, touch the present question or afford any solution of it. The argument that the principle of these restrictive agreements is "contrary to public policy" does not weigh with me, for the reasons given by Sir George Jessel (Master of the Rolls) in *Gandy v. Gandy* (*supra*), and there is much force in the observation made by counsel that public policy requires that contracts should be kept and covenants fulfilled.

In *Bishop v. Bishop* (*supra*) there was an agreement made between the parties on March 20, 1894, at the time when a petition by the wife for dissolution of the marriage was by consent dismissed, whereby the wife "agrees to accept £130 per annum by way of permanent maintenance, this sum to include the maintenance of the child. The said allowance to be paid by Mr. Walter Harry Bishop, the respondent, by monthly payments during their joint lives. This allowance to be paid in any event, whether they remain married or whether the marriage should hereafter be dissolved." There was no express covenant not to take proceedings to compel payment of any further sum for maintenance. Afterwards, in 1895, a petition was presented by the wife for the dissolution of the marriage on the ground of later adultery and desertion, and on November 19, 1895, she was granted a decree *nisi*, which was made absolute on June 8, 1896. Afterwards she presented a petition for permanent maintenance, to which the husband made answer by pleading the agreement of March, 1894. The Registrar reported that the agreement was a bar to the petition and the matter came before Sir Francis Jeune, by way of appeal, on a motion to vary the report. The cases with which I have dealt were discussed. The President pointed out (page 144) that the reasoning on which *Gandy v. Gandy* (*supra*) turned in the Court of Appeal was "the difference between the power of the Court in judicial separation and in dissolution of marriage," and added that in his opinion the decision in *Gandy v. Gandy* (*supra*) "appears to me not to reverse, but to approve, the decision in *Morrall v. Morrall*" (*supra*). He therefore held that the Court could set aside any previous agreement between the parties and do complete justice between them in the matter, and

ordered the inquiry as to the husband's means to proceed.

Judkins v. Judkins (*supra*) came before Mr. Justice Gorell Barnes. In that case there was a separation deed made on July 30, 1892, under which the husband agreed to pay the wife a yearly sum of £150, in addition to the sum to which she was entitled under her marriage settlement, and sums for the maintenance of the children of the marriage; but it did not contain any express covenant by the wife not to sue the husband for any further allowance or alimony than the £150 a year. In 1896 the wife obtained a decree for judicial separation on the ground of the adultery of the husband subsequent to the deed; and, upon the refusal by the Registrar of an application for permanent alimony and maintenance for the children of the marriage because of the terms of the deed, the matter came before the Judge. The case was one of judicial separation only, and not, as in *Bishop v. Bishop* (*supra*), of divorce. Mr. Justice Gorell Barnes reviewed the authorities and considered the effect of *Morrall v. Morrall* (*supra*) and *Gandy v. Gandy* (*supra*), but, even though the case was one of judicial separation only, he decided that he was not bound by *Gandy v. Gandy* (*supra*), and ordered the petition to proceed. His judgment turned in part on the absence of any covenant by the wife restraining her from seeking increased alimony, but his judgment cannot be set aside entirely upon that distinction, for he examines the authorities carefully, and incidentally calls attention to *Tress v. Tress* (12 P.D., 128), where Mr. Justice Hannen is reported to have said that the authority of *Gandy v. Gandy* (*supra*), was much shaken by what occurred when it came before the Court of Appeal the second time (30 Ch. D. 57). The basis of the first judgment in *Gandy v. Gandy* (*supra*), was explained by Lord Justice Bowen when it was before the Court of Appeal on the second occasion (see 30 Ch. D., at page 81)—in terms which make the case of little authority or assistance in the cases now before the Court.

In the Court of Appeal it was argued in both *Bishop v. Bishop* and *Judkins v. Judkins* (*supra*) that a new state of facts had arisen, since the agreements of separation had been entered into. In *Bishop v. Bishop* (*supra*) the wife had obtained a decree for dissolution of the marriage, and in *Judkins v. Judkins* (*supra*) a decree for a judicial separation had been made. All the cases were cited and considered. Lord Justice Lindley delivered the written judgment of the Court, which included Lord Justice A. L. Smith and Lord Justice Rigby. The two appeals in *Gandy v. Gandy* (*supra*) were reconciled; the later decision being justified by the new state of facts which had arisen in the course of the three years which had elapsed since the earlier decision, during which an order had been made giving the custody of the two youngest daughters to the wife, and the husband refused to support them. Lord Justice Lindley said it was very important to consider whether the Divorce Court had decreed a judicial separation or a dissolution of marriage, and in his summary of the effect of the first decision of *Gandy v. Gandy* (*supra*) stated expressly ([1897] P., at p. 162) that, "nothing was decided respecting any of the statutory powers of the Divorce Court in suits for dissolution of marriage," and laid it down ([1897] P., at p. 163) that *Bishop v. Bishop* (*supra*) "must turn on the power of the Divorce Court on a dissolution of marriage to compel a husband to provide for his divorced wife, and to make orders for the maintenance and education of the children." He then proceeds to consider the relevant sections of the statutes, and particularly the provisions now embodied in section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925. He definitely rejected the argument on behalf of the husband that all these matters—(the powers of the Court)—are to be disregarded and attention is only to be paid to the terms of the separation deed. "This cannot be right" is the unequivocal statement of the Court, to which is added—"The foregoing statutory powers amply justify the order under appeal," and so, on the ground "that the . . . statutory powers to which the Court has referred are ample to justify the order appealed from," the appeal in *Bishop v. Bishop* (*supra*) was dismissed.

The appeal in *Judkins v. Judkins* (*supra*) was likewise dismissed, but that case did not involve considerations so germane to the one before us as did *Bishop v. Bishop* (*supra*). I read this judgment, which is binding upon this Court, as explaining and limiting the effect of *Gandy v. Gandy* (*supra*), and pronouncing in clear terms that the statutory powers of the Court are not fettered by a covenant in an agreement for separation. *Morrall v. Morrall* (*supra*), which was brought to the attention of the Court, was not only not dissented from, but in effect approved.

Just as an agreement between husband and wife providing for a future separation was held void, so also it is not possible by a covenant in a deed of separation to bar a suit for judicial separation or for divorce. The Court is charged under the original Acts, and the Consolidation Act, to be satisfied in divorce suits that the case has been proved, that there has not been connivance or collusion for the purpose of obtaining a divorce "contrary to the justice of the case," that there has not been condonation; and that its interference is justified—see the historical survey of its jurisdiction given in *Churchward v. Churchward* (11 *The Times* L.R., 69; [1895] P., 7). The Court cannot forgo its duties, and it cannot be bound by an estoppel between the parties—"for the jurisdiction in matters of divorce is not affected by consent. No admission of cruelty or adultery, however formal, can bind the Court. The public interest does not allow parties to obtain divorce by consent, and the analogy of ordinary actions cannot be applied." See *Harriman v. Harriman* (25 *The Times* L.R., 291; [1909] P. 123, at pp. 131 and 132) *per* Lord Cozens-Hardy and also *per* Lord Justice Kennedy (at p. 156).

By parity of reasoning, a provision or stipulation attempting to shorten the arm of the Court in the exercise of its statutory powers by means of a covenant in a separation deed, when subsequently a marriage is dissolved by a decree absolute, is also ineffective. As Sir James Hannen said in *Morrall v. Morrall* (*supra*) the successful spouse is entitled to all the incidents of the suit and the Court will not allow its powers to be prevented.

The result is that, upon a decree being made absolute for the dissolution of the marriage, the effect of the deed of separation is gone, for the reason stated by Mr. Justice Gorell Barnes in *Bishop v. Bishop* ([1897] P., at p. 156), "that the parties are no longer living apart by agreement, but by the decree of the Court." Thus the wife is released from her restrictive covenant, and can proceed in the usual way to have it decided what sum she is to receive from her husband for permanent maintenance. What he is to pay must be determined according to what is "deemed to be reasonable" by the Divorce Court, under section 190, and the terms of the deed as to the sum agreed for maintenance may be con-

sidered in reaching a decision as to what sum he should be ordered to pay, for the Court is to have regard not only to the ability of her husband, but also to the conduct of the parties, in deeming what is reasonable. It is unnecessary and premature at the present stage to decide whether any term should be imposed upon the wife as was done in *Reid v. Reid* (42 *The Times* L.R., 30; [1926] P., 1).

For these reasons I am of opinion that both appeals should be dismissed with costs.

LORD JUSTICE SCRUTTON.—These two cases raise an important question as to the powers of the Divorce Court to grant maintenance after a decree absolute for divorce. Section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, reproducing earlier statutes, provides that the Court may, if it thinks fit, on any decree for divorce secure to the wife such a gross or annual sum, or monthly or weekly payment, as it thinks reasonable, having regard to the wife's fortune, the ability of the husband and the conduct of the parties. Section 192 empowers the Court, where there are settlements, to vary the application of the property settled for the benefit of the children of the marriage or the parties thereto. Section 193 enables the Court, in any proceeding for divorce, to make monetary provision for the children of the marriage.

The question intended to be raised by these appeals is whether it is a sufficient ground, without any further inquiry into the circumstances, to stop the Court from exercising its statutory powers as to grants of maintenance after a decree absolute for divorce, to prove a contract in a separation deed between husband and wife for good consideration that the wife shall not in future make any application for maintenance in addition to or in substitution for the provisions, if any, contained in the agreement. This Court in these proceedings is not deciding what effect, if any, the Divorce Court should give to the previous agreement, when it comes to consider what order for maintenance, if any, it should make, after considering all the circumstances of the case, including the previous agreement. Nor is this Court considering whether, if the Divorce Court grants maintenance, it should make any order as to the continued validity of the deed of separation, as was done in *Reid v. Reid* (42 *The Times* L.R. 30; [1926] P., 1). The question is simply: does the contract in the separation deed not to take any further proceedings for maintenance, in itself and without more inquiry, bar the Court from hearing an application for maintenance after a decree for divorce, based on adultery subsequent to the separation deed?

I approach the matter from the point of view of the statutory authority of the Court, not of the private agreement of the parties. The Divorce Court is entrusted with a jurisdiction of national importance. The stability of the marriage tie, and the terms on which it should be dissolved, involve far wider considerations than the will or consent of the parties to the marriage. The Court does not, as other Courts do, act on mere consents or defaults of pleading, or mere admissions by the parties; nor does it readily act on uncorroborated confessions. When the full Court of Appeal in *Harriman v. Harriman* (25 *The Times* L.R., 291; [1909] P.,123) discussed the effect of estoppel of the parties on the jurisdiction of the Court, Lord Cozens-Hardy said ([1909] P., at p. 131): "The jurisdiction in matters of divorce is not affected by consent. No admission of cruelty or adultery, however formal, can bind the Court. The public interest does not allow parties to obtain divorce by consent, and the analogy of ordinary actions cannot be applied." (See also *per* Lord Justice Fletcher Moulton at page 142 and Lord Justice Farwell at page 144). In the King's Bench Division, if default is made in delivering a defence, the plaintiff is entitled to judgment on the allegations in the statement of claim, which are taken to be admitted without proof. In the Divorce Division the petitioner must prove his case, though the respondent does not defend. Many agreements between husband and wife will not be recognized, because they are contrary to public policy. An agreement to separate in three years' time, an agreement not to take divorce proceedings for future adultery, will not be enforced or recognized by the Court. Collusive or condoned adultery will not be a foundation for a petition for divorce. The alteration of the status of marriage involves considerations far beyond the private agreement of the parties. I entirely agree with the judgment of the Court of Appeal in *Bishop v. Bishop* and *Judkins v. Judkins* (13 *The Times* L.R., 366; [1897] P., 138), where it is said (at p. 164): "As regards permanent maintenance, section 32 of the Act of 1857 is very wide indeed, and it would not be right for this or any Court to put a narrow construction upon it, or to fetter in any way the Court or Judge entrusted with its application in cases of divorce. The section says that regard is to be had to the wife's fortune, to the ability of the husband, and to the conduct of the parties. The appellant contends that all these matters are to be disregarded, and attention is only to be paid to the terms of the separation deed. This cannot be right." A similar instance of the way in which the Court deals with private agreements affecting their jurisdiction is to be found in their attitude to arbitration clauses. Parties agree to refer all their disputes to arbitration in an agreed form. In breach of this agreement one party, instead of concurring in an arbitration, issues a writ. The Courts do not allow the private agreement to oust their jurisdiction, but consider in the light of all the circumstances, including the agreement of the parties and the importance of maintaining agreements, how the dispute can best be disposed of, and either stay or do not stay the action according to their views on the point. Cases like *Scott v. Avery* (5 H.L.C., 811) are only an apparent exception, for, as explained in *Board of Trade v. Cayzer, Irvine and Co., Limited* (43 *The Times* L.R., 625; [1927] A.C., 610, at p. 617), the parties have agreed that until agreed arbitrators have given a decision, there shall be no cause of action and no action shall lie in any Court whatever. This is not ousting the Courts of their jurisdiction, because they have no jurisdiction whatever, and no cause of action accrues, until arbitrators have given their decision.

Now it is agreed in the present case that there is no agreement of the parties which does, or could, stop the wife from asking for divorce in respect of adultery subsequent to the date of the separation deed. The Court has then full jurisdiction to dissolve the marriage. Dissolving the marriage, the Court has then the statutory power and duty of providing, at the expense of the adulterous husband, such maintenance for the woman who ceases to be a wife, and the children who have no longer a married couple to depend on, as the Court thinks proper after considering all the circumstances. If the private agreement of the parties before the adultery complained of cannot stop the proceedings for divorce, I do not understand how, without more, it can stop the incidental but necessary consequences of divorce, proper maintenance for the wife and children.

Assume a separation agreement with no provision for payment to the wife, but a covenant that in no circumstances shall she apply for maintenance: I do not understand on principle how that mere fact prevents the Court from exercising its statutory power. Indeed it is agreed that it cannot stop an application for maintenance for the children who have not contracted, even though the application is made by the wife who has contracted; and even though she has contracted not to ask for maintenance for the children. On principle, therefore, I should decide that the jurisdiction of the Court to grant proper maintenance is not excluded by the mere fact that the parties have made an agreement, before the adultery complained of, that the wife shall not apply for maintenance.

The authorities, such as they are, were discussed at great length before us. Four Presidents of the Divorce Division have, for varying reasons, all taken the view that in a case of divorce the agreement of the parties before the adultery complained of not to apply for maintenance, is not enough in itself to stop the Courts from granting maintenance under their statutory power. Sir James Hannen, in *Benyon v. Benyon* (1 P.D., 447, at p. 451) grounds his view on the change of circumstances. In *Morrall v. Morrall* (6 P.D., 98, at p. 100), he rests on two matters, "a state of things not in contemplation when the deed was executed," and that the grant of maintenance is incidental to a successful suit for dissolution of marriage, which the wife is entitled to bring. (See also *Brown v. Brown and Shelton* (L.R., 3 P. and D., 202)). This latter view seems to me a very cogent argument. I will deal with the earlier view later. Sir Francis Jeune, in *Bishop v. Bishop* (13 *The Times* L.R., 366: [1897] P., 138), where there was a covenant in the deed for maintenance for the wife, whether before or after dissolution of marriage, and a dissolution was ordered for subsequent adultery and desertion, granted maintenance partly on the ground of power to vary settlements, partly on the ground of public policy, partly on the ground that a child was not fully provided for. As stated later, this decision was affirmed by the Court of Appeal. Mr. Justice Gorell Barnes, afterwards President, in *Judkins v. Judkins* (13 *The Times* L.R., 366; [1897] P., 138, at p. 151), granted maintenance in a case of judicial separation after a separation deed providing for payments for maintenance, but with no covenant not to sue for further alimony, and ordered an increase of alimony after considering all the previous authorities. Lastly, Lord Merrivale, in the present case of *Hughes v. Hughes*, where the wife has received a house under a deed of separation and has covenanted not to sue for further maintenance, but has obtained a divorce for adultery subsequent to the separation, has granted the wife further maintenance. He has done so, as I understand, on the ground that the wife's covenant only applied while she was a wife, and ceased to operate when she was a divorced woman through the acts of her husband. It was said that this was contrary to *Charlesworth v. Holt* (L.R., 9 Ex., 38), decided in 1873, where it was held that in the absence of express words the husband's obligation in a separation deed to pay maintenance was not discharged by the dissolution of the marriage through the wife's adultery. It is not necessary to decide it, but since 1873 the doctrine of termination of the obligations of a contract, by the destruction of some state of things which was a fundamental though implied condition of the contract, has been much extended. It is enough to refer to the Coronation cases, and to the discussion of the whole matter in *Metropolitan Water Board v. Dick, Kerr and Co.* (34 *The Times* L.R., 113; [1918] A.C., 119). *F. A. Tamplin Steamship Company, Limited v. Anglo-Mexican Petroleum Products Company, Limited*, (32 *The Times* L.R., 677; [1916] 2 A.C., 397) was cited to us for the views of Lord Parker; but I think counsel had not followed its subsequent history, and the curious position of the judgments therein, the real majority of the Court being opposed to Lord Parker's views of the law (see Scrutton on Charterparties, 12th Edition, pp. 112 and 116, and the subsequent decision of *Bank Line, Limited v. Capel and Co.*, 35 *The Times* L.R., 150; [1919] A.C., 435), and other cases proceed on different lines. I doubt very much whether *Charlesworth v. Holt* (*supra*) would now be decided in the same way, and whether the continued existence of the marriage tie would not be treated as an implied fundamental condition of the continuance of the obligations of the deed.

If this point should hereafter be discussed in an action based on a deed the decision in *Wasteneys v. Wasteneys* ([1900] A.C., 446) will of course have to be considered, with a reservation that that case also was before the development of the law in the Coronation cases and in the frustration cases during and after the War.

There remains to consider how far the Court of Appeal decisions have modified the practice of the Divorce Court as stated by its four Presidents. The two appeal decisions in *Gandy v. Gandy* (7 P.D., 168 and 30 Ch.D., 57) leave the authority of that case in a very unsatisfactory state. By a deed of separation, the wife and husband agreed (1) that the wife should not be entitled to the custody of the two younger children, but that the father should maintain them and settle to what school they should go, and where they should live; (2) that the husband should pay the wife an allowance of £250 a year for herself and the two elder daughters; (3) that the wife should not apply for further alimony. After the deed the husband committed fresh adultery. The wife thereupon applied for a judicial separation, and applied for and obtained, contrary to the provisions of the deed, the custody of the two younger children. She then applied for further alimony. Sir James Hannen held that the deed contained an implied *dum casta* clause, and granted her further alimony. He might have said, but did not, that as he had jurisdiction to grant judicial separation he had jurisdiction, if he thought just, to make orders ancillary on such a decree. The Court of Appeal held that a *dum casta* clause could not be implied and, being under the impression that the husband did not dispute his liability to maintain the younger children, thought that there was no change of circumstances, and dismissed the wife's petition. The husband then alleged that, as the custody given under the separation deed had been changed, he was not under liability to maintain the younger children. One of the children by her next friend brought a Chancery action to enforce the deed; Vice-Chancellor Bacon made a decree in her favour; the Court of Appeal, on appreciating how the change of custody had altered the situation, held (1) that neither the younger nor the elder children could enforce the deed; (2) that the wife could sue on it, and that in view of the change of custody, and the attitude of the husband, she should be allowed to present a petition for further alimony in spite of her covenant in the deed. She did so, and Mr. Justice Gorell Barnes, in *Judkins v. Judkins* (*supra*) states that the Divorce Court granted the wife on her application

£750 alimony, being an increase of £500 on the amount named in the deed, and the Court of Appeal stayed the Chancery proceedings. The judgments of the Court distinguished proceedings for divorce from proceedings for judicial separation. *Morrall v. Morrall* (*supra*) is referred to without approval by Lord Justice Cotton and Lord Justice Lindley as based on an order dissolving the marriage. Even in judicial separation the wife was allowed to apply for and obtain an order for increased alimony, based no doubt on a change of circumstances as to the children, but also on an increase of her liability under the order for judicial separation, giving her the custody of and the duty to maintain the children, contrary to the deed. I should myself have thought the right of the Court to make orders for alimony contrary to the deed followed from and was incidental to their statutory right to make an order for judicial separation. But in any event it appears impossible to extract any restriction of the powers to grant maintenance, after an order dissolving the marriage, from *Gandy v. Gandy* (*supra*), in view of the express reservation of these powers, without disapproval of *Morrall v. Morrall* (*supra*) by the Court.

There remains the decision of the Court in the two cases of *Bishop v. Bishop* and *Judkins v. Judkins* (*supra*). *Bishop v. Bishop* (*supra*) was a case of an application for maintenance after a dissolution of marriage based on adultery, subject to a separation agreement containing a clause for payment of maintenance, but no covenant not to ask for further maintenance. *Judkins v. Judkins* (*supra*) was an application for maintenance after a decree for judicial separation based on adultery subsequent to a separation deed which contained a covenant to pay maintenance, but no covenant by the wife not to ask for further maintenance. The effect of the decision in *Gandy v. Gandy* (*supra*) was carefully considered, and the Court of Appeal held that nothing was decided in *Gandy v. Gandy* (*supra*) as to the statutory powers of the Court in suits for dissolution of marriage. Certainly nothing was decided in *Bishop v. Bishop* (*supra*) limiting that power. *Morrall v. Morrall* (*supra*) was not doubted in any way. The passage already referred to in the judgment of the Court ([1897] P., at p. 164) says that the contention cannot be right that attention is only to be paid to the terms of the separation deed, and not to the wife's fortune, the ability of the husband, and the conduct of the parties. But the contention which "cannot be right" is the contention of the appellants in the present cases. They allege that on the attention of the Court being called to a covenant by the wife, before the adultery complained of, not to ask for further maintenance, the Court should at once hold its hand and give no consideration to the other matters which by statute they ought to consider. I think their contention is wrong, that there is nothing in the two Court of Appeal decisions to impugn the practice of the four experienced Presidents of the Divorce Division already referred to, and that such practice is correct in principle for the reasons which I have stated.

I repeat that nothing in this decision fetters the discretion of the Court as to what effect they should give to the separation deed, when they come to consider the matters which they are directed by statute to consider, including "the conduct of the parties." I only decide that the mere fact of a covenant in a separation deed not to ask for further maintenance does not in itself and without more oust the jurisdiction of the Court to consider an application for further maintenance. The appeals in my opinion should be dismissed with costs.

Lord Justice Lawrence.—Hyman v. Hyman.—The two main questions which arise on this appeal are:—First, whether on the true construction of the separation deed the covenant by the wife not to endeavour to compel the husband to allow her any alimony or maintenance further than the agreed allowance of £20 a week is limited in duration to the existence of the marriage tie, or continues after the dissolution of that tie in the lifetime of the spouses; and secondly whether, if on the construction of the deed the covenant extends beyond the existence of the marriage tie, it binds the wife in the event of her obtaining a decree for divorce, or whether in that event she is released from her obligation and the Court is at liberty to disregard her covenant. Although these two questions are, in my opinion, separate and distinct questions, counsel for the wife seem to me to have shown a tendency to mix them up and confuse the one with the other. I propose to deal first with the construction of the deed. It contains a covenant to pay the agreed allowance to the wife during her life and a covenant by the wife that neither she nor any person on her behalf would at any time thereafter endeavour to compel the husband to allow her any further maintenance or alimony.

These two covenants are, in my opinion, reciprocal, the obvious intention of the parties, as gathered from the deed, being that, so long as the husband remains liable under his covenant to pay the agreed allowance, the wife will not endeavour to compel him to allow her any further alimony or maintenance. The only provision contained in the deed terminating the operation of these two covenants is in case the husband and the wife should at any time thereafter resume cohabitation. The deed contains no provision that the parties should live apart in chastity and no such provision will be implied. Therefore the husband's covenant to pay the agreed allowance remains operative notwithstanding the subsequent adultery of the wife (see *Fearon v. Earl of Aylesford*, 1 *The Times* L.R., 68; 14 Q.B.D., 792), and the wife's covenant not to endeavour to compel the husband to make her a further allowance remains operative notwithstanding the subsequent adultery of the husband (see *Gandy v. Gandy*, 7 P.D., 168).

There is no provision in the deed (such as is not uncommonly contained in separation deeds) terminating the operation of these two covenants in the event of a dissolution of the marriage, and it would in my opinion be contrary to well settled principles to imply any such provision in the present case.

Lord Parker in *F. A. Tamplin Steamship Company, Limited v. Anglo-Mexican Petroleum Products Company, Limited* (32 *The Times* L.R., 677; [1916] 2 A.C., 397) points out that the principle underlying all cases in which a contract has been held to determine, upon the happening of some event which frustrates the object which the parties have in view, is a principle of contract law depending upon some condition to be implied in the contract itself, and that it is impossible to imply any such condition if it be inconsistent with the express provisions of the contract, or with the intention of the parties as gathered from those provisions, and, further, that it is more difficult to imply a condition subsequent defeating the contract when it is partly performed than a condition precedent before its execution has commenced.

In the present case the separation deed was clearly intended to remain operative after the dissolution of the marriage tie, as in the event of the husband predeceasing the wife his covenant to pay the allowance remains binding on his estate during the

remainder of her life. It cannot therefore be said that the deed was based on the continued existence of the marriage tie. Both the husband's covenant and the wife's covenant are absolute in terms, and there is no provision in the deed terminating either of them except the single condition in case of the resumption of co-habitation. This express condition, in my opinion, negatives an implied term that either of the covenants should terminate in some other event not specified in the deed, such as the dissolution of the marriage tie by a decree for divorce. Either the omission of such a provision was intentional or else (as I think may probably have been the case here) it was due to the fact that a divorce was not in the contemplation of the parties. In either case, however, the parties cannot, in my opinion, be considered as having intended that such a provision should be implied. The principle that no condition will be implied restricting liability under a covenant absolute in terms on the happening of an event not in the contemplation of the parties was considered in the Court of Appeal in *Fearon v. Earl of Aylesford* (*supra*). There the parties had entered into a deed of separation which did not contain a *dum casta* clause, and the husband contended that such a clause ought to be implied, as otherwise the deed would be against public policy. Sir William Baliol Brett (the Master of the Rolls) (14 Q.B.D., at p. 799), says: "Now I entirely agree that when a covenant is made between two persons in plain terms, from which the only inference to be drawn is that they intended what they have said, it is a most dangerous doctrine to introduce into that covenant, unless one is forced to do it by almost inevitable necessity, another covenant which, everybody must know, the parties did not intend to introduce, on the ground that, unless it be introduced, the contract between the parties is against public policy," and Lord Justice Cotton after referring to the fact that, although a *dum casta* clause was not by any means unusual in separation deeds, yet it had not been inserted in the deed in that case, proceeds as follows (14 Q.B.D., at p. 807): "It is very true that we cannot suppose the parties here to have had in their minds that there would be unchastity on the part of the wife, but they have omitted to make a provision for that which was not in their minds, namely, the fact of her leading an unchaste life. There have been decisions during the last fifty years . . . that adultery alone on the part of the wife is not an answer to her claim to be paid her annuity; and in my opinion this fact shows that the parties cannot be considered as having intended that the provisions against unchastity should be implied." Lord Justice Lindley stated that he was of the same opinion, and in the result the Court declined to imply a provision restricting the liability of the husband under his covenant to so long as the wife should remain chaste.

The same principle has been applied in cases where it has been sought to imply a provision in separation deeds restricting the liability of the husband, under a covenant absolute in terms, to such time as the marriage tie should be subsisting and should not have been dissolved by a decree for divorce, for example the cases of *Goslin v. Clark* (12 C.B., N.S., 681) and *Charlesworth v. Holt* (L.R., 9 Ex., 38).

In *Goslin v. Clark* (*supra*) the separation deed was executed before the Matrimonial Causes Act, 1857, had been passed, and therefore before the Court had power to grant a decree for divorce. After the Act had become law, the husband obtained a divorce on the ground of his wife's adultery, committed before the separation deed, and then contended that his liability under his covenant to pay her an annuity during her life had terminated, on the ground that a provision ought to be implied in the deed restricting his liability to such time as the marriage tie remained undissolved. The Court of Common Pleas decided against the husband's contention. Mr. Justice Williams, after referring to the terms of the covenant and pointing out that the husband, having covenanted for himself, his executors and administrators, did not contemplate that the annuity should be only commensurate with the period during which the wife was fulfilling the character of his wife, because it was to continue when she should become his widow, when his obligation to support her would be at an end, proceeds as follows: "The Divorce Act 20 and 21 Victoria, chapter 85, not having then passed, the notion of a dissolution of the marriage must have been altogether out of the mind of the defendant. The intention was that the wife should have an annuity of £100 for the term of her life, provided she complied with the condition imposed and led a chaste and moral life. We cannot allow the husband by his own act to absolve himself from his engagement."

In *Charlesworth v. Holt* (*supra*) the husband covenanted to pay to the trustees of the deed an annuity for his wife's support "during their joint lives and so long as they should live separate and apart." The trustees brought an action for arrears of the annuity, and the husband, who had obtained a divorce on the ground of his wife's subsequent adultery, defended the claim, on the ground that his covenant was impliedly limited to the subsistence of the marriage tie, and that, as that tie had been dissolved by a decree for divorce, he was no longer liable. The Court of Exchequer decided against the husband. Chief Baron Kelly says (L.R., 9 Ex. at p., 40): "The husband might in this case have introduced express words limiting his liability to the period during which Lucy Holt remained his wife. But there are no such words, and Mr. Holker has not satisfied me that any words are used which necessarily imply that the covenant is only to be binding during the continuance of the marriage tie. It is impossible for the Court to add such a term to the contract. If the contract were to be so construed, it would be possible for the husband, by giving grounds to his wife for a petition for divorce against him, to put an end to his liability. Suppose, for example, he were guilty of adultery and desertion, and the wife obtained a decree for dissolution, he would be freed by means of his own misconduct. We certainly ought not, unless constrained by express words or clear implication, so to interpret the contract." Baron Bramwell in giving judgment to the same effect says (*inter alia*): "It is plain that a divorce was not in the contemplation of either party; but I nevertheless see nothing to restrict the operation of the defendant's covenant, except the single condition that Lucy Holt and himself shall be living separate and apart."

The decision in *Fearon v. Earl of Aylesford* (*supra*) shows that no provision restricting the husband's liability under a covenant absolute in terms will be implied on the ground that the covenant, unless so restricted, would or might be against public policy. And the same cases of *Goslin v. Clark* (*supra*) and *Charlesworth v. Holt* (*supra*) show that no provision restricting the husband's liability under a covenant absolute in terms will be implied on the ground that such covenant, when contained in a separation deed, ought to be construed as being commensurate only with the period during which the wife is fulfilling the character of wife.

In my judgment, the principle upon which these cases were decided applies equally to a covenant by

a wife not to sue the husband for further maintenance, and accordingly no provision restricting the operation of such a covenant, if absolute in terms, ought to be implied either on the ground that, unless so restricted, the covenant might be against public policy, or on the ground that the covenant ought to be construed as being commensurate only with the period during which the husband is fulfilling the character of husband; for the reasons stated, that, on the true construction of the separation deed in the present case, the wife's covenant not to endeavour to compel the husband to allow her any further maintenance is not, either expressly or implicitly, limited in duration to the existence of the marriage tie, and accordingly that as a matter of construction the covenant continues operative after the dissolution of that tie in the lifetime of the spouses.

I now turn to the second question in the case—namely, whether the covenant so construed ceases to be binding on the wife on her obtaining a divorce, and whether the Court in such an event is at liberty to disregard it. This question is one of general importance, not only because the covenant in question is a common form covenant inserted in almost every separation deed from the earliest times, but also because since the passing of the Matrimonial Causes Act, 1923, a wife can obtain a divorce on the ground of her husband's adultery alone. If (as counsel for the wife in the present case have strenuously contended) a wife is precluded from entering into a binding contract not to apply for further maintenance during the rest of her life, she will be placed at a serious disadvantage when bargaining for an allowance from her husband, who is not likely to make her a generous allowance, or an allowance during the whole of her life, if after a divorce she could disregard her obligations under the deed and use the allowance which the husband has agreed to make as a means of obtaining a larger allowance from the Court.

The only two grounds urged before the Court in support of the wife's contention on this point are, first, that the covenant is against public policy, and therefore unenforceable, and, secondly, that it constitutes an interference with the discretionary powers conferred on the Court in case of a decree for divorce, and that therefore the Court can and ought to disregard it.

Before dealing more in detail with each of these grounds it is necessary to mention certain facts in *Hyman v. Hyman* which have a direct bearing on the question under consideration. At the date of the separation deed, adultery alone on the part of the husband did not furnish a valid ground for a decree for divorce at the instance of the wife, and it was not until four years later when the Act of 1923 was passed that the wife acquired the right to divorce her husband for adultery alone. The circumstances under which the deed of separation was executed have not changed. At the date of the deed the husband was living in adultery with the same woman as the one with whom he was proved to have committed the acts of adultery which formed the foundation of the decree for divorce. The only alteration which had taken place subsequently to the deed was the passing of the Act which granted the new remedy of divorce to the wife. The divorce proceedings were, in the opinion of the learned Judge who made the decree for divorce, taken by the wife with the object of enabling her to apply to the Court for increased maintenance under section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925.

The position, therefore, is that the wife, after having accepted the benefits of the deed (which besides the weekly allowance of £20 included the payment to her of two substantial sums of money) is now seeking, by reason of her own act, to which the husband is not a consenting party, to deprive him of the benefit of her covenant, on the sole ground of his subsequent acts of adultery with the same woman with whom he was living in adultery when the deed was executed, which acts, but for the passing of the statute of 1923, would not have furnished any valid reason for releasing his wife from her covenant.

Next it is to be observed that the wife is not asking the Court to exercise any of its powers in relation to the custody, maintenance, or education of any children of the marriage. It seems to me obvious that no agreement between the spouses purporting to affect the rights or interests of children would bind the children, or operate to prevent any application from being made on their behalf to the Court to exercise its powers in their favour. Nor is the wife asking the Court to exercise its power to vary settlements. Even if the deed of separation be a settlement within the meaning of section 192 of the Act, the Court could not in the present case make any order varying such settlement which would benefit the wife, as the scope of that section is limited to a variation of the application of the property settled, the whole of which she has received and is still receiving, and the Court is not empowered either to strike out the wife's covenant not to sue for further alimony or maintenance or to compel the husband to bring any further property into settlement.

It is also to be observed that the husband has not committed any breach of his obligations under the deed, nor has he done any other act which would disentitle him to enforce the wife's covenant in a Court of Equity.

To deal now with the question whether the wife's covenant is against public policy, it is, of course, well settled that all provisions, whether made before or after marriage, for a future separation of the spouses or for a future dissolution of the marriage contract are void on the ground of public policy. "It is forbidden to provide for the possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolate" (*per* Vice-Chancellor Page Wood in *H. v. W.* (3 K. and J., 382)). To allow validity to provisions for a future separation would be to allow the parties in effect to make the contract of marriage determinable on conditions fixed beforehand by themselves (see Pollock on Contracts, 9th Edition, page 378). This principle is applicable both to provisions for a future separation, judicial or other, and to provisions for a future divorce. On the other hand, it is equally well settled that a contract providing for and arranging the terms of an immediate separation is good and enforceable. It is made to meet a state of things which, however undesirable in itself, has in fact become inevitable (see Pollock on Contracts, 9th Edition, page 377). It has, however, never been decided whether express provisions contained in a separation deed for what is to happen in the event of a future judicial separation or of a future divorce are or are not void as against public policy, but the Court of Appeal in *Bishop v. Bishop* (13 *The Times* L.R., 366; [1897] P. 138) considered such provisions to be of doubtful validity.

If therefore the deed in the present case had contained an express covenant that in the event of the wife thereafter obtaining a divorce she should not apply for any further maintenance, it might be that such a covenant would be held to be void as against public policy, and as coming within the first of the principles to which I have referred, but I express no opinion on this point as it does not arise in the present case. It was not and could not be suggested that in the present case the deed was framed and designed

with the express object of regulating the affairs of the spouses in the event of a future divorce. The most that can be said here is that the parties have not inserted a provision terminating the wife's covenant on a future dissolution of the marriage, and I fail to see that there is anything against public policy in not inserting such a provision or in holding the wife to the clear terms of her bargain. In my opinion, the contention that the wife's covenant is void because it amounts in effect to a licence to the husband to commit adultery cannot successfully be maintained, in view of the authorities which I have mentioned. The grounds stated by Lord Justice Cotton in *Fearon v. Earl of Aylesford* (14 Q.B.D., at p. 808) for rejecting the contention that a husband's covenant to pay an annuity, continuing after the wife's adultery, would be contrary to public policy and therefore void, apply with equal force to the similar contention in respect of the wife's covenant in the present case. In the result, for the reasons stated, I am of opinion that the contention that the wife's covenant in the present case is against public policy, and therefore unenforceable, is not well founded.

There remains the question whether the Court is at liberty to disregard the wife's covenant because it constitutes an attempted interference with the powers conferred on the Divorce Court. In presenting their argument on this question, counsel for the wife seem to me to have lost sight of the distinction between a contract not to invoke the aid of the Court and a contract purporting to control or regulate the mode in which the Court should exercise its powers after its aid has been properly invoked. Before the Judicature Acts it was the common practice of the Courts of Equity to grant injunctions restraining proceedings in Courts of Common Law and in the Divorce Court in breach of covenant. This practice was altered by section 24 (5) of the Supreme Court of Judicature Act, 1873, which provided that no injunction restraining proceedings in the High Court was in future to be granted, but every matter of equity on which an injunction against the prosecution of any such proceedings might formerly have been obtained might be relied upon by way of defence. This section was re-enacted by section 41 of the Supreme Court of Judicature (Consolidation) Act, 1925. The question therefore resolves itself into whether before the Supreme Court of Judicature Act, 1873, a Court of Equity would have granted an injunction to restrain the wife from applying to the Divorce Court for further maintenance in breach of her covenant. If it would have done so, it is, in my opinion, the plain duty of the Divorce Court to give effect to her covenant by declining to entertain her application.

If the wife's covenant on the true construction of the separation deed is not limited in duration to the existence of the marriage tie, and if the covenant is not void as being against public policy, I have the greatest difficulty in appreciating on what grounds a Court of Equity could formerly have refused to enforce it by injunction, or on what grounds the Divorce Court can now refuse to give effect to it. Section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, confers powers on the Divorce Court to grant maintenance to a wife on a decree for divorce or nullity of marriage and to grant alimony to a wife on a decree for restitution of conjugal rights or judicial separation. Obviously the Divorce Court can only exercise these powers on being applied to for that purpose by the wife, who is the only person interested in procuring the Court to exercise these powers which are conferred solely for her benefit. In the absence of any contract to the contrary, the wife is free to make an application for maintenance on obtaining a divorce, or not to make such an application, just as she pleases. No third party can make such an application on her behalf, unless she is under some disability, and neither the Court nor any third party can compel her to make such an application. Then why is not the wife at liberty to contract not to make such an application? One strange result of holding that she is precluded from making such a contract would be that she could not, after having presented a petition for maintenance, compromise the proceedings, but would have to prosecute them to judgment. Another result would be that a wife could not, between the decree *nisi* and the decree absolute, come to an agreement with the husband on the question of maintenance, a course which counsel for the husband asserted was often adopted in practice.

If, contrary to my opinion, the Divorce Court could exercise its powers under section 190 without any application for that purpose being made to it by the wife, the wife's covenant in the present case does not purport to prevent the Court from so doing, as the covenant only prevents the wife from taking any steps herself to obtain an order for further maintenance. That, however, is not the question which the Court is considering on this appeal. Here the sole question is whether the wife, having contracted not to endeavour to compel the husband to make her any further allowance, and having, in direct breach of that covenant, presented a petition to the Divorce Court with the avowed object of endeavouring to obtain an order compelling the husband to make her a further allowance, ought to be allowed to proceed with that petition. Assuming the validity of the covenant, such a proceeding would, in my opinion, undoubtedly have been restrained by a Court of Equity before the Supreme Court of Judicature Act, 1873, and, therefore, the Divorce Court ought not to allow the petition to proceed.

The grounds on which the Courts of Equity formerly acted when enforcing covenants of this nature rest, in my opinion, on well-established principles—namely, first, that any person who is competent to enter into a binding contract may agree to renounce the advantage of a statutory provision made solely for his or her individual benefit; and, secondly, that no person is entitled to accept the benefits of a contract and repudiate the obligations. These principles have been applied by Courts of Equity to contracts renouncing advantages conferred by the Matrimonial Causes Acts.

In *Hunt v. Hunt* (4 De G.F. and J., 221), Lord Westbury, after stating that separation deeds are to be treated as ordinary contracts capable of being enforced at common law, decided that it was the duty of a Court of Equity to interfere by its injunction and restrain the breach of a covenant by a husband not to institute a suit for the restitution of conjugal rights, on the ground that the power conferred on the husband to institute such a suit was a private remedy and a private right belonging to the husband which he could contract to renounce.

In *Williams v. Baily* (L.R., 2 Eq., 731) the Court declined to grant an interlocutory injunction to restrain the wife, who had presented a petition for a judicial separation, from proceeding with an application for alimony *pendente lite* in breach of a covenant in a separation deed (which covenant was in practically identical terms with the covenant in the present case) entered into by trustees on behalf of the wife, on the sole ground that it was not shown to the satisfaction of the Court that the wife had acted on the deed so as to preclude herself from taking the proceedings. The Court accordingly directed the

motion to stand over until the hearing of the cause but required the wife to give an undertaking to deal with any alimony which she might be awarded as that Court should direct. The reason why the undertaking was exacted seems clear. The Vice-Chancellor had refused interlocutory relief, but the right to the injunction might be established at the trial. Meanwhile, the wife might have obtained an order for alimony which she ought not to have applied for. It was necessary, therefore, to put her under the terms of the undertaking. In delivering his judgment, Vice-Chancellor Page Wood stated the principles upon which Courts of Equity act in cases of this kind in no uncertain terms as follows:—"There can be no doubt that deeds of this description are perfectly valid, nor can there be any doubt that they can be enforced against the wife, who is not entitled to 'approbate and reprobate,' or, in other words, to accept the benefits and repudiate the obligations."

In *Besant v. Wood* (12 Ch.D., 605) the Master of the Rolls held that a wife had the right to contract to live apart from her husband, and that the husband could enforce such a contract against her, and accordingly granted an injunction to restrain the wife from applying to the Divorce Court for a decree for restitution of conjugal rights in violation of a covenant on her behalf contained in a separation deed. The basis of this decision was that the right conferred on a married woman to institute a suit for restitution of conjugal rights involves a right not only to compromise after she has commenced a suit, but also to compromise before the litigation has begun, and that, therefore, her contract not to institute such a suit was valid and enforceable.

In *Marshall v. Marshall* (5 P.D., 19), Sir James Hannen dismissed the wife's suit for restitution of conjugal rights, brought by her in breach of a covenant contained in a separation deed, on the ground that, before the Supreme Court of Judicature Act, 1873, a Court of Equity would have granted an injunction to restrain the wife from taking such proceedings.

In *Rose v. Rose* (8 P.D., 98) the Master of the Rolls stated: "As was pointed out in *Besant v. Wood* (*supra*), unless a married woman was allowed to contract herself out of her rights in the Divorce Court, no proceedings in that Court could ever be compromised, but must be fought out to the end."

In the case of *Morrall v. Morrall* (6 P.D., 98), which was much relied upon by counsel for the wife, Sir James Hannen held that a wife who had obtained a decree for divorce on the ground of her husband's incestuous adultery was entitled to apply for and obtain the usual order for permanent maintenance, notwithstanding that she had by a separation deed agreed to accept certain sums of money and not to sue her husband for any further maintenance. The reasons given by the learned President for his decision were that a state of things had arisen which was not in the contemplation of the parties when the deed was executed; that the separation deed was not a licence to the husband to commit adultery, incestuous or other, and that, while the deed continued, the wife was entitled to no more than what was stipulated for by it, but that when it had been established that the husband had been guilty of incestuous adultery she was no longer restrained by the deed. These reasons are, in my opinion, unconvincing. They are based, first, on an implied condition in the separation deed terminating the wife's covenant in the event of the husband's committing incestuous adultery, and, secondly, on the wife's covenant being in effect a licence to the husband to commit adultery. I shall have to revert to this decision later but desire to state here that both of these reasons are in my opinion unsound and would not formerly have furnished any ground in a Court of Equity for the refusal of an injunction.

Then came the first case of *Gandy v. Gandy* (7 P.D., 77). In that case the separation deed contained a covenant that the wife would not take any proceedings to compel the husband to allow her any further alimony beyond an agreed sum. The husband subsequently committed adultery, and the wife obtained a decree for judicial separation and thereupon applied to the Court for increased alimony. Sir James Hannen held that the subsequent adultery of the husband deprived him of the right to have the restraining provisions of the deed enforced. The grounds upon which the learned President based his decisions were those stated by him in *Morrall v. Morrall* (*supra*) which, after consideration, he reaffirmed, observing that to hold otherwise would make the contract extend to a state of things not in the contemplation of the parties, and moreover would amount to a licence to the husband to commit adultery for the rest of his life without subjecting himself to any liabilities beyond those imposed by the deed. The learned President added that, in all cases such as that, it was implied in the contract contained in the deed that it had reference only to the parties being separated, without more, and not to their living apart in the state of adultery, and that the deed must be construed as an agreement that the parties should live apart in chastity. It is quite plain from the judgment delivered by the learned President that he drew no distinction between the case where the wife had obtained a decree for divorce and the case where she had obtained a decree for judicial separation, and that, in his opinion, the same reasons applied to the one as to the other.

The first case of *Gandy v. Gandy* went to the Court of Appeal (7 P.D., 168), and the learned President's decision was unanimously reversed. The Master of the Rolls, Sir George Jessel, in the course of his judgment, after pointing out that it was settled law that the husband's covenant was not affected by his subsequent adultery, and that the Legislature had not given the Court power to vary settlements in cases of judicial separation as it had done in cases of divorce, and that therefore the separation deed remained binding, proceeded to consider the question whether the Court could interfere with the contract except when one of the parties had so acted as to disentitle him to rely upon the contract at all. As regards the President's opinion that it would be against public policy if the wife's covenant were to be held to continue after the decree for judicial separation, the Master of the Rolls, after remarking that there was no reason more dangerous to give, stated his reasons for arriving at the conclusion that a continuance of the wife's obligations under her covenant would not be against public policy. The Master of the Rolls further arrived at the conclusion that the adultery of the husband did not amount to misconduct on his part so affecting the position of the wife as to entitle her to repudiate the contract into which she had entered. There is in this judgment only one passage which in my opinion is open to criticism—namely, that in which the learned Judge says that "in the case of dissolution of marriage the Court has had conferred upon it the right to vary . . . settlements, and to deal with them in any way which may be thought just and expedient." This statement is too wide, as the Court's power, as I have already pointed out, is strictly confined to a variation of the application of the settled property, but it was *obiter* and does not affect the principles

upon which the judgment was founded. Lord Justice Cotton, after pointing out that the wife's application was clearly contrary to one of the covenants contained in the separation deed, stated that the question to be considered might be put in two ways: whether the covenant could under the circumstances be disregarded, or whether a Court of Equity would in the circumstances have enforced the covenant against the wife. The learned Lord Justice stated that he could not agree with the President's conclusion that the separation deed ought to be read as containing an implied condition that it should be operative so long as the parties lived chastely, nor with the conclusion that to hold that the husband was right would be to say that the deed contemplated and allowed adultery on the part of the husband. In speaking of *Morrall v. Morrall* (*supra*) the learned Lord Justice said that it might well be that the gross misconduct of the husband in that case might prevent the husband from relying on the deed, and render it just that the wife's covenant should be disregarded by the Court. In my opinion the decision in *Morrall v. Morrall* (*supra*) cannot be supported on that ground. The learned President in deciding that case did not lay stress on the incestuous character of the adultery, except as affording a ground for divorce. There were no facts there which would warrant the conclusion that the husband had been guilty of such gross misconduct as would disentitle him to enforce the wife's covenant in a Court of Equity. Lord Justice Lindley said that the question might be put in this shape: whether there had been any sufficient reason given for holding the wife discharged from her covenant not to sue for further alimony. After pointing out that *prima facie* she was bound by her covenant, which was a perfectly good covenant, and stating that the order appealed from set aside that covenant, the learned Lord Justice came to the conclusion that this was not right, and that mere adultery by the husband was not sufficient to deprive him of the benefit of the stipulation as to alimony. The learned Lord Justice in the course of his judgment further said that the cases, of which *Morrall v. Morrall* (*supra*) was one, where the Divorce Court had dealt with separation deeds after decrees for dissolution, were rather misleading when they were sought to be applied to a case where the Court had no such extensive jurisdiction. From this *dictum* it would appear as if Lord Justice Lindley had fallen into the same error as the Master of the Rolls as to the scope of the Court's power to vary settlements, and to have thought that *Morrall v. Morrall* (*supra*) was a case where the Court either had made, or could have made, an order for an increased allowance in exercise of the more extensive jurisdiction of varying settlements conferred upon it in the case of divorce.

The conclusions of the Court of Appeal in the first case of *Gandy v. Gandy* (*supra*), therefore, may be summarised as follows: that a wife's covenant not to endeavour to compel the husband to allow her any further alimony or maintenance is a valid covenant binding on her; that no *dum casta* clause will be implied in a separation deed, and consequently that the husband can enforce the covenant, notwithstanding his subsequent adultery which does not amount to such gross misconduct on his part as to disentitle him to relief in a Court of Equity; and that the fact that the wife has obtained a decree for judicial separation, with the result that the spouses are no longer living apart by agreement but by the decree of the Court, upon the making of which the Court has a statutory power to make such order for alimony as it thinks just, affords no ground for enabling the Court to disregard the wife's covenant.

In my judgment, these conclusions and the reasons upon which they are founded apply just as much to a case like the present where the wife has obtained a decree for divorce as they do to the case where the wife has obtained a decree for judicial separation.

Apart from the slight (and in my opinion wholly immaterial) difference in the expressions "as the Court may deem to be reasonable" and "as the Court thinks just" occurring respectively in subsections (1) and (4) of section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, the only distinction between the powers conferred on the Court on a decree for divorce and on a decree for judicial separation is that in the case of divorce the matters which the Court is to take into account when ordering the husband to secure the maintenance, and the method in which the maintenance is to be secured, are stated, whereas in the case of judicial separation there are no such statements. This distinction is, in my opinion, accounted for by the fact that these subsections are in substance re-enactments of sections 17 and 32 of the Matrimonial Causes Act, 1857, and that a decree for divorce was then an entirely new remedy conferred for the first time by that Act. The legislature, therefore, no doubt considered it advisable to state what matters the Court should take into account in providing for permanent maintenance, and how the order should be carried out, whereas in the case of a judicial separation (which was equivalent to a divorce *a mensa et thoro*) there was no such necessity, as the practice of the Ecclesiastical Courts as regards the matters to be taken into account in granting alimony (which matters are in fact the same as those which the Court is required to take into account in the case of divorce) was well established, and the jurisdiction in all matrimonial matters exercised by such Courts was transferred to the Divorce Court.

The express provisions in subsection (1) of section 190 that the Divorce Court is to have regard to certain specified matters when ordering the husband to secure maintenance for his wife, for whatever reason they may have been inserted, do not in my opinion affect the question whether a wife is entitled in breach of her contract to apply to the Divorce Court to exercise its power in her favour. Moreover it is to be noted that these provisions are not repeated in subsection (2) of section 190. Even assuming that they apply to an order made under that subsection I am of opinion that a Court of Equity would formerly have restrained the wife from making the application to the Divorce Court, notwithstanding that the Divorce Court was invested with a discretionary power to make or withhold an order in her favour, and notwithstanding that the legislature had indicated how that discretion was to be exercised and in what manner its order when made was to be carried out.

The fact that the Divorce Court has in cases of divorce the additional power to vary settlements has, in my opinion, no bearing on the question we have to decide, because, as already pointed out, the present case is not concerned with the exercise of that power.

I am further of the opinion that the decision of the Court of Appeal in the first case of *Gandy v. Gandy* (*supra*) entirely cuts away the grounds upon which Sir James Hannen based his judgments in *Gandy v. Gandy* (*supra*) and in *Morrall v. Morrall* (*supra*), and that the decision in the latter case cannot stand, in the face of the decision of the Court of Appeal in the former case.

I have already expressed my opinion on the *dicta* of the Master of the Rolls, Sir George Jessel, and Lord Justice Lindley that the decision of *Morrall v. Morrall* (*supra*) might be distinguished on the ground of the more extensive power to vary settlements conferred on the Court in case of divorce, and on the *dictum* of Lord Justice Cotton that *Morrall v. Morrall* (*supra*) might be supported on the ground of the gross nature of the conduct of the husband. It follows from what I have said about these *dicta*, that, in my judgment, the contention that the Court of Appeal in the first case of *Gandy v. Gandy* (*supra*) has approved of the decision in *Morrall v. Morrall* (*supra*) cannot be upheld.

It was, however, again suggested in the present case that the decision of the Court of Appeal in the first case of *Gandy v. Gandy* (*supra*) had been much shaken by what occurred in the second case of *Gandy v. Gandy* (30 Ch.D., 57) when the latter case came before the Court of Appeal. In my opinion, any doubt that there may at one time have been on this question was entirely dispelled and completely laid at rest by the clear and emphatic statement made by Lord Justice Lindley, when delivering the judgment of the Court of Appeal in *Bishop v. Bishop* (*supra*) which I will not repeat, but which affords a complete answer to the suggestion that the decision in the first case of *Gandy v. Gandy* (*supra*) is not to be relied on.

The actual decision in the second case of *Gandy v. Gandy* (*supra*) has, in my opinion, no direct bearing on the question to be decided in the present case. The ground upon which the Court allowed the wife to procced with her application for alimony in that case, notwithstanding her covenant, was that the husband had repudiated his obligations under the deed of separation by refusing to contribute to the maintenance and education of the two younger children, and that this repudiation operated to release the wife from her obligation not to apply for further maintenance. In the present case nothing of that kind has occurred.

The only other case which requires consideration is *Bishop v. Bishop* (*supra*). In that case the parties had signed an agreement whereby the wife agreed to accept a specified allowance by way of permanent maintenance, which allowance was to include the maintenance of the child of the marriage, the custody of which was given to the wife. It was expressly stipulated that the allowance was to be paid whether the parties remained married or whether the marriage should thereafter be dissolved. The agreement contained no stipulation by the wife not to sue for more than the agreed allowance. After the agreement the wife obtained a divorce on the ground of the husband's subsequent adultery and desertion, the decree giving the custody of the child to the wife, who then applied to the Court for maintenance for herself and for the child. Sir Francis Jeune, in holding that the separation agreement afforded no answer to the wife's application for maintenance, rested his decision mainly on the grounds relied upon by Sir James Hannen in *Morrall v. Morrall* (*supra*), which grounds, in Sir Francis Jeune's opinion, had been approved by the Court of Appeal in the first case of *Gandy v. Gandy* (*supra*). The learned President stated that it appeared to him that the Court of Appeal in the latter case had laid down that the power given to the Court to vary settlements on a divorce enabled the Court to set aside any previous agreement of the parties for the allowance to the wife, and to do complete justice in the matter. For the reasons which I have already stated, and which I will not repeat, I am of opinion that none of the grounds upon which Sir Francis Jeune rested his decision in *Bishop v. Bishop* (*supra*) can be supported, in view of the decision of the Court of Appeal in the first case of *Gandy v. Gandy* (*supra*).

In the Court of Appeal the decision of the learned President in *Bishop v. Bishop* (*supra*) was upheld, but on entirely different grounds. Lord Justice Lindley, who, during the respondent's argument, had pointed out that the only question was whether upon the construction of the agreement the wife had agreed not to apply for further maintenance, delivered the considered judgment of the Court. After clearing up the misunderstanding which appeared to have existed as to the effect of the decision in the second case of *Gandy v. Gandy* (*supra*) upon the decision in the the first case of *Gandy v. Gandy* (*supra*), the judgment proceeds to deal with the facts in *Bishop v. Bishop* (*supra*). It points out that the agreement contained no covenant not to sue for restitution of conjugal rights or for judicial separation or for a divorce; that it appeared from the agreement that the parties contemplated a divorce; that the agreement contained no covenant by the wife not to sue for more than the agreed allowance; and that the agreement provided that the wife should have the child and maintain her out of that allowance. It also points out that as the first case of *Gandy v. Gandy* (*supra*) was a case of judicial separation, and not of divorce, it was not in point, except in so far as it negatived any implied condition of continued chastity, and that the case in *Bishop v. Bishop* (*supra*) must turn on the power of the Divorce Court on a dissolution of a marriage to compel a husband to provide for his divorced wife and to make orders for the maintenance and education of the children. After considering the statutory powers conferred on the Court in this respect the judgment proceeds: "The appellant contends that all these matters are to be disregarded, and attention is only to be paid to the terms of the separation deed. This cannot be right." The judgment then referred to the express provision that the allowance was to continue, even in the event of a future dissolution of the marriage, and stated that the validity of the agreement in this respect was very questionable, and that it was doubtful whether an express covenant not to sue for increased alimony in the event of a divorce grounded on future misconduct could be recognized. It stated further that a covenant of such questionable validity certainly could not be implied, and that the wife could not be held to have precluded herself by her agreement from invoking the aid of the Court to obtain further maintenance. It further points out that no agreement between the parents could deprive the Court of its statutory powers relating to the custody, maintenance, and education of the children. It then explains that an exercise of the power conferred on the Court to vary settlements would be of no assistance to the wife, and concludes with the statement that the other powers conferred on the Court (which I understand to mean the powers to make an order for maintenance for the wife and for the maintenance and education of the child) were amply sufficient to justify the order which the learned President had made.

In my opinion, this case is distinguishable from the present in three essential particulars. First, the agreement contained no covenant by the wife not to sue for further maintenance. Secondly, the agreement contained an express provision that the allowance to the wife should continue after the dissolution of the marriage. Thirdly, the agreement provided that the allowance was to cover the maintenance of the child, whose interests were therefore

directly affected. The decision of the Court of Appeal was, in my opinion, based entirely upon these three distinguishing features, all of which are absent from the present case. The Court, when referring to the questionable validity of the provision that the allowance to the wife should continue after the dissolution of marriage, did not, in my opinion, intend to cast any doubt on the principle that no condition will be implied terminating a covenant absolute in terms on an event not in the contemplation of the parties, whether that event be a divorce or judicial separation or merely unchastity, or on the decisions in such cases as *Goslin v. Clark* (*supra*), *Charlesworth v. Holt* (*supra*), *Fearon v. Earl of Aylesford* (*supra*), and the first case of *Gandy v. Gandy* (*supra*). The judgment in *Bishop v. Bishop* (*supra*) must be read in view of the fact that the Court was there concerned with an *express* provision as to what was to happen in case of a future divorce, which provision, although contained in a valid separation agreement, might, in the opinion of the Court, offend against public policy as an agreement during marriage designed and framed with the object of regulating the affairs of the spouses on a future dissolution of the marriage and be void on that ground. In the special circumstances of that case the Court declined to imply a covenant by the wife that she should not sue for further maintenance in the event of a future divorce, the validity of which covenant, if expressed in those terms, would, in the opinion of the Court, have been as much open to doubt on the ground of public policy as the express agreement by the husband to pay the allowance after a future divorce.

In the absence, therefore, of an agreement, either express or implied, by the wife not to sue for further maintenance, the Court held that the wife was free to apply to the Court, and that the Court was free to entertain her application. The only question which then arose was whether the Court, in exercising its power to award maintenance to the wife, was bound by the amount which the husband had agreed to allow to the wife; in other words, whether it was bound to have regard only to the terms of the separation agreement, or whether it was free to take into consideration the other matters to which the Act requires the Court to have regard. The Court held that in exercising its powers, which the wife had not by her agreement precluded herself from invoking, it was not fettered by the terms of the agreement, as contended for by the husband, and was not bound to have regard only to the terms of the agreement, but could also have regard to the other matters referred to in the Act. The Court also held that the amount of the maintenance affected the interests of the child, and that this was an additional reason why the wife should not be held disentitled to apply for further maintenance.

If the Court had been of opinion, or had intended to decide, that a wife could not bind herself not to apply for further maintenance in the event of her obtaining a divorce, I find it difficult to understand why the Court did not say so, instead of going into the whole matter and laying such strong emphasis on the absence of an agreement on the part of the wife not to apply for further maintenance and considering the question whether such an agreement ought to be implied. The short answer to the whole of the arguments advanced on behalf of the husband would have been that the wife could not preclude herself from applying to the Court for maintenance after she has obtained a decree for divorce, and, therefore, that it was wholly immaterial to consider whether or not she had by the particular agreement in that case purported to do so.

If the view which I have expressed as to the effect of the decision of the Court of Appeal in *Bishop v. Bishop* (*supra*) be right, it follows that it does not assist the wife's contention in the present case, which, in my opinion, falls to be decided on the principles upon which the Court of Appeal acted in deciding the first case of *Gandy v. Gandy* (*supra*).

In my judgment it is entirely contrary to equitable principles that a wife, after having accepted the benefits of a separation deed, should be allowed to repudiate her obligations under it, whether such repudiation takes place because she has obtained a decree for judicial separation or because she has obtained a decree for divorce. In either event it seems to me that she is both approbating and reprobating the deed, a proceeding against which Courts of Equity have always set their faces.

In the result, for the reasons which I have stated, I am of opinion that the appeal ought to be allowed, and that the wife's petition for maintenance ought to be dismissed.

HUGHES v. HUGHES.

The facts of this case differ in certain respects from those in *Hyman v. Hyman*. The spouses were resident in Ireland and the deed containing the covenant in question was executed to carry out a compromise of proceedings instituted by the wife in the High Court of Justice in Ireland for a divorce *a mensa et thoro*. The Irish Court had no jurisdiction to grant a divorce *a vinculo*, and the only method by which such a divorce could be obtained whilst the parties were resident in that country was by Act of Parliament. The consideration moving from the husband consisted of an absolute assignment of a leasehold house to the wife. The deed provided that the wife should have the custody and control of the four children of the marriage, of whom however two would appear to have been of the age of 21 years and upwards and the remaining two of the respective ages of 20 years and 16 years. At the date of the divorce in England, therefore, all the children of the marriage were of full age and the wife is not on the present occasion seeking to invoke the powers conferred on the Court relating to the custody, maintenance, and education of children.

The covenant by the wife is absolute in terms: viz.:—that she or any person for her or on her behalf should not and would not at any time thereafter commence or prosecute any action or other proceeding for compelling the husband to allow her any support, maintenance or alimony. There is nothing in the deed to suggest that the parties contemplated a dissolution of the marriage by a decree for divorce, and in the circumstances the proper inference, in my opinion, is that such an event was not contemplated by either of the parties when the deed was executed. The deed, however, contains provisions relating to the estate of each of the spouses in the event of the dissolution of the marriage tie by the death of the one in the lifetime of the other.

The judgment of the learned President is based entirely upon the construction of the deed. According to the learned President's view, the wife's covenant, on the true construction of the deed, lasted only as long as the marriage tie existed, and terminated on the dissolution of that tie by a decree for divorce. With the greatest respect for the view thus taken by the learned President, I am unable to agree with it. The covenant is absolute in terms and the deed contains no express provision for its termination. The absence of any such provision renders one of the reasons (viz.:—that based on the maxim *expressio unius est exclusio alterius*) stated in my judgment

in *Hyman v. Hyman* for not implying any such provision in the event of a divorce inapplicable to the present case, but I am of opinion that the other reasons expressed in my judgment in that case are equally applicable here, and afford amply sufficient grounds for not making any such implication. Moreover it would, in my opinion, be more difficult to imply a condition subsequent defeating the wife's covenant in the present case because such a condition, besides being (as in *Hyman v. Hyman*) inconsistent with the express terms of the deed, and with the intention of the parties as gathered from its provisions, ought not to be implied where the husband has performed the whole of his part of the deed.

As appears from my judgment in *Hyman v. Hyman,* I have the misfortune also to differ from the learned President's statement that the Lords Justices in *Bishop v. Bishop* (*supra*) did not appear to have doubted that in a case of divorce Sir James Hannen's view in *Morrall v. Morrall* (*supra*) would have been correct.

In my opinion, the differences between the facts here and the facts in *Hyman v. Hyman* are not sufficient to prevent the reasons upon which my judgment in the latter case is based from applying to the present case.

It is not disputed that the wife was competent to enter into the covenant. The covenant is absolute in terms, and no condition terminating it in an event not in the contemplation of the parties ought to be implied. The wife ought not to be permitted to approbate and reprobate. The covenant is not against public policy and does not constitute an attempt to fetter the discretion of the Court. The Court, therefore, is not at liberty to disregard the covenant, even although the husband has committed adultery and the wife has obtained a divorce.

For the reasons stated in this judgment and in my judgment in *Hyman v. Hyman,* therefore, I am of opinion that the appeal should be allowed and the wife's petition for maintenance should be dismissed.

LORD JUSTICE GREER: The question involved in these appeals may be shortly stated as follows:—

Is it competent to the parties to a deed of separation between husband and wife to prevent the Court, when decreeing a divorce, from exercising the jurisdiction conferred by section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, by agreeing that the wife will not prosecute any action or proceeding for compelling her husband to allow her support, maintenance, or alimony.

In stating the question, I have used the words contained in the separation deed in *Hughes v. Hughes.* The words used in the separation deed in *Hyman v. Hyman* are not identical, but are to the same effect.

It is true that in form the agreements do not purport to limit the powers of the Court, but only restrain the wife from seeking the aid of the Court. The distinction drawn by the appellants between an agreement expressly purporting to limit the powers of the Court and an agreement restraining a litigant from doing that which, under the rules of practice, is necessary before the Court can exercise its power, has, in my opinion, no substance. The effect of the covenants in these cases is exactly the same as it would have been if the parties had expressly stipulated that when making a decree of divorce the Court should not have the power to make an order for maintenance. If you lock the door of the Court and take away the key, you prevent the Court from exercising its powers just as effectively as if you leave the door open and agree that, when you get into Court, the Court shall not exercise its powers.

Before I deal with the effect of previous decisions, I think it useful to call attention to several considerations which appear to be pertinent to the problem which we have to solve.

Section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, which reproduces the provisions of earlier statutes, does not of its own force require any application for maintenance to be made by the wife, but expressly gives power to the Court "on any decree for divorce," to make an order securing to the wife an annual sum of money, or an order for the payment by the husband of a monthly or weekly sum for her maintenance and support. So far as the statute is concerned, an order for maintenance might be made by the Court on any successful petition for divorce by a wife, whether the wife asked for it or not. But Rule 65 of the Matrimonial Causes Rules provides that application for maintenance shall be made by a separate petition. Rules of practice are only machinery to enable the Court to exercise its powers in a manner convenient to the efficient despatch of its business. While the rule remains as it is, if a wife agrees not to petition for maintenance, she thereby, in effect, agrees to deprive the Court of the powers expressly given to it "on any decree of divorce."

A decree of divorce is, in its nature, a judgment *in rem.* It does more than affect the rights of the parties *inter se.* It alters their status, and profoundly affects their relation to third parties. Before divorce, a husband is liable for his wife's torts, he is liable in certain circumstances on her contracts for necessaries, and if she becomes a pauper he is liable to recoup to the guardians the expense of her maintenance. Further, though married people can lawfully enter into separation deeds and thereby modify their rights, *inter se,* they cannot by agreement become divorced persons. But when they are duly divorced by the Court they have all the rights and liabilities of unmarried persons, and it is a matter of great public interest that an adequate provision should be made by the Court for the maintenance of the wife and children of the marriage. In giving judgment in *Harriman v. Harriman* (25 *The Times* L.R., 291; [1909] P., 123, at p. 143) Lord Justice Farwell said: "The Act of 1857 abolished the old ecclesiastical jurisdiction (section 2) and created a new civil tribunal with new powers, including a power to dissolve marriages altogether; but this power, trenching as it did on the binding sanctity of the marriage tie, and affecting, therefore, not only the parties to the suit, but also their children (if any) and society generally, was limited by the Act, especially by sections 29, 30, and 31."

These observations seem to me in principle to apply just as much to the incidental powers conferred on the Court, when granting a decree of divorce, as they do to the limitations imposed on the Court. It is, in my judgment, in the public interest that the Court should be able to secure to the wife such sum by way of maintenance as should seem reasonable, having regard to her fortune, the ability of the husband, and the conduct of the parties, without being restrained by any agreement they have made while they had the status of married persons.

Apart from authority, I should have no hesitation in holding that the Divorce Court is entitled to consider in each of these cases under appeal the wife's petition for maintenance, and, on the hearing of the petition, to grant such sum by way of maintenance as the Court deems reasonable, notwithstanding the wife's covenant in the deed of separation not to ask for any maintenance beyond the sum provided for

in the deed. Section 190 gives the Court its power to order maintenance, as I have pointed out, "on any decree of divorce," and it is not permissible to read into the section some such words as "unless otherwise agreed by the parties." If the appellants' argument is right, a wife, who had agreed to live separate from her husband and to do without maintenance, might unexpectedly find herself without any means when she obtained a decree of divorce, while her husband had meantime acquired a substantial fortune. It would be unfortunate, indeed, in the interests of justice and in the public interest, if the Court could not, in those circumstances, disregard an agreement made in other circumstances, but was thereby disabled from making a reasonable order for the maintenance of the wife, the need for the divorce having been occasioned by the husband's misconduct. But it is said that there is authority, by which this Court ought to hold itself bound, that a wife who has, during the continuance of the marriage bond, entered into an agreement, in words which are wide enough to include the joint lives of the parties, not to seek an order for maintenance, is bound by that agreement after she has obtained a divorce, and the Court cannot grant maintenance at any larger sum than she agreed to accept. In my opinion, there is no binding authority for this proposition, and the weight of authority is the other way.

The appellants relied chiefly on the decisions in *Charlesworth v. Holt* (L.R., 9 Ex., 38), and *Gandy v. Gandy* (7 P.D., 168). In *Charlesworth v. Holt* (*supra*) it was held that the trustees of a separation deed, in which the husband covenanted to pay an annuity to the trustees for the wife's support during their joint lives and so long as they should continue to live separate and apart, could sue on the deed, notwithstanding the fact that the wife had been divorced by her husband. The point was raised by demurrer to a plea by the defendant setting up, as a defence to a claim by the trustees for money due under the deed, the wife's subsequent adultery, and the dissolution of the marriage. The Court held the plea bad, as there were no express words limiting the husband's obligation to the period during which the marriage subsisted. I think this case is an authority for the proposition that a covenant, such as there was in the separation deeds under consideration in these appeals, is to be construed as applying between the parties after a divorce on the ground of adultery. This was not a decision of a Court of Appeal, and would not be binding on this Court if it were a recent case; but it was decided nearly 55 years ago, and many deeds of separation must have been entered into since then upon the assumption that a covenant in a separation deed to pay or accept an agreed sum for maintenance would be construed as applying between the parties, after a divorce, in the absence of any order made by the Divorce Court under its statutory powers. The case was not cited to the learned President in *Hughes v. Hughes*—if it had been, he might possibly have given a different reason for his judgment than that which appears in the transcript. I think this Court would hesitate for a long time before it overruled a case which was decided so long ago as was *Charlesworth v. Holt* (*supra*). But the case has no bearing on the question we have to decide in these appeals, which are concerned not so much with the construction of the covenants in the deeds as with the extent of the powers conferred by statute on the Court when decreeing a divorce.

In *Gandy v. Gandy* (*supra*) it was held that a covenant by a wife in a separation deed not to sue for increased alimony beyond that provided for by the deed was binding on her, notwithstanding the fact that the husband had committed adultery, and that she had obtained a decree for judicial separation. The Master of the Rolls, Sir George Jessel, and Lord Justice Lindley expressly distinguished the case, which was one of judicial separation, from a case arising on the dissolution of a marriage. The subsequent history of the litigation in *Gandy v. Gandy* (*supra*) is peculiar, and I doubt whether even in a case of judicial separation the first case of *Gandy v. Gandy* (*supra*) can now be regarded as an authority. The parties came before the Court of Appeal again (see 30 Ch.D., 57), and as a result of the situation created by the fact that the husband contended that, having by the decree of the Court lost the custody of his children, he was no longer liable to pay for their maintenance and education, the Court gave the wife liberty to apply again to the Divorce Court for increased alimony, and adjourned the hearing of the appeal until she had done so. The subsequent history of the case is stated by Mr. Justice Gorell Barnes in *Judkins v. Judkins* (13 *The Times* L.R., 366 ; [1897] P. 138, at p. 155). On the wife's second application for maintenance the President allowed her permanent alimony at the rate of £750 per annum, being £500 more than the amount agreed in the separation deed, credit to be given for the annual payment made under the deed. A final order was then made by the Court of Appeal, staying the Chancery proceedings. Mr. Justice Gorell Barnes concludes his account of the litigation in *Gandy v. Gandy* (*supra*) in these words:—"The result of all this litigation in *Gandy v. Gandy* (*supra*) was that the wife obtained about £500 a year more than the deed gave her as permanent alimony. I cannot ascertain exactly how this increase was fixed; but it may have been in order to maintain the two youngest children. At the same time the final order does in terms give permanent alimony beyond that which was covenanted to be paid by the deed."

Gandy v. Gandy (*supra*), therefore, cannot be regarded as an authority that even in a case of judicial separation the Court cannot under any circumstances override the agreement of the parties as to the amount to be paid for maintenance. The second case of *Gandy v. Gandy* (*supra*) did not, as was suggested by the appellants' counsel, depend on the wife being freed from her contract by the husband's repudiation of it. A contention by a party to a contract, that his liability to make a payment under the contract has come to an end, is not a repudiation of the contract.

Be this as it may, *Gandy v. Gandy* (*supra*) has, in my judgment, no application to the case where the marriage is dissolved by a decree of divorce. Whatever proposition of law can be extracted from it only applies to a case of judicial separation, and it ought not to be applied to the wholly different situation created by a divorce. The decisions of Sir James Hannen in *Morrall v. Morrall* (6 P.D., 98) and of Sir Francis Jeune and the Court of Appeal in *Bishop v. Bishop* (13 *The Times* L.R., 366 ; [1897] P., 138) were given in cases where there was a decree of divorce, and they afford ample authority for deciding these appeals in the present respondents' favour. The law, in my opinion, is correctly stated by the President, Sir James Hannen, in *Morrall v. Morrall* (*supra*) in these words:—"Circumstances now justify her (the wife) in bringing a suit for dissolution of marriage, and she is entitled to all the incidents of that suit, and amongst them to an allowance based upon her husband's actual income."

The wife's covenant in *Morrall v. Morrall* (*supra*) was that she would not at any time thereafter commence or prosecute any suit or other proceeding for compelling her husband to allow her any support or

maintenance or alimony whatsoever, except the sum provided for in her separation deed. The Court held, for the reasons stated, that the deed afforded no answer to a petition for maintenance. The case was mentioned without dissent by Lord Justice Cotton and Lord Justice Lindley in the first case of *Gandy v. Gandy* (*supra*) in the Court of Appeal. It was cited to the Court of Appeal in the argument in *Bishop v. Bishop* (*supra*) but no observations were made about it in the judgment.

In *Bishop v. Bishop* (*supra*) at the trial of a petition for divorce the parties consented to have the petition dismissed, the petitioner agreeing to accept £130 per annum by way of maintenance, to include the maintenance of the child, of which she was to have the custody. There was no express covenant not to sue for further maintenance but, in my opinion, the agreement must be construed in the same way as covenants relating to permanent maintenance in separation deeds, and, apart from any order made by the Court on a dissolution of the marriage, the petitioner would have been bound by her promise to accept £130 per annum by way of permanent maintenance, and could not have sued for anything more. When the petitioner, having obtained a decree of divorce, asked for an order for more than £130 per annum, the President, Sir Francis Jeune, held that the agreement did not afford any answer to her petition, and his judgment was upheld by the Court of Appeal. It is quite clear that the Court of Appeal considered that though the agreement contemplated the continuation of the agreed allowance, and consequently of the obligation of the wife to accept it, in the event of a future dissolution of the marriage, they thought that the Court had power to override that agreement and award her a larger allowance, if, when the petition came on for hearing, it was considered reasonable, on the grounds mentioned in section 190, that she should have permanent maintenance at a higher rate than she had agreed to accept. It seems to me to follow that if the Court has power to award to a wife a higher allowance than that which she has agreed to accept, it has also power to consider her petition and make a proper order for maintenance, notwithstanding her agreement that she will not ask for such an order.

For these reasons, and those stated in the judgment of Lord Justice Scrutton, I think the judgments appealed from were right, and the appeals should be dismissed with costs.

Lord Justice Sankey stated the facts in *Hyman v. Hyman,* and continued:—

Two points are taken by the respondent: (1) That the words of the covenant do not cover the present case and do not estop the wife. (2) That, if the words do not cover the present case, the covenant is illegal and cannot be relied upon, as there is no power to contract out of the Act of Parliament—viz., section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, which empowers the Divorce Court, if it thinks fit, on any decree for divorce or nullity of marriage, to order that the husband shall secure to the wife such gross sum of money or annual sum of money as the Court may deem to be reasonable. In the case of *Hughes v. Hughes,* the President, on the construction of a somewhat similar covenant, said: "The decisive question here . . . is whether the present applicant has covenanted not to do the thing which she now seeks to do. In my opinion, she has not. She covenanted, as a wife, against making, as a wife, any claim upon her husband, for support, maintenance, or alimony. That is to say, she covenanted not to proceed in a Court, having jurisdiction in such matters, to require as against her husband the provision for her livelihood for which in his marital capacity he would during their marriage *prima facie* be liable. She is not so proceeding. She is no longer a wife." Before dealing specifically with the above two points, it will be convenient to examine the statutes and decided cases applicable to them.

Originally the law relating to matrimonial causes was largely dealt with by the ecclesiastical authorities and Parliament, but in 1857, by the Matrimonial Causes Act of that year, a Court was constituted with exclusive jurisdiction over matters matrimonial in England, and is known as the Divorce Court. The Act created two new remedies. By section 7 powers were given to the Court to pronounce a decree for judicial separation in lieu of the old decree for a divorce *a mensa et thoro,* and, by section 17, further powers were given, where the application was by the wife, to make any order for alimony which should be deemed just. By section 31 powers were given to the Court to pronounce a decree for dissolution of marriage, and by section 32 the Court was further empowered to grant alimony. An examination of the statutes will show that, at the very beginning, a clear line was drawn between the right to obtain, and the results of obtaining, the said two remedies. The reason is not far to seek. In the case of judicial separation the marriage tie was not broken; in the case of divorce it was, and it is not difficult to understand why, in such circumstances, such a difference should have been made between the two.

Whether certain situations were overlooked in the new venture of 1857, or whether it became the policy of Parliament to increase the jurisdiction in divorce, is a question upon which it is not necessary to speculate; but certainly the jurisdiction in divorce, as distinguished from the jurisdiction in judicial separation, was, from time to time, enlarged.

By the Matrimonial Causes Act of 1859, section 5, power was given to the courts in inquire into the existence of ante-nuptial or post-nuptial settlements in cases of nullity of marriage or dissolution of marriage. Section 4 of that Act, when dealing with the custody of children, included cases of judicial separation, nullity of marriage, and dissolution of marriage. Section 3 of the Matrimonial Causes Act, 1878, again enlarged the jurisdiction of the Court by making section 5 of the Act of 1859 applicable, notwithstanding that there were no children of the marriage.

It will thus be seen that, from time to time, the distinction between judicial separation and divorce was preserved, and the jurisdiction of the Court in the latter enhanced. It is not, therefore, surprising that, in the cases from time to time decided, the Courts should not only draw a distinction between judicial separation and divorce, but should act upon such a distinction in coming to their decisions.

After several re-enacting statutes, the law was consolidated by the Supreme Court of Judicature (Consolidation) Act of 1925. It may perhaps be a little unfortunate that the sections dealing with alimony in judicial separation and in divorce were not kept entirely separate, but were, possibly for the sake of convenience, thrown together in section 190, although in different subsections, but that does not alter the distinction which still remains and which is fundamental, that the remedies and the results of the remedies are upon entirely different bases, viz., in one the continuance, and in the other the dissolution, of the marriage.

I now turn to the cases. There have been decisions not only in the Divorce Court, but in the Courts of Chancery and the Courts of Common Law, but, speaking for myself, I think those two latter Courts should be extremely cautious in doing anything to interfere with the practice of the Divorce Court, which for many years has had a peculiar jurisdiction and a large experience in cases arising between husband and wife. Normally in suits coming before the Chancery or King's Bench Judges, the Court is considering only the rights of the parties *inter se*. The Divorce Court is dealing with changes in the status of the parties, and considerations of public and national interest arise. In ordinary cases before a Chancery or King's Bench Court a defendant is at liberty to consent to judgment for the plaintiff with costs; no such liberty is permitted to a respondent in a divorce case ; indeed, collusion is an absolute bar to a dissolution of marriage. We were much pressed by the learned counsel for the appellants with the the case of *Charlesworth v. Holt* (L.R. 9 Ex. 38). There, by a separation deed, the defendant covenanted with trustees to pay them an annuity for his wife's support during his and his wife's joint lives and so long as they should live separate and apart. In an action by the trustees for arrears of the annuity it was held that a plea setting forth the deed and alleging the wife's subsequent adultery, and the dissolution of the marriage in consequence, was bad, there being no express words limiting the defendant's obligation to the period during which the marriage tie subsisted. That case was not cited to the learned President, but it is to be observed that it was a suit by the trustees. The decision is not binding on this Court, and it is no authority upon the question whether the Divorce Court has, or has not, jurisdiction in such a case as the present. It is a decision of a Court of Common Law, and moreover, in my view, that case would, even in a Court of Common Law, be differently decided now, in view of the decisions in the Coronation and frustration cases. Two decisions of the Court of Chancery may be referred to ; *Besant v. Wood* in 1879 (12 Ch. D., 605), where the Master of the Rolls, Sir George Jessel, at p. 622, expresses the opinion that a married woman may compromise by agreeing to live separate on terms as regards maintenance for herself, although he adds that that contract, like all other contracts, if not against public policy, is one which may be upheld and enforced; and *Gandy v. Gandy* (30 Ch. D., 57), which is a sequel to the other case of *Gandy v. Gandy* (7 P.D. 168). As some criticism was made in the course of the appellants' argument with regard to the phrase "variation of settlement" in reference to section 192 of the Supreme Court of Judicature (Consolidation) Act of 1925, when considering the gradual increase of the power of the Divorce Court, I should point out that Sir George Jessel said in *Gandy v. Gandy* (30 Ch. D. at p. 72) that the Legislature has not thought fit in the case of judicial separation to give the same powers to the Court that it has given in the case of dissolution of marriage. The headnote of the report of *Gandy v. Gandy* (*supra*) in the Probate Division, where it says (7 P.D. 168) that the Court has not, as it has in the case of a decree for dissolution, power to alter the separation deed, possibly goes too far, but I do not propose, however, to dwell long upon that case. It was a case where judicial separation and not divorce was involved, and I cannot help thinking that the Court of Appeal when it gave its decision did not contemplate the facts which were presented to it when it gave its decision three years later as reported in 30 Chancery Division. It is sufficient to refer to Lord Justice Lindley's explanation of it in *Bishop v. Bishop* (13 *The Times* L.R. 366; [1897] P. 138, at p. 162). I pass over other cases not connected with divorce, because, as it appears to me, the considerations which apply to divorce are different; namely, *Marshall v. Marshall* (5 P.D. 19). which was a suit for restitution of conjugal rights, as also was *Tress v. Tress* (12 P.D. 128). The case of *Aldridge v. Aldridge* (13 P.D. 210) was, it is true, a nullity case, but in nullity the marriage is not void, but only voidable at the instance of the aggrieved party.

To pass to a case which is concerned with divorce, *Morrall v. Morrall* (6 P.D. 98) would appear to be a decision in favour of the respondents in the present cases, although I cannot help thinking that the reasons given by Sir James Hannen were reasons which have been disapproved by the Court of Appeal, and a similar remark applies to the decision of *Benyon v. Benyon* (1 P.D. 447).

I doubt, however, if it is possible to say that there can never be a case where a change of circumstances would operate to induce the Court to declare that a deed is no longer binding. Finally, it is necessary to refer to the case of *Bishop v. Bishop* (*supra*). It is true that the covenant in that case and the case of *Judkins v. Judkins*, which is reported with it, were rather different from the covenant now under consideration, there being no express covenant by the wife not to sue for increased alimony in the event of a divorce decree grounded on future misconduct in the one case, and no covenant by the wife not to sue for an increase in the other, but the reasoning in those two cases is in favour of the respondents in the present cases.

To sum up, a review of the authorities leads me to the conclusion that the point to be decided is an open one and comes before this Court for the first time. There are in the cases *dicta* which can doubtless be relied upon by either side, although it appears that the Divorce Court has always struggled to maintain what Parliament had undoubtedly given to it—namely, a large and unfettered power to decree alimony in divorce cases.

I now pass to the two points which fall for decision.

(1) Does this covenant cover the present case ? Speaking for myself, I agree with the President's reasoning in *Hughes v. Hughes*, that the covenant does not apply in the present circumstances. In my view it only operates so long as the relationship of husband and wife exists between the parties, but the decision in *Charlesworth v. Holt* (*supra*) may make it difficult to decide the matter upon this ground, although I think it is correct. I, therefore, turn to the second point.

(2) Was there a power to contract out of this Act of Parliament ? If not, the clause is invalid. Now the covenant must be strictly construed. It is not, nor indeed can it be, a covenant not to petition for a divorce. It is a covenant that the Divorce Judge, in the event of the wife's coming before him for a divorce, shall not have the powers which Parliament says he is to have in such cases. It does not, indeed, go so far as to say that he may hear the case but not determine it, but it does seek to prevent the Judge from exercising those powers which Parliament says he is to have when pronouncing a decree, and without which it does not appear to me that he can do justice between the parties. It is not logical that he should be bound, when he decrees a divorce, by stipulations agreed between the parties as applicable to, and binding in, entirely different circumstances; neither is it, in my opinion, permissible for the parties to a contract to say that

the Judge shall be so fettered in his discretion. It is impossible to fetter the discretion where there are children of the marriage—divorce, children, alimony, are inextricably mixed up together, and the jurisdiction of the Divorce Court refers to delicate matters which cannot be treated as one would treat a contract for the sale of goods, or a suit for specific performance. As above pointed out, the parties to a marriage contract are not at liberty to do as they like with regard to the contract. There are public and national interests to be considered. The cases on public policy are conveniently collected in *In re Hope Johnstone* (20 *The Times* L.R. 282 ; [1904] 1 Ch. 470), where the learned Judge quotes Vice-Chancellor Wood in *H. v. W.* (3 K. and J. 382, at p. 387) as saying: "It is forbidden to provide for the possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolate." Over and above that I read Lord Justice Lindley as saying, in *Bishop v. Bishop* (*supra*), at p. 164 : "We are not aware of any authority since the Divorce Act which shows that a covenant by a husband or wife not to sue the other for a divorce grounded on future misconduct is valid, and we doubt whether an express covenant not to sue for increased alimony in the event of such a divorce could be recognized."

In my view, a consideration of the statutes, coupled with the doubts expressed by Lord Justice Lindley, clearly points to a covenant of this character being invalid, and it is impossible for parties so to contract out of this Act of Parliament.

I can see no distinction in law between this case and that of *Hughes v. Hughes,* and both appeals should, I think, be dismissed with costs.

Lord Justice Russell.—These two cases raise for determination the same point, which may thus be stated: Is a contract by a wife (made at arm's length and for valuable consideration) by which she agreed not to take proceedings to compel her husband to allow her support, maintenance, or alimony, or to allow her any alimony or maintenance beyond a stipulated amount, binding upon the wife after she has obtained a decree absolute for divorce; or is it still open to her to petition for maintenance under section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925 ? (His Lordship stated the facts in *Hughes v. Hughes,* and continued.)

The judgment of the President, as I read it, disposed of the matter on one short ground which he described as the "decisive question." He held that the petitioner, in applying for maintenance, was committing no breach of her covenant, because the covenant only related to a claim by her as a wife against the covenantee as her husband. It is true that he proceeds then to refer to *Morrall v. Morrall* (6 P.D., 98) and *Bishop v. Bishop* (13 *The Times* L.R., 366 ; [1897] P., 138) as not weakening the petitioner's right to apply under section 190, but his decision rests, I think, entirely upon the view that the covenant ceases to apply after the relationship of husband and wife has come to an end. I am unable to take this view. The words of the covenant contradict it; the bargain is that she will not "at any time hereafter" commence proceedings, and the benefit which she obtains in substitution is the assignment of property to be enjoyed by her at all times thereafter, whether the relationship of husband and wife continues to exist or not. Nor is there any ground for the view that the indenture of November 15, 1920, is of such a nature that all its provisions automatically cease to operate in the event of a dissolution of the marriage. It is a deed of separation and *Charlesworth v. Holt* (L.R., 9 Ex., 38) is sufficient authority to show that, in the absence of express words in the deed, liability under a covenant contained therein survives the dissolution of the marriage of the parties to the deed. See also the decision of this Court in *Clifford v. Clifford* (9 P.D., 76). In my opinion, the judgment of the President cannot be supported upon what I conceive to be its sole foundation.

There remain, however, for consideration certain other important contentions which were urged in argument. It was said that, even assuming that the petitioner's application for permanent maintenance was a breach of the covenant, her covenant did not bind her, by reason of the fact that she had obtained a decree for divorce founded upon the respondent's adultery subsequent to the date of the deed. Further, it was said that the covenant was bad, as being a covenant against public policy; this upon the theory that a covenant by a wife in a separation deed not to ask at any time thereafter for further maintenance or support is either an agreement entered in contemplation of divorce, or is equivalent to a licence to the husband to commit adultery. To deal with these points requires an examination of certain relevant authorities.

In *Gandy v. Gandy* (7 P.D., 168) the precise point arose in the Court of Appeal in connexion with a decree for judicial separation. In the Court below (7 P.D., 77) the President (Sir James Hannen) had decided that a wife, who had obtained a decree of judicial separation by reason of adultery committed by her husband subsequently to the execution of a separation deed, was not bound by a covenant therein contained. The covenant was a covenant by the trustees with the husband that the wife would not, nor any person on her behalf, thereafter commence any proceedings against the husband for alimony except as aforesaid ; that is to say, beyond £252 per annum which the husband had covenanted to pay to the trustees during the life of the wife for the use of the wife and two of her daughters. The President held that, notwithstanding the deed, the wife could apply for and obtain permanent alimony under 20 and 21 Victoria, chapter 85, section 17. The grounds of the decision appear to have been, (1) that the subsequent adultery created a state of facts not in the contemplation of the parties at the date of the deed; (2) that the subsequent adultery deprived the husband of the right to have the restraining provisions enforced ; (3) that the deed should be construed as an agreement to live apart in chastity; and (4) that any other decision would be prejudicial to morality, as holding that the husband obtained by the deed a licence to commit adultery, without subjecting himself to any liabilities beyond those imposed by the deed. Sir James Hannen decided *Gandy v. Gandy* (*supra*) in the year 1882. Before that he had already decided two cases of a somewhat similar nature—namely, *Benyon v. Benyon* (1 P.D., 447) in 1876 and *Morrall v. Morrall* (*supra*) in 1881. *Benyon v. Benyon* (*supra*) is not very relevant here. It was a case where the Court examined the powers which are now contained in sections 192 and 193 of the Act of 1925 in favour of a husband and child. There was no covenant by the husband not to apply for more than the allowance provided by the separation deed. *Morrall v. Morrall* (*supra*), however, is of great importance because Sir James Hannen there decided that a covenant in a separation deed not to sue for further maintenance was not binding upon a wife who had obtained a decree of divorce founded on the husband's incestuous adultery committed after the

date of the deed. In deciding both *Morrall v. Morrall* (*supra*) and *Gandy v. Gandy* (*supra*), Sir James Hannen acted upon the view that subsequent adultery by the husband created a new state of facts which deprived him of the right to enforce the covenant not to sue. There was no appeal in *Morrall v. Morrall* (*supra*). In *Gandy v. Gandy* (*supra*), however, the husband appealed; and, as I read the judgments in the Court of Appeal, the grounds upon which Sir James Hannen based his decisions in *Morrall v. Morrall* (*supra*) and *Gandy v. Gandy* (*supra*) can no longer stand. Sir George Jessel and Lord Justice Cotton and Lord Justice Lindley all agreed that the subsequent adultery of the husband did not deprive him of the benefit of the stipulation as to alimony. In particular Lord Justice Cotton uses (7 P.D., at p. 174) the following language : "But the learned Judge seems to have decided the matter on principles that would lead to the conclusion that the deed was bad altogether at law (which it is not), because he said this deed must be read as containing an implied condition that it shall be operative so long as the parties shall live chastely, and that to hold that the present appellant was right would be to say that this deed contemplated and allowed adultery on the part of the husband. I cannot agree with such a conclusion" ; and Sir George Jessel (at p. 172) expresses himself thus : "I see that the learned Judge put it on the ground of public policy. I have explained more than once, and especially in a case which has been referred to by the learned Judge himself of *Besant v. Wood* (12 Ch.D., 605), that there is no reason more dangerous to give, and no reason on which such difference of opinion exists, as public policy. He has said, 'If you do not allow the wife to ask for increased alimony in such a case as this, you allow the husband to commit adultery with impunity.' I am by no means prepared to say that this remark is correct. It is not impunity merely because he is not obliged to pay more money. I do not consider that payment of alimony is the only punishment for adultery if the word 'punishment' should be used in connexion with it. No doubt he may be to some extent relieved from that liability, but the contract is one by which he is compelled to pay an amount having regard to his then state of fortune, which might have been much larger then than that at the date of the decree for separation, for his fortune might have diminished instead of increasing. It appears to me a very strong thing to say that by his committing an act which does not affect the wife either directly or indirectly her rights to participate in his fortune should be altered." It is true that reference is made in the judgments to the fact that the case was one of judicial separation, and not of dissolution of marriage, but the object of such references appears from the context to be to point out that in the event of divorce the Court has powers in regard to settlements (which include separation deeds) which would be unaffected by any stipulations between the spouses as to alimony or maintenance. These powers (which are those now included in section 192 of the Act of 1925) are not, however, either available or relevant in either of the cases now under the consideration of this Court.

A somewhat similar matter arose later for consideration in the Court of Appeal in the case of *Bishop v. Bishop* (*supra*). That case resembled the present cases in that the marriage had been dissolved ; it differed from the present cases, however, in that in *Bishop v. Bishop* (*supra*) there was no covenant not to apply for further maintenance. The facts were as follows : The wife had petitioned for divorce, but compromised the proceedings by an agreement dated March 20, 1894, which ran thus : "The petitioner agrees to accept £130 per annum by way of permanent maintenance, this sum to include the maintenance of the child. The said allowance to be paid by Mr. Walter Harry Bishop, the respondent, by monthly payments during their joint lives. This allowance to be paid in any event, whether they remain married or whether the marriage should hereafter be dissolved. Mrs. Edith Bishop, the petitioner, is to have the custody of the child." It was an agreement that a certain sum should be payable for permanent maintenance during the joint lives, to include maintenance of the child, and to be payable even after a divorce. In July, 1895, the wife filed a petition for divorce, and obtained a decree *nisi* which was made absolute on June 8, 1896. She then applied for (1) permanent maintenance for herself and (2) provision for the maintenance and education of the child. Sir Francis Jeune allowed the matter to proceed, apparently taking the view that the decision in *Gandy v. Gandy* (*supra*) had been virtually set aside by the later decision of the Court of Appeal in *Gandy v. Gandy* (30 Ch.D., 57), and also that the decision in *Gandy v. Gandy* (7 P.D., 168) in substance approved of the decision of Sir James Hannen in *Morrall v. Morrall* (*supra*). In the Court of Appeal the nature and scope of the earlier decision in *Gandy v. Gandy* (*supra*) is stated. It is made quite clear, (1) that the Court of Appeal had never gone back from that decision ; (2) that the reason why an order for increased alimony was eventually made was that the subsequent repudiation by the husband of his obligations under the separation deed had freed the wife from her covenant not to sue (see [1897] P., at p. 161) ; (3) that, apart from special cases relieving the wife from her covenant, the Divorce Court had no power to disregard it (see [1897] P., at p. 162); (4) that nothing was decided in *Gandy v. Gandy* (*supra*) respecting the statutory powers of the Divorce Court in suits for dissolution of marriage or as to the power to make orders respecting the custody, maintenance and educaton of children. The actual decision in *Bishop v. Bishop* (*supra*) was that the appeal from Sir Francis Jeune's order be dismissed, but not at all upon the grounds upon which he based his decision. As I read the judgment of the Court of Appeal in *Bishop v. Bishop* (*supra*) its foundation is this :—There was no covenant by the wife not to sue, nor could such a covenant be implied. In no view could the agreement preclude an application on behalf of the child. *Gandy v. Gandy* (*supra*) (being a case of judicial separation) was not in point except in one respect. The case must turn solely (there being no covenant not to sue) on the powers of the Divorce Court on dissolution to compel a husband to provide for his former wife, and to make orders for the maintenance and education of the children. As regards the former, these were not fettered by the existence of the agreement in *Bishop v. Bishop* (*supra*), i.e., the mere fact that the parties had in the separation agreement fixed a figure as being the proper sum to cover the future, could not prevent the Court from having regard to the wife's fortune, the husband's ability, and the conduct of the parties, and, if deemed proper, from fixing a different and higher sum. As regards the latter powers, no agreement between the parents could deprive the children of the benefit of the Court's jurisdiction. That, in my opinion is the foundation of *Bishop v. Bishop* (*supra*). In other words, the only decision in *Bishop v. Bishop* (*supra*) is that, where there is no bargain for value by the wife releasing her personal rights to permanent maintenance under the statute, those rights are not destroyed by a separation deed which fixes a

sum for maintenance and provides that it shall be payable even after divorce. It was argued before us that *Bishop v. Bishop* (*supra*) covered the present cases, because the agreement in *Bishop v. Bishop* (*supra*) was so worded as to involve an agreement by the wife not to apply for further maintenance. To say this is to shut one's eyes to the language used in the judgment. The case is expressly stated to be decided upon the footing that no such agreement by the wife, express or implied, did exist. The words at pages 164 and 165 are explicit: "There is no express covenant to that effect in the present case; and a covenant of such very questionable validity certainly cannot be implied. In other words, the wife cannot be held to have precluded herself by her agreement from invoking the aid of the Court to obtain further maintenance in the events which have happened." Unless the English language bears some meaning unknown to me, there is no decision in *Bishop v. Bishop* (*supra*) that such a bargain as I have mentioned above is, or would be, unenforceable against the wife after a divorce.

There is no doubt a suggestion (at page 164) that such an agreement may be invalid. This suggestion is, however, only an *obiter dictum*, with which I will deal hereafter. For the moment I am content to say that *Bishop v. Bishop* (*supra*) leaves us free in our consideration of the present case.

The really relevant authorities for the decision of the present case are *Morrall v. Morrall* (*supra*) and the first case of *Gandy v. Gandy* (*supra*); for it appears to me that, while the appellants cannot succeed unless the former case is overruled, the respondents must fail unless *Gandy v. Gandy* (*supra*) is either departed from or distinguished. The grounds upon which the first case of *Gandy v. Gandy* (*supra*) was decided destroy completely the foundations upon which *Morrall v. Morrall* (*supra*) was built. Sir James Hannen had relied upon the same line of reasoning as appears to have influenced him in *Gandy v. Gandy* (*supra*). The judgment in *Morrall v. Morrall* (*supra*) is meagre, but it rests only on change of circumstances, namely, misconduct by the husband subsequent to the separation deed, with the four alleged consequences which I have enumerated earlier as the grounds of the decision in *Gandy v. Gandy* (*supra*). *Morrall v. Morrall* (*supra*) was cited and considered by the Court of Appeal in the first case of *Gandy v. Gandy* (*supra*), with the result that it was stated to be a decision which might be supported only upon the ground that the husband's conduct (namely, incestuous adultery) was such as to amount to repudiation by him of the whole contract. I confess that I feel difficulty in justifying the decision upon that ground. *Morrall v. Morrall* (*supra*) was again cited to the Courts in *Bishop v. Bishop* (*supra*); but although Sir Francis Jeune had said in his judgment that the Court of Appeal in *Gandy v. Gandy* (*supra*) had approved of *Morrall v. Morrall* (*supra*), the Court of Appeal in *Bishop v. Bishop* (*supra*) maintained an eloquent silence in regard to that decision. I cannot find that *Morrall v. Morrall* (*supra*) has ever in terms been approved in this Court. On the other hand, although the reasons for the decision have been disapproved, the decision itself has not been overruled. The truth is that the identical case (namely, a covenant in a separation deed not to sue for further maintenance followed by divorce) has not arisen in this Court until now. It now arises and must be decided; but we are unfettered as to *Morrall v. Morrall* (*supra*) if we think it ought to be overruled.

The authority which does bind this Court is the first case of *Gandy v. Gandy* (*supra*), and unless it can be distinguished on some material point it governs the present case. The outstanding point of distinction is, of course, that in *Gandy v. Gandy* (*supra*) the marriage had not been dissolved. I deviate for a moment to deal with a point raised in the argument. It was stated or suggested that in some way the authority of the first case of *Gandy v. Gandy* (*supra*) had been overruled or discredited or shaken by the decision of the Court of Appeal in the later case of *Gandy v. Gandy* (30 Ch.D., 57). This theory has cropped up here and there in judgments of various Presidents, but I thought that it had been disposed of for ever by the judgment of the Court of Appeal in *Bishop v. Bishop* (*supra*). What happened seems reasonably clear. Having held his wife to her covenant by the first decision, the husband subsequently refused to make payments for the maintenance of the children. Rightly or wrongly, the Court of Appeal in the second case of *Gandy v. Gandy* (*supra*) considered that the refusal by the husband operated to release the wife from her obligation not to sue, and they made an order in the following terms: "It now appearing that the husband declines to contribute to the maintenance and education of the two youngest children, stay the proceedings under the judgment of Vice-Chancellor Bacon till further order, with liberty to the wife, if she is so advised, to present a fresh petition to the Divorce Court for increased alimony, with liberty to either side to apply to restore this appeal to the paper." In the result, the wife presented her fresh petition and obtained a much larger sum for her maintenance than was provided by the separation deed. That decision in no way overrules, discredits, shakes, or throws the slightest doubt on the correctness of the decision in the first case of *Gandy v. Gandy* (*supra*). I am content to recall to mind (without repeating it) the emphatic language of the judgment in *Bishop v. Bishop* (*supra*) used for the purpose (but apparently without success) of making it for ever clear that the Court of Appeal had never gone back from that decision, and that the ground of the second decision was that the refusal of the husband freed the wife from her covenant.

Let me now return to the point of distinction—namely, that in the present case the separation deed has been followed by divorce. In *Gandy v. Gandy* (*supra*) it was only followed by judicial separation. In both cases there had been adultery by the husband.

Gandy v. Gandy (*supra*) has established that a wife is bound by her agreement not to enforce her statutory rights under section 190 (4) of the Act of 1925, notwithstanding her husband's subsequent misconduct. To quote the judgment in *Bishop v. Bishop* (*supra*), "in the first case of *Gandy v. Gandy* (*supra*) the Court held the wife bound by her agreement, there being no circumstances to relieve her from it, and no power in the Divorce Court to disregard her covenant." If that decision was correct, how does she become relieved of her agreement in the present case, and how does the Court acquire power in the present case to disregard her covenant? The only answer suggested is the word "divorce."

Is there anything in the nature of the rights conferred by section 190, subsection (1), of the Act of 1925 upon a wife different from the rights conferred upon her by subsection (4); and so essentially different that, while a bargain to release the latter will be enforced, as in *Gandy v. Gandy* (*supra*), a bargain to release the former should not? For myself, I cannot see why this should be so. The right under each subsection is a right conferred by

statute for the personal benefit of an individual; in the latter case a wife living apart from her husband; in the former case a person whose status as wife has determined. I can see no valid reason why a contract entered into by such an individual whereby, in consideration of some other benefit received, that statutory benefit is released is not enforceable and should not be enforced. A wife can bargain away her right to *consortium* with her husband, *Marshall v. Marshall* (5 P.D., 19) and *Besant v. Wood* (*supra*). I do not see why she should not be allowed to bargain away or modify her personal right to support from her husband, whether during the continuance or after the dissolution of the marriage tie.

I put to counsel for the respondents, in argument, the question whether, after divorce obtained by a wife, and an order made for payment to the wife of an annual sum under section 190 (2) of the Act of 1925, the man and woman could, for valuable consideration, bargain not at any time thereafter to apply to the Court under section 196 of the Act of 1925 to vary the order made. It was admitted that such a contract would be valid and enforceable. In my opinion, the admission was correctly made, but it is quite irreconcilable with all the arguments of the respondents, except the argument of invalidity founded upon public policy.

I turn now to the argument founded on public policy. It is said that public policy requires that an agreement, such as was made in the present case, should be held to be illegal. Arguments which rest on so shifting and sandy a foundation as public policy require careful scrutiny—the more so when one is conscious that another element (which may equally well label itself public policy) comes into consideration on the other side—namely, freedom and observance of contract. There is, no doubt, a suggestion in *Bishop v. Bishop* (*supra*) that such an agreement may be invalid. This suggestion, however, is merely *obiter*, and the reasons for invalidity are not formulated. If the suggestion is based upon the theory of a licence for misconduct, it appears to me inconsistent with the statements in the Court of Appeal by Sir George Jessel and Lord Justice Cotton in *Gandy v. Gandy* (*supra*), which I have already read; and, indeed, inconsistent with the actual decision in that case, in which the bargain was upheld, after subsequent adultery by the husband. Moreover, upon its merits, the proposition does not commend itself to me—namely, that a bargain not to avail yourself of one of the by-products of a possible future divorce decree in consideration of your enjoying a fixed benefit from the date of the bargain onwards is tainted with illegality. The fixed benefit may turn out more or less than the Court would give under the statute; but I cannot see how such a bargain can reasonably be said to be a licence to commit adultery, or to encourage a dissolution of the marriage tie. The suggestion must be that the knowledge by a husband that the wife is bound to a fixed sum will kindle or fan the flame of passion and encourage him to embark upon a career of immorality. I decline to entertain any such far-fetched hypothesis.

The illegality point is also sought to be based upon the theory that this agreement is one executed in contemplation of divorce, and therefore illegal. Speaking for myself, I am not prepared to accept this general proposition. I do not see why the mere contemplation of that which the statute law of this country permits should be illegal. If the agreement goes further, and can truly be said to encourage a course of conduct or action which is against public policy, then, no doubt, the agreement would be illegal. But there is no trace of that here. There is immediate provision for the wife for all time, in consideration of which she gives her covenant not at any time to ask for more. Her covenant covers the whole of the future and all contingencies; it therefore covers, in fact (though not in express terms), the contingency of a divorce and the time subsequent to a divorce. To that extent only can the agreement here be said to be an agreement executed in contemplation of divorce. Is it, therefore, illegal? In my opinion, it is no more illegal than the common form clause in a separation deed which provides that the deed shall come to an end in the event of a divorce; and no more illegal than a covenant in a separation deed (which continues in operation after a divorce) that the husband shall pay an annual sum to the wife during the rest of her life. In the former case the parties are in terms contemplating the possibility of a divorce. In the latter case the covenant covers (though not in express terms) the contingency of a divorce and the time subsequent thereto. In my opinion, there is nothing illegal in the contract which we have here to consider.

When all is said and done, this fact emerges: that every argument adduced before us in support of the President's judgment is an argument which, if well-founded, would have been fatal to the husband on the first appeal in *Gandy v. Gandy* (*supra*). We are really asked to say that that decision was wrong, and that *Morrall v. Morrall* (*supra*) was right. In the view which I take, the true legal position is the exact reverse. *Morrall v. Morrall* (*supra*) was wrongly decided; the present appeal should be allowed, and the order of the Registrar restored.

In the other appeal of *Hyman v. Hyman*, the same principles apply. The provision for the wife in that case consisted of substantial lump sums paid down, and a weekly sum of £20, free of tax, during her life; the covenant by the wife was that neither she nor any other person on her behalf should at any time thereafter endeavour to compel the husband to allow her any alimony or maintenance further than the said weekly sum and the lump sums. There is no substantial difference in the relevant facts of the two cases. In *Hyman v. Hyman* Mr. Justice Hill simply followed the decision in the other case, as being a decision binding upon him, and given upon facts which were not capable of being distinguished. In my opinion the appeal in *Hyman v. Hyman* should also be allowed.

[Solicitors—In *Hyman v. Hyman*, Messrs. John B. and F. Purchase and Clark; Messrs. Heywood and Ram; in *Hughes v. Hughes*, Messrs. J. Westcott and Sons; Messrs. Evelyn Jones and Co.]

K.B. Div. (Roche, J.) } 1928. June 25.

IN RE MACKAY.
IN RE ROWLAND AND ANOTHER.
IN RE BARRY AND ANOTHER.*

Insurance (Unemployment) — Domestic servants—Employment in hostel—Connexion of hostel with educational institution—Non-insurability—Unemployment Insurance Act, 1920 (10 and 11 Geo. V., c. 30), Sched. I., Part II. (*b*).

Domestic servants employed in a hostel which is so connected with an educational institution

* Reported by W. E. HURT, Esq., Barrister-at-Law.

as to be part and parcel of that institution are not insurable under the Unemployment Insurance Act, 1920.

These three cases were an appeal and two references under the Unemployment Insurance Act, 1920.

The agreed facts in the first case were, *inter alia*, that the appellant, Miss Evelyn Minot, was the owner and occupier of Westbury, 1, Nightingale-lane, Clapham Common. The Girls' Public Day School Trust, Limited, held the premises on lease for many years down to 1922, during which time they were used solely as a hostel for students of the Clapham High School for Girls. In 1913 Miss Minot, who was head of the domestic department of the school, was appointed head of the hostel. She resigned in 1921 her position as head of the domestic department of the school, but continued to hold her appointment as head of the hostel. In 1922, with the knowledge and approval of the trust, she purchased the premises and was now owner and occupier as well as head of the hostel. From 1913 until the present time she had never received any remuneration from the trust for acting as head of the hostel, but had been entitled to retain for her own use any profit made and was liable for any loss. The school authorities, on behalf of the trust, admitted students, including students to be trained for teaching in the training department of the school, and arranged for their residence at the hostel, which was subject to regulations made by the council of the trust.

On November 4, 1927, the Minister of Labour decided that Mary Mackay, employed by Miss Minot as cook at the hostel, was an employed person within the meaning of the Unemployment Insurance Acts, 1920-1926, and on November 16, 1927, the Ministry stated that, in view of that decision, insurance contributions were payable in respect of her.

Against that decision Miss Minot now appealed on the ground, *inter alia*, that the cook was not employed in a trade or business carried on for the purpose of gain, and that she was, therefore, excepted by Schedule I., Part II. (*b*), of the Unemployment Insurance Act, 1920, as the hostel was part of the Clapham High School for Girls.

The two other cases were references by the Minister of Labour.

Mr. G. Edwardes Jones, K.C., and Mr. Gurney G. Beagley appeared for the appellant; Mr. C. W. Lilley for the Crown.

Mr. JONES said that the three cases were somewhat similar, and he supported the contention that the domestic servants were all excepted from the operation of the Act. He cited *In re Application by David and others* and *In re Application by Bryant* (38 *The Times* L.R., 11 ; [1922] 1 K.B., 172, at p. 184), known as the *Rugby School* case; *In re North and Ingram* (38 *The Times* L.R., 11; [1922] 1 K.B., 188); *In re Wilkinson* (38 *The Times* L.R., 254 ; [1922] 1 K.B., 584) ; *In re Woollands, Limited* ([1921] W.N., 247 ; and *In re Selfridge and Co., Limited* ([1922] W.N., 241).

He contended that residence in a hostel or boarding house which was conducted for educational purposes was as important a part of education as what was done in the school with which it was connected, and that where a hostel was controlled by the governing body of the school it did not matter whether the head of the hostel was a member of the school staff or not. The students in Miss Minot's hostel were being trained as teachers, and it was important that they should mix together. The hostel was part of the educational institution, and it came within the *Rugby School* decision (*supra*).

Mr. LILLEY said that there was no dispute that the duties of the servants were purely domestic. The difference between the three present cases was that Miss Minot was licensed, while the others were not ; she was not on the staff of the school, the others were. In the school cases cited the contracts were made between the parents of the students and the governors or the principals of the school. Here the contracts were made separately, and the girls, who were about 24 years of age, probably made their own arrangements. The hostels in question were no part of the corporate life of the school, and received no remuneration from the school.

Counsel added that the exception of domestic servants had given the Ministry of Labour more trouble than anything else. In university towns there were a large number of authorized lodgings where rules had to be observed. No one could argue that they were not carried on for the purpose of gain, and they were all to some extent under the control and discipline of the college authorities.

The hostels in the present cases were all distinct from the school, except that the authorities of the latter exercised some supervision. The hostels were, however, separate undertakings, and were no part of the school. If it were not for their connexion with the school they would be boarding houses simply, and the servants would certainly be insurable. The question was whether the connexion of the hostels with the school was close enough to bring them within the school cases which had been decided.

His LORDSHIP, in giving judgment, said that the three cases involved questions of fact, not law, of considerable difficulty. The difficulty was where to draw the line in administering the very difficult part of the Unemployment Insurance Act, 1920, which dealt with domestic servants. The scope of that Act was to except from insurability persons who were engaged in domestic service unless such servants were employed in a trade or business carried on for the purpose of gain. The commercial nature of the trade or business was in contemplation. The words "carried on for the purpose of gain" were inserted to emphasize the fact that only those persons were taken out of the original exception who were employed in commerce.

The present cases were those of domestic servants employed in hostels or boarding houses which were connected with or licensed by the Girls' Public Day School Trust, which was a body carrying on the day or high schools for girls which were so well known throughout the country.

He had previously decided in the *Rugby School* case (38 *The Times* L.R., 11; [1922] 1 K.B., 172) and in the *North and Ingram* case (38 *The Times* L.R., 11; [1922] 1 K.B., 188) that domestic servants employed in the boarding houses connected with public and private schools were not persons who were employed in a business carried on for the purpose of gain. Educational institutions and boarding houses connected therewith were not undertakings within the definition which he had given of business carried on for the purpose of gain. Starting from that principle, which he reaffirmed, the question in the present cases was whether the connexion between the school and the boarding houses was close enough to bring them within the cases already decided. In his opinion the proper answer was in the affirmative. There was such a nexus, owing to the management and control imposed on those hostels by the educational authorities, as to make them part and

parcel of the educational institution with which they were connected and from which they derived their authority to take boarders. The domestic servants employed in those hostels or boarding houses were not, therefore, employed in a trade or business which was carried on for the purpose of gain, and were not insurable.

[Solicitors—Messrs. Burton, Yeates and Hart; the Solicitor to the Ministry of Labour.]

Judicial Committee of the Privy Council.
(Lord Hailsham, L.C., Viscount Haldane, Lord Atkin, Sir John Wallis, and Sir Lancelot Sanderson.)

1928. July 2.

KISHAN SINGH v. THE KING-EMPEROR.*

India—Allahabad—Indian Penal Code.

The appellant was tried for murder by intentionally causing the death of another native. He was convicted by the Additional Sessions Judge and four assessors of culpable homicide not amounting to murder, and was sentenced to a term of rigorous imprisonment. The Government applied for a revision of the judgment and the High Court altered the conviction to one of murder and sentenced the appellant to death.

Held, that on an application for revision, as distinguished from an appeal, the High Court had no jurisdiction to convert the finding of an acquittal of murder into one of conviction and to sentence the man to death.

This was an appeal from a judgment of the High Court at Allahabad which, on an application for revision by the Local Government, convicted the appellant of murder under section 302 of the Indian Penal Code and sentenced him to death.

Mr. W. Wallach appeared for the appellant; Mr. Dunne, K.C., and Mr. Kenworthy Brown for the Indian Government.

SIR LANCELOT SANDERSON delivered their Lordships' judgment as follows:—

By his Majesty's Order in Council dated March 22, 1928, special leave to appeal against a judgment of the High Court of Judicature at Allahabad, dated October 31, 1927, was granted to the appellant.

On June 18, 1927, the appellant, Kishan Singh, was charged by a Magistrate of the First Class as follows:—

"That you on or about March 20, 1927, at Bharthwa did commit murder by intentionally causing the death of Kuber Singh and Shoran Singh and thereby committed an offence punishable under section 302 of the Indian Penal Code, and within the cognizance of the Court of Session.

"And I hereby direct that you be tried by the said Court on the said charge."

He was tried on the said charge by the Additional Sessions Judge of Aligarh, with the aid of four assessors, and on July 31, 1927, the learned Judge delivered his judgment. He recited the finding of the assessors as follows:—

"All the assessors are unanimously of the opinion that the accused was guilty under section 304, I.P. Code, and in their opinion the story about the *rath* was a false one and the accused had shot down Kuber Singh as he had seen him cohabiting with his own wife. They were also of opinion that both Shoran Singh and Kuber Singh were shot by Kishan Singh with his gun and the *gandasa* story was a got-up one and the *gandasa* was never used by the accused in order to kill Shoran Singh. They were also of the opinion that in the struggle which ensued between Kishan Singh and Shoran Singh the gun went off and shot Shoran Singh."

The learned Judge concluded his judgment by saying:—

"Agreeing with all the assessors I find the accused guilty under section 304, I.P.C., for committing both the said murders. I sentence him to three years' rigorous imprisonment for the murder of Kuber Singh under section 304, I.P.C., and I sentence him to five years' rigorous imprisonment for the murder of Shoran Singh with his gun under section 304, I.P.C.; both the sentences to run concurrently."

Although the learned Judge in the above-mentioned part of his judgment spoke of the "murder of Kuber Singh" and "the murder of Shoran Singh," it is clear that the sentence was passed under section 304 of the Indian Penal Code. That section deals with culpable homicide not amounting to murder, and it must therefore be taken for the purposes of this appeal that the offence of which the appellant was found guilty by the learned Judge was culpable homicide not amounting to murder.

The charge, as already stated, was that the appellant had committed an offence punishable under section 302 of the Indian Penal Code, viz., murder.

It is, however, provided by section 238 (2) of the Code of Criminal Procedure that when a person is charged with an offence and facts are proved which reduce it to a minor offence he may be convicted of the minor offence, although he is not charged with it.

It was, therefore, legitimate for the learned Judge to convict the appellant of the offence punishable under section 304 of the Indian Penal Code, viz., culpable homicide not amounting to murder, although there was no charge in respect of that offence framed against the appellant.

The learned Judge did not record an express finding of acquittal in respect of the charge of murder, but their Lordships are of opinion that the conclusion at which the learned Judge arrived amounted to an acquittal in respect of that charge.

The only charge framed against the appellant was one of murder; he certainly was not convicted of murder. On the contrary, he was found guilty of culpable homicide not amounting to murder.

The appeal, therefore, must be decided upon the assumption that the appellant was acquitted of the charge of murder, and that he was convicted of the offence punishable under section 304 of the Indian Penal Code.

On September 23, 1927, the Government advocate, on behalf of the Local Government, filed an application for revision of the judgment of the learned Additional Sessions Judge of Aligarh.

The grounds of the application were as follows:—

1. That on the evidence the accused should have been convicted under section 302, I.P.C.

2. That the sentence passed on the accused is inadequate.

The application concluded as follows:—

"It is therefore prayed that the conviction be allowed and the sentence passed on the accused be enhanced."

* Reported by SIR W. J. SOULSBY, Barrister-at-Law.

The learned counsel who appeared for the appellant argued that the word "altered" should be read instead of the word "allowed," whereas the learned counsel for the respondent suggested that the word "revision" should be read instead of the word "conviction."

It is not necessary to consider this matter further, for their Lordships are of opinion that, having regard to the terms of the first ground, there is no doubt but that the main object of the application for revision was to obtain a conviction of the accused in respect of the offence punishable under section 302 of the Indian Penal Code, viz., murder.

The application for revision was decided by the High Court of Judicature at Allahabad on October 31, 1927.

The learned Judges, having considered the evidence, came to the conclusion that there had been a miscarriage of justice in the trial Court. They accepted the application and directed that the conviction of the appellant, Kishan Singh, should be altered to a conviction under section 302 of the Indian Penal Code, and they sentenced him to death.

The main argument on which the learned counsel for the appellant relied was that the appellant had been acquitted by the Trial Judge of the charge of murder, that the Local Government had not appealed from the acquittal of the appellant in respect of that charge, as they might have done under section 417 of the Code of Criminal Procedure, 1898, that inasmuch as the Local Government had not appealed against the said acquittal, the learned Judges of the High Court should not have entertained the application for revision at the instance of the Local Government, and that in any event, even if it was open to the High Court to entertain the application for the purpose of enhancing the sentence in respect of the offence punishable under section 304 of the Indian Penal Code, of which the appellant had been convicted, the learned Judges had no jurisdiction to convert the finding of acquittal on the charge of murder into one of conviction.

As already stated, their Lordships are of opinion that the appellant was acquitted by the learned Judge who tried the case in respect of the charge of murder.

They are further of opinion that the Local Government could have appealed to the High Court against that acquittal in pursuance of the provisions of section 417 of the Code of Criminal Procedure.

It is clear that the Local Government did not appeal against the acquittal.

The procedure adopted by the Local Government was to present an application for revision.

The sections of the Code of Criminal Procedure which are material to the application for revision are 435 (1) and 439 (1), (4) and (5).

Section 435 (1) relates to the power to call for records of inferior Courts and is as follows:—

"435. (1) The High Court or any Sessions Judge or District Magistrate or any Sub-divisional Magistrate empowered by the Local Government in this behalf may call for and examine the record of any proceeding, before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record."

Section 439 relates to the High Court's powers of revision and subsections (1), (4) and (5) are as follows:—

"439. (1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 423, 426, 427 and 428 or on a Court by section 338, and may enhance the sentence; and when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.

"(4) Nothing in this section applies to an entry made under section 273, or shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

"(5) Where, under this Code, an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed."

Their Lordships are of opinion that in view of the provision contained in section 439, subsection 4—that nothing in that section shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction—the learned Judges of the High Court, who were dealing only with the application for revision, had no jurisdiction to convert the learned Trial Judge's finding of acquittal on the charge of murder into one of conviction of murder.

Their Lordships' attention was drawn to a decision of the Madras High Court in *In re K. Bali Reddi and Others* (I.L.R., 37 Mad., 119), in which, amongst other matters, it was decided that section 439, subsection (4), must be construed as referring to cases where the trial has ended in a complete acquittal.

The reason of that decision was that any other construction would be inconsistent with the power to "alter the finding" given to the Court as a Court of Revision by virtue of its power to exercise the powers conferred on a Court of Appeal by section 423 (*b*).

It should be noted that the facts of the cited case are different from the facts of the present case, inasmuch as in the Madras case the accused had appealed to the High Court against their conviction under sections 147 and 304 of the Indian Penal Code, and the High Court, as a Court of Revision, had given them notice to show cause why they should not be convicted of murder and be sentenced for that offence.

It is not necessary on the present occasion for their Lordships to express any opinion whether the facts of the cited case would justify the decision at which the learned Judges arrived. Their Lordships, however, do think it necessary to say that if the learned Judges of the High Court of Madras intended to hold that the prohibition in section 439, subsection 4, refers only to a case where the trial has ended in a complete acquittal of the accused in respect of all charges or offences, and not to a case such as the present, where the accused has been acquitted of the charge of murder, but convicted of the minor offence of culpable homicide not amounting to murder, their Lordships are unable to agree with that part of their decision. The words of the subsection are clear and there can be no doubt as to their meaning. There is no justification for the qualification which the learned Judges in the cited case attached to the subsection.

The High Court of Allahabad, in the case of *The Emperor v. Sheodarshan Singh* (I.L.R. 44 All., 332) decided in 1922, and the High Court of Bombay in

the case of *The Emperor v. Shivputraya Durdundaya* (I.L.R. 48 Bomb., 510), decided in 1924, dealing with the provisions of section 439 (4), arrived at a conclusion contrary to that of the Madras High Court in the case hereinbefore cited.

The head-note of the Allahabad case is as follows:—

"An accused person was charged with both murder and culpable homicide not amounting to murder. He was acquitted on the former charge and convicted on the latter. On a perusal of the sessions statement, notice was sent to the accused to show cause why he should not be convicted of murder and punished accordingly.

"*Held*, on return of the notice, that the High Court had no power, except through the medium of an appeal on behalf of the Local Government, to convert the acquittal into a conviction."

The learned Judges in giving judgment said as follows:—

"We cannot, however, change the conviction into a conviction for murder. Sheodarshan Singh was acquitted by the Sessions Judge of the offence of murder and we cannot in revision convert a finding of acquittal into one of conviction. The only method by which it would be possible to obtain a conviction of murder would be by an appeal by the Government against the acquittal."

Their Lordships are of opinion that the above is a correct statement of the law; it is indeed no more than a repetition of the provisions of the material sections of the Code of Criminal Procedure.

It was contended further by the learned counsel for the respondent that it was open to the High Court to entertain the application for revision at all events so far as it was an application that the sentence passed upon the appellant in respect of the offence, of which he had been convicted, should be enhanced; and he asked their Lordships to remit the case to the High Court of Allahabad in order that the application that the sentence in respect of the offence under section 304, Indian Penal Code, should be enhanced, might be heard and disposed of.

Their Lordships do not express any opinion on the facts of this case, or upon the decisions arrived at by the two Courts in India in respect thereof, or upon the adequacy of the sentence passed upon the appellant by the learned Judge who tried the case.

In the circumstances of this case, however, their Lordships have come to the conclusion that it would not be right to remit it to the High Court for further consideration solely upon the question whether the sentence in respect of the offence, of which the appellant was convicted, should be enhanced.

Finally, it was urged by the learned counsel on behalf of the respondent that even though the learned Judges of the High Court had no jurisdiction on the application for revision to convert the order of acquittal on the charge of murder into one of conviction, there had been no injustice done to the appellant, for the Local Government could have appealed to the High Court against the acquittal, that the time for appealing had not expired, and that the High Court upon such appeal would have had before it the same materials as were before the Court on the application for revision, and the appellant could and would have been convicted of murder.

Their Lordships cannot accept that argument.

They are of opinion that the learned Judges of the High Court in converting the finding of acquittal of the appellant on the charge of murder into one of conviction, and in sentencing him to death on the application for revision, were acting without jurisdiction, and in such circumstances it is impossible to hold that no injustice was done.

Their Lordships are of opinion that this case comes within the exception to the rule stated in the judgment of Lord Watson in *In re Dillett* (3 *The Times* L.R., 492; 12 App. Cas., 459, at p. 467).

This appeal, therefore, should be allowed, the judgment and order of the High Court should be set aside, and the judgment and order of the learned Additional Sessions Judge should be restored, and their Lordships will humbly advise his Majesty accordingly.

[Solicitors.—Mr. H. S. L. Polak; the Solicitor to the India Office.]

Chan. Div. (Tomlin, J.) 1928. June 29.

IN RE VISSER—QUEEN OF HOLLAND v. DRUKKER AND OTHERS.*

Conflict of Laws—Foreign revenue law—Whether enforceable.

The Court has no jurisdiction to entertain an action for the enforcement of the revenue law of a foreign State.

This was a motion on behalf of the defendant, Mr. Israel Zeegen, to strike out the statement of claim and to dismiss this action, in which her Majesty the Queen of Holland sought to recover from the defendants, who were alleged to be the legal personal representatives in England of Mr. David Visser, deceased, sums alleged to be due to the plaintiff by virtue of the fiscal laws of Holland, which imposed dues on the estates of deceased persons of Dutch nationality and domicile.

It was claimed that the plaintiff was a creditor of the deceased man's estate. For the defendants, it was contended that the English Courts did not take notice of the revenue laws of foreign States, and that foreign States could not sue for the recovery of taxes falling due under foreign law.

Mr. A. M. Latter, K.C., and Mr. Henry Johnston appeared for the defendant, Mr. Israel Zeegen, the applicant on the motion; Mr. C. A. Bennett, K.C., and Mr. Frank Gahan for the plaintiff, the respondent on the motion; Mr. James Wylie for the defendant, Mr. Maritz Drukker; and Mr. Wilfrid Hunt for the defendant, Mr. Willem Roosegaard Bisschopp.

Mr. Latter said that there was no precedent in English Courts for an action of this kind. The claim was to collect, in this country, succession duty accruing under Dutch law. Such a claim was quite contrary to the elementary rule of law that one country did not enforce the revenue laws of another: *Municipal Council of Sydney v. Bull* [*or Cook*] (25 *The Times* L.R., 6; [1909] 1 K.B., 7); *Indian and General Investment Trust, Limited v. Borax Consolidated, Limited* (36 *The Times* L.R., 125; [1920] 1 K.B., 539); *Huntington v. Attrill* (8 *The Times* L.R., 341; [1893] A.C., 150). Rule 54 in the fourth edition of Dicey's "Conflict of Laws" stated, at page 224:—

"The Court has no jurisdiction to entertain an action (1) for the enforcement, either directly or indirectly, of a penal, revenue, or political law of a foreign State, or (2) where the grounds of the action involve an Act of State."

Mr. Bennett referred to the cases cited by Mr. Latter, for the applicant, and also to *Spiller v. Turner*

* Reported by K. R. A. Hart, Esq., Barrister-at-Law.

([1897] 1 Ch., 911); *Cotton v. The King* (30 *The Times* L.R., 71; [1914] A.C., 176); *Emperor of Austria v. Day* (3 de G. F. and J., 217); *Holman v. Johnson* (1 Cowper, 341); *Planché v. Fletcher* (1 Douglas, 251); *Henry v. Sargeant* (13 New Hampshire Reports, 321); *Alves v. Hodgson* (7 T.R., 241); *Clegg v. Levy* (3 Campbell, 166); and *The Eva* (37 *The Times* L.R., 920; [1921] P., 454). There was no direct authority for the proposition that the English Courts do not enforce the revenue laws of a foreign country.

Mr. LATTER replied. He was stopped by the Court.

MR. JUSTICE TOMLIN, in giving judgment, said that for the last 200 years, or, at any rate, since the time of Lord Hardwicke, Judges had repeatedly said that the Courts of this country would not take notice of the revenue laws of foreign States. In the rule that was now Rule 54 in the fourth edition of Professor Dicey's book, the word "revenue" had appeared for the first time in the third edition, which was brought out in 1922.

It had been argued for the respondent on the motion that what had been said by the Judges in the cases cited had been *obiter dicta*, and ought, in the present case, to be disregarded, because there had been no actual decision establishing the proposition. But the absence of authority for what had been called an elementary proposition might mean merely that the proposition was so well recognized that it had never been put to the test.

A number of cases had been cited, and it was very difficult to say of any one of them that it was a direct decision. But the case of *Municipal Council of Sydney v. Bull* [*or Cook*] (25 *The Times* L.R., 6; [1909] 1 K.B., 7) did support the view that the revenue law of a foreign country would not be enforced in England, although there were certain cases in which they were bound to recognize some of the consequences of that law.

Being bound by the ordinary rule, he felt bound to treat the case of *Municipal Council of Sydney v. Bull* [*or Cook*] (*supra*) as one which it was his duty to follow, and to leave it to a higher jurisdiction to say whether the rule should be maintained. His view was that there was a recognized rule under which English Courts would not collect taxes for foreign Sovereign States. The present application, therefore, succeeded, and the statement of claim would be struck out and the action dismissed. As the foreign Sovereign had submitted to the jurisdiction of the Court, the Court was in a position to order her to pay costs.

[Solicitors—Messrs. Waltons and Co.; Mr. Mathew J. Jarvis; Messrs. Speechly, Mumford, and Craig; Messrs. Linklaters and Paines.]

Court of Appeal.
(Lord Hanworth, M.R., Lawrence and Russell, L.JJ.)
1928. June 25.

M. WHEELER AND CO., LIMITED v. WARREN.*

Companies—Debentures—Powers of receiver—Getting in property—Action without company's consent.

A debenture of a limited company empowered the holder to appoint a receiver and manager and provided: "A receiver and manager so appointed shall be the agent of the company and shall have power (1) to take possession of and get in the property hereby charged . . ." A receiver and manager having been appointed brought an action in the name of the company for the rescission of an agreement by the defendant for the purchase of land from the company and forfeiture of the deposit, and alternatively for specific performance.

Held, that the debenture empowered the receiver and manager to bring the action without the company's consent.

This was an appeal from a decision of the Vice-Chancellor of the County Palatine Court of Lancaster, who had held that a receiver appointed by a debentureholder of the plaintiffs, M. Wheeler and Company, Limited, had no power to bring certain proceedings in the name of the company.

On August 26, 1927, a debenture was issued by the company to David Horwich charging its undertaking and all its assets by way of floating security for a sum of £75 then advanced and further advances. Clause 5 of the debenture gave the lender power to appoint a receiver and manager at any time after the principal moneys thereby secured had become payable. Clause 6 provided:—"A receiver and manager so appointed shall be the agent of the company and shall have power (1) to take possession of and get in the property hereby charged . . ."

The principal moneys having become due, the debentureholder appointed Mr. Joshua Ralph Atkins to be a receiver and manager of the property charged. On May 5, 1928, the receiver issued the writ in this action in the name of the company against the defendant, Mrs. Sarah Ann Warren, claiming rescission of an agreement dated September 23, 1927, entered into on behalf of the company with the defendant for the sale of land to her; and forfeiture of the deposit paid by her; and (in the alternative) specific performance of that agreement.

The defendant moved for an order that the company might be struck out as plaintiffs and all further proceedings stayed on the ground that the action had been begun without the company's authority. Against that it was contended that the receiver had power to bring the proceedings in the name of the company without its consent.

The Vice-Chancellor held that the receiver had not that power and made the order asked for.

The receiver appealed in the name of the company.

Mr. Grant, K.C., and Mr. John Bennett appeared for the appellant company; Mr. Gover, K.C., and Mr. J. M. Easton for the respondent.

THE MASTER OF THE ROLLS said that the appeal raised an extremely short point on the construction of the debenture in question. It was not expressly provided by clause 6 (1) of the debenture that the receiver was to have power to use the company's name in proceedings to get in property charged, but it was provided that the receiver was "To take possession of and get in the property hereby charged." It appeared to him (his Lordship) that as the getting in of the property was to be done by the receiver, and the property was vested in the company, he must have power to get in the property in the only way in which it was possible—namely, by bringing an action for the purpose in the name of the company. The fact that the receiver was made the agent of the company and given power to get in the property charged was sufficient to give him power to take the requisite steps in the name of the company. Other-

* Reported by H. C. GARSIA, Esq., Barrister-at-Law.

wise the receiver would have to go to the company for its assent to the action being brought and the effect of that would be to render clause 6 (1) valueless. The purpose of the debenture was to give ample security to the lender, and it appeared to him (his Lordship), therefore, that clause 6 (1) must be taken to have the wide meaning that would entitle the receiver to get in assets by action in the company's name.

An argument was advanced that an action for rescission was not an action for getting in property of the company. But there was an alternative claim for specific performance, and if an order for specific performance were made, that would have the effect of getting in the purchase money. The alternative claim for rescission was made as a means of getting all outstanding questions decided between the parties, and in that sense the proceedings were proceedings to get in property charged. The appeal would, therefore, be allowed.

LORD JUSTICE LAWRENCE and LORD JUSTICE RUSSELL gave judgment to the same effect.

[Solicitors—Messrs. Milner and Bickford, for Messrs. J. Arnold Haughton and Co., Manchester; Messrs. Farrer-Morgan and Co., Manchester.]

K.B. Div. (Acton and Finlay, JJ.) 1928. June 29.

HODGKINSON AND ANOTHER v. HEWITT.*

Landlord and Tenant—Restrictions—Rates paid by owner instead of occupier—Nine-tenths only of full rate payable—Claim to increase rent by full rate—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 2 (1) (*b*).

In 1927 the Sheffield City Council, by virtue of section 56 of the Sheffield Corporation Act, 1920, passed a resolution to the effect that from October 5, 1927, the owner and not the occupier of premises where the rateable value did not exceed £10 should be rated to the consolidated rate on a basis of nine-tenths of the full consolidated rate. There was thus a difference of 10 per cent. of the full consolidated rate between the full rate previously payable by the occupier and the rate now payable by the owner.

The landlords of certain premises, within the rateable value limit fixed by the resolution, claimed the right to increase their tenant's rent under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, by the full consolidated rate as previously paid by the tenant, and not by the amount, equal to nine-tenths of that rate, now payable by the landlords.

Held, that section 2 (1) (*b*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, was applicable to the facts of the case, and that there had been an "increase" in the amount for the time being payable by the landlords in respect of rates over the corresponding amount paid in respect of the period including August 3, 1914; but that the landlords could only increase the rent by the amount of nine-tenths of the full consolidated rate, and not by the amount of the full rate previously paid by the tenant.

This was an appeal by the plaintiffs from a decision of his Honour Judge Lias, sitting at Sheffield County Court. The plaintiffs, who were the owners of 9, Broom-close, Sheffield, claimed from the defendant, Mr. John Hewitt, the tenant of the premises, a sum of money by way of increase of rent which they said that they were entitled to charge under the Rent Restriction Acts. The amount of increase per week represented the difference between the rate levied on the premises for which the defendant had previously been liable, namely, 2s. 11d., and the rate of 2s. 7½d. which became payable by the plaintiffs in the following circumstances:—

By the Sheffield Corporation Act, 1920, the rates were consolidated and became a comprehensive borough rate. On May 4, 1927, by virtue of section 56 of the Sheffield Corporation Act, 1920, which provided that the owner instead of the occupier might be rated in certain cases to the consolidated rate, a resolution, which took effect on October 5, 1927, was passed by the Sheffield City Council placing the liability for the rate on the owners in certain cases limited by the rateable value of the premises. The result in the case of the present premises was that, instead of the occupier being rated at 2s. 11d. per week, the owners became the persons rated and liable as such to pay a rate calculated on the basis of nine-tenths of the amount in the pound of the full consolidated rate, which was 2s. 7½d. per week instead of 2s. 11d., the amount of the full consolidated rate previously levied on and payable by the occupier. The owners were allowed the 10 per cent. rebate in respect of the cost of collection, the risk of bad debts and other matters which had to be borne by the owners.

The plaintiffs then gave the defendant notice under the Rent Restriction Acts and the Sheffield Corporation Act, 1920, of an increase of rent. The question was whether the plaintiffs were entitled to add the whole 2s. 11d. rate, which the occupier had paid, to the rent, or only the 2s. 7½d. for which they, the plaintiffs, were now liable.

By section 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, if the increased rent exceeded the standard rent by more than the permitted amount, the amount of excess was irrecoverable; and the permitted amount under section 2 (1) was an amount not exceeding any increase in the amount for the time being payable by the landlord in respect of rates over the corresponding amount paid in respect of the period including August 3, 1914.

The county court Judge gave judgment for the defendant. The plaintiffs appealed.

Mr. Konstam, K.C., and Mr. F. M. Crawshaw appeared for the appellants; Mr. W. Hanbury Aggs and Mr. F. J. O. Coddington for the respondent.

MR. JUSTICE ACTON.—This appeal was concerned with the incidence of rates in Sheffield and the application thereto of the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The question in issue between the parties was whether in the circumstances the landlords of a dwelling to which that Act applied were entitled to demand from the tenant a weekly rental of 2s. 11d., as they contended, or a weekly rental of 2s. 7½d., as the tenant contended.

Before the outbreak of War in 1914 there were being levied and paid in Sheffield (*a*) a poor rate, and (*b*)

* Reported by CHARLES CLAYTON, Esq., Barrister-at-Law.

a general district rate. To the poor rate there had not been applied either of the systems of compounding such a rate which are dealt with by sections 3 and 4 of the Poor Rate Assessment and Collection Act, 1869. The poor rate was accordingly a rate which was leviable upon and payable by the occupiers, and there had not been an agreement by the owners of hereditaments to which section 3 of the Act of 1869 had application to pay the rate and be allowed a commission on the amount thereof, nor any order under section 4 of that Act that the owners of such hereditaments should be rated instead of the occupiers upon the terms of that section. As to the other rate in force, the general district rate (the legislation as to compounding which rate is to be found in section 211 (1) (*a*) of the Public Health Act, 1875), in 1914 the owner was rated at an amount equivalent to 75 per cent. of the full rate, and this rate was levied and paid on that basis. In practice the owner paid both the poor rate and the general district rate, the two rates together amounting to 2s. 1d. a week, though there was no information before us to show how this amount was divided between poor rate and general district rate; and the owner added this amount of 2s. 1d. a week to the rent payable by the tenant. This continued until 1920 when the Sheffield Corporation Act, 1920, was passed. Part VIII. of that Act deals with the "Consolidation of Rates, &c." Section 45 provides that "this Part of this Act shall come into operation as and from March 31, 1921." Sections 46-50 provide that from and after that date the rates are to be consolidated and are to become a comprehensive borough rate. It was contended by Mr. Konstam, and not controverted, that the result of this was that the enactments applying to such rate were sections 3 and 4 of the Poor Rate Assessment and Collection Act, 1869, and not sections 209-211 of the Public Health Act, 1875. In 1921, however, this consolidated rate was dealt with as a rate for which the occupier and not the owner was liable without any deduction or abatement, and the whole rate was levied upon the occupier. The owner, therefore, had no direct relation thenceforward with the rating authority in respect of this consolidated borough rate, but paid, as he had always paid, the water rate. This system remained in operation until 1927. What then took place was this: By section 56 of the Sheffield Corporation Act, 1920, it is provided that the owner instead of the occupier may be rated in certain cases to the consolidated rate. The full terms of this section are as follows: "(1) The owner, instead of the occupier, may from time to time, at the option of the Corporation, be rated to the consolidated rate, (A) Where the rateable value of the premises does not exceed seven pounds or such other amount not exceeding ten pounds as the Corporation from time to time may determine; or (B) where the premises are let in separate apartments; or (C) where the rents are collected weekly: Provided that where the rateable value of the premises does not exceed seven pounds or other the amount for the time being determined as aforesaid, the owner so rated shall be assessed to the consolidated rate in respect of such hereditaments on the full rateable value thereof but shall be liable to pay in respect of such premises a rate calculated on the basis of not less than four-fifths or more than nine-tenths (as the Corporation shall from time to time prescribe) of the amount in the pound of the full consolidated rate. (2) When the Corporation exercise their powers under this section they shall forthwith give notice thereof to the overseers and the overseers shall rate the owner and the owner shall pay the rate accordingly and during the currency of any such notice the provisions of this section shall apply within the city in substitution for the provisions with regard to the rating of owners instead of occupiers which are contained in sections 3, 4, and 5 of the Poor Rate Assessment and Collection Act, 1869." Under that section a resolution was passed and confirmed on May 4, 1927, by the Sheffield City Council, as follows, namely:—"Resolved: That this committee recommend the council, as the local rating authority, to exercise, in respect of future consolidated rates to be made by them, the option given to them by section 56 of the Sheffield Corporation Act, 1920, to rate to the consolidated rate the owner of premises instead of the occupier, where the rateable value of the premises does not exceed £10, and that such owner shall be liable to pay, in respect of such premises, a rate calculated on the basis of nine-tenths of the amount in the pound of the full consolidated rate."

This resolution took effect as from October 5, 1927, and the result was in relation to the premises in question in this case, which were admittedly premises to which the resolution applied, that instead of the occupier being rated at 2s. 11d. a week, the owners became the persons rated and liable as such to pay, in respect of the premises in question, a "rate calculated on the basis of nine-tenths of the amount in the pound of the full consolidated rate," or in other words, 2s. 7½d. a week, instead of 2s. 11d., the amount of the full consolidated rate previously levied upon and payable by the occupier. The question then was whether the owners, as landlords, were, under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, entitled to increase the rent payable by the occupier, as tenant, by the sum of 2s. 11d. or only by the sum of 2s. 7½d.

The contention of the appellant landlords, as formulated by Mr. Konstam, was that in these circumstances section 2 (1) (*b*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, had no application, and that the provision applicable was section 2 (3). As a corollary to this proposition, he contended further that the principle laid down in *Nicholson v. Jackson* (37 *The Times* L.R., 887) could not be applied in the present case. The substance of this argument was that what was effected by the resolution of the city council under section 56 of the Sheffield Corporation Act, 1920, could not be said to be an "increase" in the amount for the time being payable by the landlords over the corresponding amount paid by them in the specified period of 1914; that there was no amount "corresponding," within the meaning of the subsection, to the amount at which the landlords became rated in 1927; and that there was no possibility of a comparison between an earlier amount paid, and a later amount becoming payable, by the landlords, upon which it was right or reasonable to say that the latter amount was an "increase" over the earlier amount. It was said that what had taken place was not an increase in the amount payable by the landlords, but a transfer to the landlords of a burden or liability previously borne by the tenant; that that was a matter expressly dealt with by subsection (3) and not by subsection (1) (*b*); and that as the burden or liability which was transferred from the tenant to the landlords was the burden or liability of discharging 100 per cent. of the full consolidated rate, the landlords were entitled to increase the rent payable by an amount equivalent to 100 per cent. of the full consolidated rate, or in other words, the sum of 2s. 11d. instead of only 90 per cent. of that rate, or, in other words, 2s. 7½d. per week. It was said that, if that contention pre-

vailed, it could not be said to be the result of the transfer of such a burden or liability that the terms on which the dwelling-house was held were on the whole less favourable to the tenant than the previous terms, and that there was no reason why such an increase of rent as the landlords sought to impose in respect of such a transfer from tenant to landlords of this burden or liability should be deemed to be an "increase" of rent obnoxious to, or impermissible under, the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, or indeed an "increase" of rent at all. The argument then proceeded to the further proposition that, if these points were once established, there was no reason why the principle of *Nicholson v. Jackson* (*supra*) should be applied, and good reason why it should not. It was, however, admitted that if section 2 (1) (*b*) was applicable to the present case, this appeal could not succeed, and the principle of *Nicholson v. Jackson* (*supra*) would then apply.

The respondent's contention, in answer to these arguments, was this: By section 12 (1) (*d*) the expression "rates," for the purposes of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, includes "water rents and charges." The landlords of the premises in question have always paid the water rate, and, therefore, were always paying "rates." In 1914 what they received from the tenant was 7s. a week—4s. 11d. for rent and 2s. 1d. for rates. This sum of 2s. 1d. comprised water rate, poor rate, and general district rate. The landlords have throughout paid some "rates," namely, the water rate, and from 1914 to 1921 the poor rate and the general district rate, the latter under the compounding section 211, of the Public Health Act, 1875. From 1921 to 1927 it is true that they paid water rate only. But as the landlords were always paying some "rates" within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, any alteration in the rates payable by them must have been either an increase or a diminution of the rates payable by them. Attention was then drawn to section 1 and to section 12 (1) (*a*) and (*c*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. By section 12 (1) (*a*), "The expression 'standard rent' means the rent at which the dwelling-house was let on the third day of August nineteen hundred and fourteen, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said third day of August, the rent at which it was first let: Provided that, in the case of any dwelling-house let at a progressive rent payable under a tenancy agreement or lease, the maximum rent payable under such tenancy agreement or lease shall be the standard rent; and, where, at the date by reference to which the standard rent is calculated, the rent was less than the rateable value the rateable value at that date shall be the standard rent." By section 12 (1), (*c*) "The expression 'net rent' means, where the landlord at the time by reference to which the standard rent is calculated paid the rates chargeable on, or which but for the provisions of any Act would be chargeable on the occupier, the standard rent less the amount of such rates, and in any other case the standard rent." If regard be had to section 2 (1) (*b*) of this Act (ignoring permissible increases of rent in respect of matters other than increase of "rates" payable by the landlord), the rent to which the landlord is entitled is the "standard rent" with the addition of any subsequent increase permitted by section 2 (1) (*b*), the "standard rent" being the "net rent" with the addition of any rates which were paid by the landlord at the material date, which may be roughly described as the date of the outbreak of the War. The rates paid at this date by the landlords were 2s. 1d. per week. The rates now payable by the landlords are 2s. 7½d. per week, an increase of 6½d. per week; and that amount is a permitted increase, and the only permitted increase, of the rent which the landlords are entitled to claim against the tenant, upon the true construction of section 2 (1) (*b*) and on the principle decided in *Nicholson v. Jackson* (*supra*).

It was said that the fallacy of the argument for the appellants is that it introduces and persists in maintaining a confusion between the "standard rent" and the "net rent." It is true that in 1922 the landlords were getting 7s. 4d., which included no "rates" other than the water rate, the amount of which was then 4d. a week. But the landlords were always entitled to the "standard rent," which includes the rates which were being paid by the landlords at the date of the outbreak of the War. It was also said that, however this may be, and from whatever point of view the matter is to be regarded, what has happened is that there has been an "increase" in "the amount for the time being payable by the landlords in respect of rates over the corresponding amount paid in respect of the yearly, half-yearly or other period, which included the third day of August, 1914." It follows that section 2 (1) (*b*) applies in express terms to what has taken place in the present case, and it is unnecessary to look further. It also follows that the principle of *Nicholson v. Jackson* (*supra*) also applies.

I think that the respondent's contention is the correct one. I am of opinion that what has taken place is an "increase" of the rates payable by the landlords such as is contemplated by, and dealt with in, section 2 (1) (*b*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and that that is the subsection which is applicable to the facts of this case. It follows, of course, that the principle of *Nicholson v. Jackson* (*supra*) must also apply, and the result is that this appeal fails. I am, however, also of opinion that even if Mr. Konstam had succeeded in establishing that the subsection applicable was subsection (3), there would still have been no satisfactory or sufficient reason for holding that to the transfer of this burden or liability from the tenant to the landlords the principle of *Nicholson v. Jackson* (*supra*) ought not to be applied, as it must beyond question be applied to any "increase" of rates within section 2 (1) (*b*). It is highly undesirable to introduce this further complication into the interpretation of legislation already very complicated, unless indeed it cannot be avoided; and we think that the sounder view is that advanced by Mr. Coddington for the respondent, that even if Mr. Konstam were right in saying that the appropriate subsection is (3), the principle of *Nicholson v. Jackson* (*supra*) must still apply.

MR. JUSTICE FINLAY.—I agree. This is an appeal from a decision given by his Honour Judge Lias sitting in the Sheffield County Court in a case which, in form, was an action of ejectment, but, in substance, was a proceeding raising a point which is said to affect the position as between landlord and tenant in a very large proportion of the houses in the City of Sheffield. The amount at stake in the particular case is very small, but for the reason indicated the point has been treated, and no doubt rightly, as one of importance to those owning or occupying houses in

Sheffield. The facts are as follows : The defendant was the tenant, and the plaintiffs were the landlords, of a dwelling-house, No. 9, Broom-close, Sheffield. The defendant had been tenant of the house for many years. In August, 1914, the standard net rent of the house was 7s. per week, being 4s. 11d. in respect of rent, and 2s. 1d. in respect of rates. Of the 2s. 1d. rates 3¾d. represented water rate, which was throughout the whole period payable and paid by the landlords. The rates, apart from water rate, represented in proportions which we do not know precisely, and which are not material, poor rate and general district rate. This standard rent of 7s. had, by reason of various permitted increases, risen to 9s. in 1921.

In order to make intelligible the further facts it is necessary to state, quite shortly, the general position of the law with regard to rates, and to refer in particular to the Sheffield Corporation Act, 1920. With regard to poor rate, the important Act is the Poor Rate Assessment and Collection Act, 1869. Sections 3 and 4 of that Act contain provisions whereby the rates of certain hereditaments of a certain value may, either by agreement or by order of the vestry, be exigible from the owner instead of the occupier, and make provision for certain rebates to be allowed to the owner. These sections were never brought into operation in the City of Sheffield, and the result was that the poor rate was, up to and including 1914, levied on the occupier. With regard to the general district rate, that is dealt with by section 209 and the following sections of the Public Health Act, 1875. Section 211 of that Act relates to compounding. The position in Sheffield was that this rate was levied on the owner, and 75 per cent. only of the rate was, in accordance with the statutory provision, exacted from such owner. In practice the owner paid both the rates, recouping himself by a corresponding increase in the rent.

By the Sheffield Corporation Act of 1920 it is provided (see section 46 and the following sections) that the poor rate and the general district rate are to be consolidated into one rate called the consolidated rate. The result of this Act was to effect an alteration in the incidence of the rates in the City of Sheffield, and from 1921 onwards the whole rate was made on the occupier, and was levied without deduction. This transfer of the liability to rate from owner to occupier was the subject of an unreported decision of the Divisional Court in 1921 in *Highfield v. Griffin*, which will be referred to later in this judgment.

By a resolution of the city council of Sheffield of May 4, 1927, it was resolved to bring into operation section 56 of the Sheffield Corporation Act, 1920, and the house with which we are here concerned, being of the rateable value of £9 10s., was brought within the section. The effect of what was done was that from October, 1927, the rates, instead of being levied on the occupier, were levied on the owners, and, by reason of the corporation prescribing that amount, the owner was to pay, not the whole rate, but nine-tenths of the rate. The owner having thus become liable to pay a rate previously paid by the occupier, it is common ground between the parties that the Rent Restriction Acts permit the owner to recoup himself by an addition to the rent. There is no difficulty in seeing that a tenant must pay a larger sum by way of rent if his landlord pays the rates than he would pay if he pays the rates himself. The dispute in this matter is as to what is the proper amount to be added to the rent. The contention of the defendant is that inasmuch as 90 per cent. only of the rate is in fact exigible from the plaintiffs, 90 per cent. represents the sum which may be added to the rent. The contention of the plaintiffs is that inasmuch as the defendant has been relieved from paying 100 per cent. of the rates, and the liability to pay rates has been wholly shifted to the plaintiffs, they are entitled to add 100 per cent. of the rates to the rent. In terms of figures, the amount at stake is 3½d. per week. If 90 per cent. only of the rates can be added to the rent the addition to the rent will be 2s. 7½d. If 100 per cent. of the rates can be added the amount of the sum added will be 2s. 11d.

From a general point of view there is, of course, a very great deal to be said for the plaintiffs' contention. The defendant has got rid of his liability to pay the whole of the rates, and although the plaintiffs are liable to pay 90 per cent. only, it is no doubt true that the 10 per cent. abatement is allowed in respect of the cost of collection, the risk of bad debts, and other matters which have to be borne by the plaintiffs. The matter, however, cannot be decided upon any such broad considerations. It depends upon the exact terms of this difficult and involved Act, and upon the application of decided cases. There is a dispute between the parties as to which is the section of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which is applicable in this case. The defendant says that section 2 (1) (*b*) of the Act of 1920 is the relevant section. By that section there is a permitted increase in rent as follows :—" (*b*) An amount not exceeding any increase in the amount for the time being payable by the landlord in respect of rates over the corresponding amount paid in respect of the yearly, half-yearly or other period which included the third day of August, 1914, or in the case of a dwelling-house for which no rates were payable in respect of any period which included the said date, the period which included the date on which the rates first became payable thereafter." The plaintiffs, on the other hand, contend that on the facts of this case section 2 (1) (*b*) does not apply, and that the relevant provision is section 2 (3). That is in the following terms : " (3) Any transfer to a tenant of any burden or liability previously borne by the landlord shall, for the purposes of this Act, be treated as an alteration of rent, and where, as the result of such a transfer, the terms on which a dwelling-house is held are on the whole less favourable to the tenant than the previous terms, the rent shall be deemed to be increased, whether or not the sum periodically payable by way of rent is increased, and any increase of rent in respect of any transfer to a landlord of any burden or liability previously borne by the tenant where, as the result of such transfer, the terms on which any dwelling-house is held are on the whole not less favourable to the tenant than the previous terms, shall be deemed not to be an increase of rent for the purposes of this Act : Provided that, for the purposes of this section, the rent shall not be deemed to be increased where the liability for rates is transferred from the landlord to the tenant, if a corresponding reduction is made in the rent."

Upon the whole, I incline to the view that the very able argument of Mr. Coddington on this point is correct, and that section 2 (1) (*b*) is the relevant section. I was not impressed by the arithmetical criticism which Mr. Konstam made of that argument, for his criticism appeared to me to depend upon ignoring other permitted increases which would have altered the standard rent between 1914 and the date we have to consider. More difficulty is, to my mind, caused by the decision of a Divisional Court in the unreported case of *Highfield v. Griffin*. In that case it was decided that the transfer of liability to rates

from landlord to tenant which, as pointed out earlier in this judgment, took place in 1921, was a transfer of a burden or liability within the earlier part of subsection (3). In that case the point which was so forcibly put to us was not argued, and, further, it may be noted that the proviso at the end of the subsection is a proviso only on the earlier part relating to transfer from landlord to tenant, and not on the latter part relating to transfer from tenant to landlord. But I nevertheless feel considerable difficulty in holding that while a transfer of rates from landlord to tenant is a transfer of a burden within the subsection, a re-transfer of the liability back from tenant to landlord is not within the subsection. For this reason I prefer to discuss the case both on the view of the defendant that section 2 (1) (*b*) is the relevant section, and also on the view of the plaintiffs that section 2 (3) is the relevant section. In my opinion whichever be the relevant section the result is the same.

If the section to be considered is section 2 (1) (*b*) the question is what was the increase in the amount payable by the landlords in respect of rates over the corresponding amount paid in respect of the period including August 4, 1914. In my opinion we are bound by the decision of the House of Lords in *Nicholson v. Jackson* (37 *The Times* L.R., 887) to hold that the word "payable" in the subsection has reference to the amount in money which there is a liability to pay. The case was decided on the corresponding provision in the Act of 1915, but it was not suggested that any distinction could be drawn by reason of any change of language. Mr. Konstam pointed out to us that there was a remarkable difference of judicial opinion in *Nicholson v. Jackson* (*supra*), and no doubt the case was one which admits of much argument, but it does not appear to me to be profitable to consider the difficulty which arose in that case, for it was not, and it could not be, questioned that we are bound by the view which commended itself to the majority alike in the Court of Appeal and in the House of Lords. It follows that, applying this decision to the present case, the amount payable by the landlords, the present plaintiffs, was 90 per cent., and not 100 per cent. of the rates.

It now only remains to consider what is the effect if the view be taken that section 2 (3) is the section really applicable. It may be pointed out, though perhaps in a case under the Rent Restriction Act the argument may not be very weighty, that if the construction of section 2 (3) contended for by the plaintiffs is adopted the result would be curious and anomalous. On the view of the construction of the Act which I am now adopting there may be an increase of rates borne by the landlord due to such causes as increase in local expenditure, and there may also be an increase in rates borne by the landlord due to the transfer of the liability to some rate to him. It is certainly a startling result if, in the case of an increase due to causes other than the transfer, the actual amount payable only is to be allowed, while in the case of increase due to transfer the whole amount of the rate, whether payable or given as a rebate for expenses, is to be allowed. I am of opinion that the construction of subsection (3) does not lead to any such result. The words to be considered are "any transfer to a landlord of any burden or liability previously borne by the tenant." The liability previously borne by the tenant was a liability to pay the rates. The liability now borne by the landlord is a liability to pay the rates. In so far as the liability to pay rates is concerned, there is no difficulty in holding (assuming the subsection is really applicable at all) that the liability which rested on the tenant is now transferred to the landlord, but with regard to the 10 per cent. can it be said to be transferred at all? As a payment of money, and as a liability to pay money, it has really disappeared. An equivalent appears in the form of a responsibility for collection, and a risk of bad debts on the part of the landlord, and that is measured as being the equivalent of 10 per cent. of the rate, but it seems to me that these services thus rendered by the landlord cannot, in any proper sense, be said to have been transferred from the tenant. For this reason I am of opinion that on the construction of section 2 (3) the result is the same. It follows that the increase of rent exigible is 2s. 7½d. per week as the defendant contends, and not 2s. 11d. per week as the plaintiffs contend. This was the conclusion arrived at by the learned County Court Judge. In my opinion his conclusion was correct, and this appeal ought to be dismissed.

Leave to appeal was granted.

[Solicitors—Messrs. Wingfield, Halse and Trustam, for Mr. Ernest Wilson, Sheffield; Messrs. Gregory, Rowcliffe and Co., for Mr. Walter B. Siddons, Sheffield.]

K.B. Div. (Charles, J.) 1928. June 20.

FLATHER v. HOOD.*

Agricultural Holdings—Notice to quit—Statutory provision for 12 months' notice—Whether applicable to notice by tenant—Agricultural Holdings Act, 1923 (13 and 14 Geo. V., c. 9), s. 25 (1).

By s. 25 (1) of the Agricultural Holdings Act, 1923, "Notwithstanding any provision in a contract of tenancy to the contrary, a notice to quit a holding shall be invalid if it purports to terminate the tenancy before the expiration of 12 months from the end of the then current year of tenancy. . . ."

Held, that this provision applies to a notice to quit given by a tenant, as well as to a notice to quit given by a landlord.

This action was brought by Mr. Oswald Vivian Flather, a tomato grower, of 42, Clarendon-road, Lewisham, S.E., against Mr. Amos Hood, a nurseryman, of the Park Nurseries, Welling, Kent. The plaintiff claimed possession of part of the Park Nurseries, consisting of about an acre of land, three greenhouses, and a packing shed, of which, according to the plaintiff, the defendant was a tenant at will at a rent of £100 a year in virtue of an oral letting by the plaintiff to the defendant on or about December 23, 1927. Mr. Flather said that he gave immediate notice of determination of the tenancy to the defendant by letters dated February 6 and March 19, 1928. He further claimed £25 4s. 1d., rent at the rate of £100 a year from December 25, 1927, until March 26, 1928, and mesne profits thereafter until judgment. The defendant also gave the plaintiff three months' notice to determine the tenancy.

The first question was whether the defendant was tenant at will of the plaintiff; the second was whether the three months' notice given by the tenant (the

* Reported by W. E. Hurt, Esq., Barrister-at-Law.

defendant) was a valid notice in view of the provisions of section 25 of the Agricultural Holdings Act, 1923.

Section 25 (1) provides:—

"Notwithstanding any provision in a contract of tenancy to the contrary, a notice to quit a holding shall be invalid if it purports to terminate the tenancy before the expiration of 12 months from the end of the then current year of tenancy. . . ."

Mr. Picciotto appeared for the plaintiff; Mr. J. B. Melville, K.C., and Mr. S. Seuffert for the defendant.

His LORDSHIP held that the defendant was a tenant at a rental of £100 a year reserving his rights of compensation. On the second point, he decided that section 25 of the Act applied to both the landlord and the tenant, and that any notice of less than a year was invalid in view of the actual wording of the section. He said that he could not accept Mr. Picciotto's submission that the section applied only to a notice given by the landlord to the tenant. He gave judgment for the defendant with costs.

[Solicitors—Messrs. Dollman and Pritchard, for Mr. R. G. F. Vickery, Bexleyheath; Messrs. Pyke, Franklin, and Gould, for Mr. C. B. Searle, Dartford.]

Chan. Div. (Clauson, J.) 1928. July 3.

VERNER-JEFFREYS v. PINTO.*

Moneylenders — Agent or canvasser — Prohibition against acting as such—Illegality of transaction—Employment by moneylender—Whether necessary to be proved — Moneylenders Act, 1927 (17 and 18 Geo. V., c. 21), s. 5 (3) (6).

By s. 5 (3) of the Moneylenders Act, 1927, "No moneylender or any person on his behalf shall employ any agent or canvasser for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a moneylender, and no person shall act as such agent or canvasser, or demand or receive directly or indirectly any sum or other valuable consideration by way of commission or otherwise for introducing or undertaking to introduce to a moneylender any person desiring to borrow money."

By s. 5 (6), "Where it is shown that a moneylending transaction was brought about by a contravention of any of the provisions of this section, the transaction shall, notwithstanding that the moneylender was duly licensed under this Act, be illegal, unless the moneylender proves that the contravention occurred without his consent or connivance."

Held, that the above provisions apply not merely where the person said to be an agent or canvasser is employed as such by the moneylender, but are intended to prevent any transaction brought about by touting, provided that the moneylender consents to or connives at the touting; and to prove the illegality of the transaction it is not necessary to show that the moneylender gave any authority to the tout.

This was an action in which the plaintiff, Mrs. Dorothy May Verner-Jeffreys, claimed a declaration that the moneylending transaction between her and the defendant, Mr. Joseph Pinto, a moneylender, of 4A, King-street, Hammersmith, W., in a bill of sale dated January 10, 1928, signed by the plaintiff, was illegal, and that the bill of sale was void. She also claimed an injunction to restrain the defendant from enforcing the bill of sale until after the hearing of the action. Alternatively, she said that the interest charged was excessive and that the transaction was harsh and unconscionable, and she asked for a declaration as to what, in the circumstances, was a fair rate of interest.

The plaintiff was the widow of a naval commander who was killed in action in 1915, and had some means under a settlement, but in 1927 she was in need of money and wrote to Clive Everton, Limited, registered moneylenders, of 24, New Bond-street, London, for a loan. The manager of that company, Mr. Harwood, was sent down to Devonshire, where the plaintiff resided, and took an inventory of her furniture. On December 23, 1927, she signed a promissory note for £400 and received £210. She subsequently required a further loan, and was asked by Clive Everton, Limited, to come up to London and see them. She called on January 9, 1928, and Mr. Harwood told her that he had a friend who would advance the money—namely, the defendant, Mr. Joseph Pinto.

On January 10, 1928, she went with the solicitor recommended to her by Clive Everton, Limited, to see the defendant, and signed a bill of sale containing an inventory of her furniture and goods, and the defendant handed her £500 in notes. She was then taken back to the office of the company and paid off the promissory note for £400 in favour of Clive Everton, Limited. For that purpose the plaintiff handed Mr. Harwood £479 of the £500, and he handed her back £115 or £119, allowing £40 as a rebate. Twenty-one pounds was paid to the solicitor for his costs. Clive Everton, Limited, claimed that they allowed a rebate of £100 and not £40.

The plaintiff pleaded that the transaction with the defendant was a moneylending transaction and contrary to section 5 (3) of the Moneylenders Act, 1927, because, she said, Mr. Harwood, or the company, Clive Everton, Limited, acted as an agent or canvasser in the transaction either for the defendant or with his knowledge and consent.

Section 5 (3) of the Moneylenders Act, 1927, states:—

"No moneylender or any person on his behalf shall employ any agent or canvasser for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a moneylender, and no person shall act as such agent or canvasser, or demand or receive directly or indirectly any sum or other valuable consideration by way of commission or otherwise for introducing or undertaking to introduce to a moneylender any person desiring to borrow money."

The plaintiff said that at the interview which she had on January 9, 1928, with Clive Everton, Limited, Mr. Harwood got her to sign a letter requesting Mr. Harwood to obtain a loan of £500 for her. The letter was addressed to Clive Everton, Limited, and was as follows:—

"Will you kindly introduce me to some person or firm of moneylenders so that I may obtain an ad-

* Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.

vance to enable me to pay you off the money I owe you, as I understand you are not prepared to let the same stand over ? "

Mr. Frank G. Enness appeared for the plaintiff ; Mr. Edward Clayton, K.C., Mr. H. J. Wallington, and Mr. C. E. Rochford for the defendant.

The plaintiff was called in support of the contention that Clive Everton, Limited, acted as agents for the defendant. She stated that she came away from Clive Everton, Limited, on January 10, 1928, with £119, and not, as alleged, with £179.

Mr. Harwood gave evidence on behalf of the defendant, and said that £300 was taken in discharge of the plaintiff's debt to his company.

MR. JUSTICE CLAUSON.—Did you know that that was at the rate of 550 per cent. per annum on the £210 which your company had lent her for about a month? Is that the usual rate of interest to be charged to a woman who is fairly well off ?

Mr. Harwood.—It was the usual rate.

MR. JUSTICE CLAUSON.—Do you mean to say 550 per cent. is a usual rate?

Mr. Harwood.—Yes.

In answer to counsel, the witness said that his company received no commission from Mr. Pinto.

The witness went on to say that he never told the defendant that out of the loan by the defendant to the plaintiff his company were going to be paid off the amount due on the promissory note given to them by the plaintiff. He never acted as agent or canvasser for the defendant in the transaction of the £500 lent by the defendant.

Mr. Joseph Pinto then gave evidence, and said that he had heard absolutely nothing from Mr. Harwood about the plaintiff requiring a loan from him before a telephone message of January 9, 1928. He told Mr. Harwood that the interest would be 48 per cent., payable by monthly instalments of £40. Neither Mr. Harwood nor Clive Everton, Limited, acted as his agents or canvassers. He was quite unaware that the plaintiff was going to pay off the amount due to Clive Everton, Limited, out of the £500 which he lent her.

Counsel then addressed the Court.

MR. JUSTICE CLAUSON, in giving judgment, stated the facts, and said that two points had been taken—first, that the transaction was illegal under section 5 (6) of the Act of 1927 by reason of the fact that there had been a contravention of subsection 3 of that section. If the construction which he put on section 5 (3) was accurate, it would operate very seriously for moneylenders, but his decision, if wrong, could be taken to a higher authority. He was not prepared to hold on the evidence that the arrangements on January 9, 1928, had been plotted for and planned previously between the defendant and Mr. Harwood.

It had been contended by the defendant that subsection 3 was applicable only when the person who was said to be an agent or canvasser was employed as such by the moneylender, but he did not so read it. There was no dispute that the plaintiff was invited by Mr. Harwood to borrow money from the defendant, and it was clear that Mr. Harwood acted as canvasser for the purpose of inviting the plaintiff to borrow money from the defendant, who was a moneylender, and in so doing he was acting in contravention of subsection 3. On that construction of the subsection the whole transaction was illegal, and the plaintiff was entitled to a declaration that it was illegal and that the bill of sale was void. That construction might not be held to be correct, but he thought the Legislature appreciated the terrible result of touting and intended to interfere to prevent any transaction brought about by touting, provided that the moneylender consented to or connived at the touting. It was not necessary to show that he gave authority to the tout.

On the second point, as to the plea that the interest was excessive and the transaction harsh and unconscionable, the interest was 48 per cent. for the loan of the £500. He was directed by section 10 of the Moneylenders Act, 1927, that he was to presume that interest was excessive if the rate charged was over 48 per cent. If, therefore, without any security, interest of 48¼ per cent. would make a transaction harsh and unconscionable, he had no hesitation in saying that 48 per cent. interest charged on a loan for which there was quite a substantial security was grossly excessive, and he was entitled to hold that such a rate of interest made the present transaction harsh and unconscionable. The transaction could, therefore, be reopened, and if he was wrong on the first point he would allow the defendant interest at the rate of 15 per cent. In his opinion, however, the plaintiff was entitled to succeed on the first point.

[Solicitors—Messrs. W. H. Speed and Co. ; Messrs. H. M. Meyler and Co.]

Chan. Div. (Maugham, J.) 1928. July 3.

CHANEY v. MACLOW.*

Vendor and Purchaser—Contract for sale of land—Memorandum in writing—Auctioneer's signature—Law of Property Act, 1925 (15 Geo. V., c. 20), s. 40.

At an auction a freehold house was knocked down to the defendant as the highest bidder, but he afterwards refused to sign the contract because one of the conditions of sale required the purchaser to pay certain road-making charges. On the same day the auctioneer, as soon as he was informed of the defendant's refusal, signed the contract as the defendant's agent.

Held, that since in the circumstances the auctioneer's signature could fairly be said to be part of the transaction of sale there was a memorandum in writing sufficient to satisfy s. 40 of the Law of Property Act, 1925.

His LORDSHIP delivered a reserved judgment in this action in favour of the plaintiff, Mr. Chaney, who claimed, as the vendor, specific performance of a contract to purchase a freehold house at Southend-on-Sea. The case raised an important question as to the extent and duration of an auctioneer's authority to sign a memorandum of the contract as agent for the purchaser, who had refused to sign it.

On the plaintiff's instructions a freehold house, known as Tiverton, Durham-road, Southchurch, Southend, was put up for sale at the London Auction Mart on April 29, 1927, by Mr. J. E. Ewin, carrying on business as Brown and Ewin, of 218, East India Dock-road.

According to the evidence given on behalf of the plaintiff, the house, lot 3 at the auction, was knocked down to the defendant as the highest bidder at £650.

* Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.

The defendant admitted that he had bid for the house, but denied that he bid beyond £500 or £510, owing to his having read during the bidding a condition of sale requiring the purchaser to pay road charges amounting to £56.

The second defence was that there was no memorandum in writing to satisfy section 40 of the Law of Property Act, 1925, which replaced section 4 of the Statute of Frauds, on the ground that in the circumstances of the case the auctioneer had no authority to sign the memorandum.

Mr. Vaisey, K.C., and Mr. G. P. Slade appeared for the plaintiff; Mr. C. A. Bennett, K.C., and Mr. W. A. Jolly for the defendant.

MR. JUSTICE MAUGHAM, in the course of his judgment, said that there was a marked conflict of fact between the evidence of the half-a-dozen witnesses called for the plaintiff and that of the defendant himself. Mr. Ewin was an experienced auctioneer, and the defendant a well-known bidder at the Auction Mart. Mr. Ewin was told by his chief clerk, Mr. Herbert Doughty, that the defendant was the highest bidder at £650, and Mr. Ewin at once wrote his name down in the particulars. He (his Lordship) had no doubt that the story of the defendant that he had stopped bidding at £510 was quite untrue, and that he deliberately bid £650 for the property and had it knocked down to him.

The defendant, knowing that the property had been knocked down to him, did not state at the time that there had been a mistake and that he never made the final bid, and did not wait to see the auctioneer. In those circumstances Mr. Ewin left the Auction Mart and got back to his office about an hour later. He was then told that the defendant refused to sign the contract because of the road-making charges, and that he had not come to the office. Without further delay Mr. Ewin signed the memorandum—which had already been filled up by his clerk—as agent for the defendant on the footing that the defendant would probably come and pay his deposit in due course. It, therefore, contained a recital that the defendant had paid a deposit of £65, and stated that he agreed to pay the balance of the purchase money and complete the contract.

There remained only the defence that Mr. Ewin had no authority to sign the memorandum at his office between 4.30 and 5 p.m. on the day of the sale. It had long been settled that an auctioneer was the agent of both vendor and purchaser to sign the contract or a memorandum sufficient to satisfy the statute: *Emmerson v. Heelis* (2 Taunt., 38); *White v. Proctor* (4 Taunt., 209); *Sims v. Landray* ([1894] 2 Ch., 318). The authority, however, must be exercised at the time of the sale and could not be exercised a few days later (*Mews v. Carr*, 1 H. and N., 484); nor did it extend to the auctioneer's clerk (*Bell v. Balls* (13 *The Times* L.R., 274; [1897] 1 Ch., 663)). It could not be revoked by the vendor or the purchaser after the fall of the hammer: *Bell v. Balls* (*supra*). The principle could not be better stated than it was by Mr. Justice Stirling in *Bell v. Balls* (*supra*, at p. 671), where he said:—

"The authority which the purchaser confers upon the auctioneer is to write down the bidding—that is, to make a minute or record of it at the time and as part of the transaction, and such a record is held a memorandum sufficient to satisfy the statute. I do not see that the nature of the proceeding justifies the implication of an authority to make a memorandum, except at a time when the writing down can fairly be held to be a part of the sale. If the auctioneer were allowed to record the bidding at a later time evils might arise similar to those which the Statute of Frauds was intended to prevent."

Mr. Justice Stirling there came to the conclusion that a memorandum signed a week after the day of sale was signed after the auctioneer's authority had ceased.

Here the defendant had not repudiated his bid in the sale-room. If he had, Mr. Ewin could not safely have postponed signing the memorandum. He had simply raised a protest of no moment based on a special condition which he ought to have read before making his bid. Mr. Ewin was justified in the view which he took that such a protest would not be insisted on and that the defendant would probably come to his office, pay the deposit, and sign the contract on the day of the sale.

Accordingly, he (his Lordship) held that Mr. Ewin, on receiving the information that the defendant had not paid his deposit and was refusing to sign the contract, was entitled to sign the memorandum as his agent. His signature could fairly be held to be part of the transaction of sale. In the result there was a memorandum sufficient to satisfy section 40 of the Law of Property Act, 1925, duly signed by an agent for the defendant, and the plaintiff was entitled to the usual order for specific performance and the costs of the action.

[Solicitors—Messrs. George Reader and Co.; Messrs. Griffinhoofe and Brewster.]

K.B. Div. (Rowlatt, J.) } 1928. July 5.

ATTORNEY-GENERAL v. NATIONAL PROVINCIAL BANK LIMITED.*

Revenue — Income-tax — Profits or gains—Receipt on behalf of beneficiary by another person—Obligation on receiver to deliver statement—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), ss. 103, 107.

HIS LORDSHIP gave judgment for the Crown in this special case stated by consent pursuant to Order XXXIV., rule 1, and Order LXVIII., rule 2, of the Rules of the Supreme Court. The question raised was whether a bank, on being required by the Commissioners of Inland Revenue, under section 103 of the Income Tax Act, 1918, to deliver lists of the persons beneficially entitled to stocks registered in the name of the bank or its nominees, either as trustees, by way of security, or at the mere request of the owner, was bound to do so.

The proceedings were begun on June 1, 1928, by a writ of *subpœna* whereby the informant claimed penalties under section 107 of the Income Tax Act, 1918, for the neglect and refusal of the defendants to prepare and deliver lists in the prescribed form as required by section 103 of that Act, and the parties concurred in stating in a special case the questions of law which arose.

Section 103 (1) of the Income Tax Act, 1918, provides:—

"Every person who, in whatever capacity, is in receipt of any money or value, or of profits or gains arising from any of the sources mentioned in this Act, of or belonging to any other person who is chargeable in respect thereof, or who would be so chargeable if he were resident in the United Kingdom and not an incapacitated person, shall, whenever re-

* Reported by J. W. HALL, Esq., Barrister-at-Law.

quired to do so by any general or particular notice, prepare and deliver, within the period mentioned in such notice, a list in the prescribed form, signed by him, containing—(*a*) a true and correct statement of all such money, value, profits or gains; (*b*) the name and address of every person to whom the same shall belong; (*c*) a declaration whether every such person is of full age, or a married woman living with her husband, or a married woman whose husband is not accountable for the payment of any tax charged on her, or is resident in the United Kingdom or is an incapacitated person."

The following stocks—5 per cent. War Loan, 1929-47, inscribed or registered; 5 per cent. and 4 per cent. National War Bonds, registered; 4 per cent. War Loan, 1929-42, inscribed or registered—belonging to customers of, or others having business relations with, the defendants, or held in trust by them, were frequently registered or inscribed in the name of the defendants, or of one or other of certain subsidiary companies as their nominees, in the following circumstances:—

(*a*) When the defendants were acting as trustees or executors under the trusts created by some will or settlement, and the dividends when received by the defendants were duly paid to the beneficiaries. (*b*) When the stock was taken by the defendants as security for a loan or overdraft; in that case the dividends when received were placed to the credit of the customer from whom the security was taken. (*c*) When the stock was taken by the defendants as security not for the owner's personal account but for the account of some other person; in such case the dividends when received by the defendants were accounted for by the defendants to the owner of the stock in the manner agreed on, including the placing thereof to a realized security account to await liquidation of the principal debtor's estate. (*d*) When the stock was merely registered or inscribed at the request of the owner in the name of one of the aforesaid nominees; in that case the dividends were received by the defendants and placed to the credit of the customer's account or otherwise dealt with on his instructions.

The Commissioners of Inland Revenue, purporting to act under section 103 of the Income Tax Act, 1918, required the defendants by particular notices to prepare and deliver within the prescribed time lists in the prescribed form containing true and correct statements of the names and addresses of all persons on whose behalf they received interest on the aforesaid stocks registered or inscribed in the name of the defendants or the aforesaid nominees, under the above four heads (*a*) to (*d*) respectively, in all cases where the value of the 5 per cent. War Loan or Bonds was £500 or more and the value of the 4 per cent. War Loan or Bonds was £1,000 or more.

The defendants, contending that the Commissioners of Inland Revenue were not entitled to demand such lists under section 103, and that they were not bound to furnish the information required, refused to comply with the demands. The Attorney-General agreed to waive any penalty, and the questions for the Court were whether the defendants were bound to prepare and deliver any and which of the four lists demanded.

The Attorney-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills appeared for the informant; Mr. A. M. Latter, K.C., and Mr. Raymond W. Needham, K.C., for the defendants.

The Attorney-General said that he understood that the bank did not dispute liability to deliver a list under case (*a*). Case (*d*) would probably follow the result in (*a*), (*b*), and (*c*). On the face of it, the section appeared in very clear terms to require every person, whenever required to do so, to prepare and deliver a list.

Presumably, the reason of this friendly proceeding—the Attorney-General having agreed to waive penalties—was that the bank might have a clear direction which would protect them in dealing with their customers, and not because of any real difficulty in construing section 103. Nothing turned on the fact that in case (*d*) the registered owner was a nominee, instead of the bank. It was presumably intended to cover the case of a person going abroad for a lengthy period and not wishing to give a power of attorney.

Mr. Latter said that the last thing that the bank desired to do was to fail in its duty, or obstruct the revenue authorities in any way, but it desired to be protected by the decision of the Court before disclosing any of its clients' affairs.

Case (*a*) was drawn a little too widely. If the bank held "as executor" it was not clear to whom the stock would belong until debts were paid and it had assented to the legacies or ascertained the residue. Then it was holding as trustee. He admitted that the bank must then prepare and deliver the list. If it made the lists under cases (*b*) and (*c*) it would not get the exemption from assessment given to persons in a fiduciary capacity, for the relation was simply that of banker and customer—*i.e.*, of creditor and debtor. Case (*d*), he submitted, was more like (*b*) and (*c*) than (*a*).

With regard to the 4 per cent. "tax compounded" securities, there was no "other person chargeable," and the revenue authorities were not entitled to lists of that stock.

Mr. Justice Rowlatt, in giving judgment, said that he could not see the answer to the Crown's claim. As to trustees and executors, the case was quite clear, except that, as every one conceded, it did not apply to executors in the course of administration. The fourth case was, in principle, exactly the same.

In the second and third cases, the bank was a pledgee of the stock, which was registered in its name as security. The bank was the registered proprietor, but, subject to its right to use that registration for its protection, the stock still belonged to the pledgor. Mr. Latter had contended that the bank did not receive the interest within the meaning of section 103, because it was going to be carried to the credit of the pledgor, which would make the bank a debtor for it. But the Attorney-General's answer was correct—that that happened afterwards. The bank received the interest as mortgagee on behalf of the person who was entitled to it. It was exactly the case the statute aimed at. His judgment must be for the Crown in all the four cases.

[Solicitors—The Solicitor of Inland Revenue; Messrs. Waterhouse and Co.]

Chan. Div. (Clauson, J.) 1928. July 5.

VISCOUNT BURNHAM v. ATLANTIC AND PACIFIC FIBRE IMPORTING AND MANUFACTURING COMPANY, LIMITED.*

Limitations (Statute of)—Written acknowledgment of debt—Debentures of company—Statement in company's accounts—Whether

* Reported by G. P. Langworthy, Esq., Barrister-at-Law.

a sufficient acknowledgment—Civil Procedure Act, 1833 (3 and 4 Wm. IV., c. 42), ss. 3, 5.

A limited company at various dates between 1890 and 1902 issued debentures payable within two years but paid no part of the principal or interest. The company's published accounts habitually referred to the debenture debt as outstanding, and in 1925 the accounts, which were signed by two directors and the secretary, stated the amount of the arrears of interest.

Held, that the statement in the accounts was a written acknowledgment within s. 5 of the Civil Procedure Act, 1833, and therefore an action to recover the principal and interest was not barred by the 20 years limitation fixed by s. 3 of that Act.

His LORDSHIP gave judgment in favour of the plaintiff, Viscount Burnham, in this action, which he brought on behalf of himself and all other debenture-holders claiming an account of what was due by the company in respect of principal and interest.

It was admitted by the defendant company that no part of the principal or interest, which was payable at the rate of 10 per cent., had ever been paid on any of the debentures.

The Atlantic and Pacific Fibre Importing and Manufacturing Company, Limited, which was incorporated in 1883 to purchase certain freehold land and patent rights, issued at various times during 1890, 1891, 1892, 1893, 1894, 1896, 1900, and 1902 debentures to the amount of £23,925 8s. 6d., one of which, dated November 19, 1890, was issued to the plaintiff, then Mr. Harry Lawson Webster Lawson, to secure the principal sum of £1,110 11s. 8d.

The company pleaded that the moneys alleged to be owing on the debentures, both for principal and interest, had become barred by the Civil Procedure Act, 1833.

The plaintiff contended that an acknowledgment was contained in the yearly balance-sheets issued by the company that part of the liabilities of the company consisted of the amounts due on the debentures, and that that acknowledgment prevented the statute of limitations from running.

The debentures, being under seal, created a specialty contract debt which was barred after 20 years under section 3 of the Civil Procedure Act, 1833, but that statute also created a statutory acknowledgment by section 5, which, if in writing, would prevent the statute from running.

Each debenture issued became payable two years after the date of its issue. The company now had assets available for the payment of the principal and interest due on the debentures. The arrears of interest up to the year ending December 31, 1925, amounted to £78,340 12s. 4d. Most of the debenture-holders were also shareholders in the defendant company.

Mr. C. L. Fawell appeared for the plaintiff; and Mr. A. P. Vanneck for the defendant company.

MR. JUSTICE CLAUSON, in giving judgment, said that the question was whether certain debentures issued upwards of 20 years ago were barred by the Civil Procedure Act, 1833. The principal money secured on each debenture became due upwards of 20 years ago. Was the right to sue on the debentures barred by section 3 of the statute? The only point was whether there had been a sufficient acknowledgment in writing of the sum due on the debentures and of the interest within the meaning of section 5 of that Act so as to enable the debenture-holders to recover.

The company, over a long series of years, had habitually referred in their yearly published accounts to the debenture debt as outstanding, and of recent years to the arrears of interest. In 1925 the accounts, which showed the amount of arrears of interest to be £78,340 12s. 4d., were signed by two directors and the secretary, the obviously authorized agents of the company. Could it be said that that statement was an acknowledgment made in writing signed by the agents of the party liable for principal and interest being due on the specialty—namely, the debentures, the nominal amount of which was £23,925? It was clear that the statement was such an acknowledgment. It was not made to the debenture-holders, but that was not made necessary by the Act of 1833.

The result was that the defence to the action failed and there would be a declaration that the claim of the plaintiff and the other holders of debentures for principal and interest against the defendant company had not been barred by any statute of limitations.

[Solicitors—Messrs. Alfred Cox and Son.]

Court of Appeal. (Scrutton, Lawrence, and Greer, L.JJ.) 1928. July 5.

ST. ANNE'S WELL BREWERY COMPANY v. ROBERTS AND OTHERS.*

Negligence — Duty to adjoining owner—Ancient wall.

The defendants were the owners, but not the occupiers, of a part of the ancient city wall of Exeter, which also formed the back wall of an ancient inn owned by the plaintiffs. The portion of the wall belonging to the defendants collapsed, demolishing the plaintiffs' inn. In an action for damages the Judge held that, though the ancient wall was not a thing essentially dangerous within *Rylands v. Fletcher* (L.R., 3 H.L., 330), yet on the principle of *Todd v. Flight* (9 C.B., N.S., 377), the defendants, being owners, though not occupiers, were under a duty to prevent the wall from causing damage to adjoining property. He therefore gave judgment for the plaintiffs.

Held, (1) that the doctrine of *Rylands v. Fletcher* (*supra*) had never been applied to affect the liability of an owner who was out of possession at the time when the injury took place; though the defendants did not erect the wall, they took it over when they bought the property as the boundary and retaining wall for their property and they were only using that property in the ordinary ways in which property is used, so that they were outside the authority of that case; (2) that there was no reason to suppose that when they let the property to their tenant it was in a ruinous condition or that in the exercise of

* Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.

a reasonable diligence they should have ascertained that it was in a ruinous or dangerous condition. In these circumstances the plaintiffs failed to bring their case within the principles of the decision in *Todd v. Flight* (*supra*).

Decision of Acton, J. (44 *The Times* L.R., 479), reversed.

This was an appeal by the defendants from the decision of Mr. Justice Acton (44 *The Times* L.R., 479) in an action for damage caused to an ancient inn by the fall of a portion of the ancient city wall of Exeter.

The facts appear fully from the judgments.

Mr. Justice Acton held (1) that the ancient wall was not a thing essentially dangerous within *Rylands v. Fletcher* (L.R., 3 H.L., 330), but (2) that there was a duty on the defendants to keep it in such a state that their neighbours might not be injured by its fall; (3) that the plaintiffs had not been guilty of contributory negligence in failing to discover the dangerous state of the wall; (4) that the action was maintainable against the owners and not merely against the occupier of the wall.

The defendants appealed.

Mr. du Parcq, K.C., and Mr. J. L. Pratt appeared for the appellants; Mr. Holman Gregory, K.C., and Mr. G. D. Roberts for the respondents.

Lord Justice Scrutton.—This appeal raises some curious and interesting questions, and I have listened with great care to the arguments addressed to us, particularly, if he will allow me to say so, to the able and ingenious argument of Mr. Roberts. But I have come to the conclusion that the decision of Mr. Justice Acton cannot be supported. As one of the counsel has said, the first thing is to get the facts right; and the trouble in this case is that it is quite impossible to get some of the facts right, because nobody knows what the facts are. The matter complained of by the plaintiffs, who are the owners of an ancient inn situate in the ancient city of Exeter, is that a large portion of the city wall of Exeter fell into their premises and did a great deal of damage, and they therefore claimed compensation for that damage against two trustees and a tenant for life of the property which is said to comprise that portion of the ancient city wall. The city wall has surrounded the city of Exeter more or less continuously for centuries. It is a very substantial structure, at any rate in this part of the city. It is six feet thick, and it is some 30 to 40 feet high; and in this part of the city it appears to have been built on the side of a hill. Against it—I am not certain whether I am using a correct term, for a reason that I will state in a moment—there appears to have been built many years ago an ancient inn, known as the Custom House Inn, which has now been destroyed. On the top floors of that inn there was daylight between the wall and the structure of the inn. On the lower floor of the inn it is very difficult to know what the position was. It rather looks as if in portions the city wall was the back wall of the inn. It may be that in some places a thin brick wall had been built against the city wall. But inasmuch as when the inn and the wall were standing you could not see what the relations of the inn to the wall were, without boring holes in the inn to find out where the wall was, and, now that the wall has fallen, the wall and inn are buried under one huge mass of masonry, it is difficult to be sure whether the city wall was the back wall of the inn or whether there was a wall of the inn next to the city wall. And nobody knows where the brickwork of the wall began in relation to the floor of the inn. Whether it began on the level of the ground floor, whether it went down lower than the ground floor, whether it began higher up the hill than the ground floor, will, I imagine, never be known as to that particular portion of the wall. About 30 feet in length of the wall fell. Apparently the evidence is that it began dropping down, that it sagged, and then fell out. Why did it fall? There was very considerable controversy at the trial as to whether the wall was a wall with buttresses, or whether there had been on the part of those who built the inn or inhabited the inn, at some time or other, excavation into the wall; for on each side of the fireplace in the kitchen on the ground floor there were two cupboard recesses going back some 6 or 7 feet, and the case made for the defendants was that whoever built them had dug into the wall and made two large recesses in the wall. On behalf of the plaintiffs it was said: "No, you are wrong in that: the fireplace is on a buttress, the sides of the cupboards furthest from the fireplace on each side are also buttresses, and that explains the two cupboards." At the trial the learned Judge, having heard the evidence and looked at the plans, some imaginative and some taken from measurement, came to the conclusion that the cupboards or recesses were excavated out of the wall. Speaking for myself, having looked at the evidence, and in particular having looked at the plan prepared in February from actual measurement, I have come to the conclusion that at some time or other excavations were made into the wall to make recesses, which went some considerable way into the wall. Under those circumstances, the defendants say: "You have only yourselves to thank for it. You have been weakening our wall by digging into it, and when it ultimately tumbles down because you weakened it by digging into it, you must not come to us and complain that it has tumbled down. You must thank yourselves for this tumbling down; you should not have dug into it." The learned Judge takes the view, as I understand him—and I see no reason to differ from his conclusion—that the fall of the wall was due partly to its being weakened by these recesses, partly to the continual percolation of the ordinary fall of the rain through the soil down the wall to the bottom of the wall, possibly washing away foundations or soil from around the foundation of the wall. And he takes the view that the fall of the wall, which has stood for centuries, is due to those two things: that the plaintiffs themselves have weakened the wall by digging round it, and that the natural operation of water falling from the skies on a wall which has stood as it has for centuries without any particular means of drainage has ultimately caused this fall. And one other fact has to be appreciated—namely, that nobody could see what was going on at the base of this wall; on the side furthest from the inn you could not find out without digging down for 20 or 30 feet into the soil. On the other side, in order to find out what was happening you would have had to break through the line of brick which was in the cupboards, possibly to bore the wall to find out how thick it was, possibly to dig in order to find out exactly where its foundations were. And therefore, if there was anything wrong, it was about as latent a defect as you could expect any defect to be. Now that I take to be the sort of facts we have to investigate, and on those facts the plaintiffs say to the defendants: "Never mind for

the moment what your legal relations are with anybody to whom you have let the land. You are owners of land. On it you have erected an artificial structure. You have not kept that artificial structure on your own land. You have not stopped it from falling on to our land ; and we say, therefore, under the well-known doctrine of *Rylands v. Fletcher* (L.R., 3 H.L., 330), that having put bricks on your land you have not kept them on your own land, and you are absolutely liable whether you were negligent or not." Now it strikes me that there are two reasons why *Rylands v. Fletcher* (*supra*) does not apply, and the learned Judge has found that it does not apply in this case. In the first place, as I understand the doctrine of *Rylands v. Fletcher* (*supra*) it relates to occupiers. I do not know, and neither counsel for the respondents could refer me to any case where the doctrine of *Rylands v. Fletcher* (*supra*) has been applied to an owner not in occupation. If there are such cases, though each counsel has been invited to supply me with them, none has been supplied to me. The doctrine of *Rylands v. Fletcher* (*supra*), as I understand it—I take it from a well-known text-book (Law of Torts, by Salmond, 6th ed., at page 257), which appears to me to be accurate—is this : "The occupier of land who brings or keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape, and is liable for all the natural and probable consequences of its escape, even if he has been guilty of no negligence." While stated in that way, it is an absolute liability ; there are so many exceptions to it that it is doubtful whether there is much of the rule left. And I do not propose in this judgment—I do not think it is necessary—to try and state what there is left of the rule when you have taken out all the exceptions. The first point that I have mentioned will, of course, be relevant when we come to see what the exact position of the defendants is : whether they are owners or occupiers. But there is another matter which seems to me of great importance. It has been frequently said that the doctrine of *Rylands v. Fletcher* (*supra*) does not apply to what may be called the normal use of land. I will not put it in my own words. I will put it in the words of Lord Cairns, L.C., in *Rylands v. Fletcher* (*supra*), who says at page 338 : "My Lords, the principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used ; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place." Now that passage about the normal use of land is not only Lord Cairns's ; because in a later case of *Wilson v. Waddell* (2 App. Cas., 95), where Lord Blackburn gave the judgment of the Court, the facts were that the land in its ordinary condition drained in a particular way, and the water went in a particular way. There the occupier of a coalfield excavated all the coal from the land, with the result that the water went in quite a different way on to the land of a different adjoining owner. And the different adjoining owner said : "Your land in its natural state sends its water to A. You have done to the land something which sends the water to me, B. You are liable under the doctrine of *Rylands v. Fletcher* (*supra*)." Lord Blackburn says this : "The general rule of law in both countries"—that is, England and Scotland—"is that the owner of one piece of land has a right to use it in the natural course of user, unless in so doing he interferes with some right created either by law or contract ; and as a branch of that law, the owner of the minerals has a right to take away the whole of the minerals in his land, for such is the natural course of user of minerals" ; and then he cites the passage from Lord Cairns to the effect that, if when that is done or if by using the land in the normal way the water in the ordinary course is diverted somewhere else, there is no cause of action by third parties for damage by the receipt of the water, because the owner, the occupier of the land, is only using it in the normal way.

Now, that argument, which has been put forward in this case, is met by counsel for the respondents by saying : "Oh, it is not a normal use of land to have a retaining wall." I am afraid I have not been able to appreciate that. One of the most normal uses of land, it appears to me, is to put buildings on it ; and if you put a building on the land and it falls, either because your adjoining owner has done something to the building to weaken it, or because the natural operations of Nature by the fall of rain weaken its foundations without your knowing it, and you cannot be down at the foundations all the time to see how they are getting on—there is no cause of action in your adjoining owner, who has, first of all, weakened your wall and then complained of its falling. For these reasons, without going into the whole doctrine of *Rylands v. Fletcher* (*supra*), I think the attempt to say that this is a case of that class fails. Similar views were expressed by Mr. Justice Branson in the case that has been cited of *Ilford Urban District Council v. Beal and Another* (41 *The Times* L.R., 317 ; [1925] 1 K.B., 671), where he held that the erection of a retaining wall on land was a normal use of land, and that its having been built in such a way that damage was afterwards done to underground property, which was not known to exist, did not constitute a case like *Rylands v. Fletcher* (*supra*). I agree, and I think this case is on the same lines as the *Ilford* case (*supra*).

Then the next line of attack was this : it is said, "Anyhow, this wall falling was a nuisance." I think it was correct to say that it was a nuisance, and not a trespass ; because neither the owners nor the occupier threw this wall into the plaintiffs' property ; it fell into the plaintiffs' property from indirect causes, not by direct action of the owners or occupier of the defendants' land ; and therefore I think it is correct to treat it as nuisance and not as trespass. And it is said : "There being a nuisance, we say that you, the trustees and tenant for life, legal and equitable owners of this land—are liable, because there has been a nuisance on your land which has done us damage." No doubt the first question to decide—which also has a relevance with regard to the point about *Rylands v. Fletcher* (*supra*)—is : Who was the occupier of the wall ? In fact, in 1918 the then trustees of the will of a Mr. Wreford, who had made his will in 1893 and died in 1899, let the house and the garden at the top of the wall to one Wilson as a weekly tenant at 4s. 3d. a week. And it is said by the defendants : "When we let him the garden, of course we let him the garden wall ; we did not let him the wall without the garden : and it is impossible to conceive us as remaining in occupation of the wall while he is in

occupation of the garden." On the other side, it is said, as I understand, when you let a house and a small garden like this at 4s. 3d. a week, you never think of letting the wall. You never suppose that the weekly tenant is tenant of the wall. It seems a small matter to deal with ; it seems to me that when you let a house and garden you ordinarily let the boundaries of the garden ; though I have no doubt that Wilson during his tenancy would have been rather astonished to hear that he was the tenant of the wall. I should imagine that in law he was the tenant of the wall, and it was included in the premises for which he was paying 4s. 3d. a week. If that is so, then Wilson was the occupier of the premises on which there was a nuisance. I think also it is clear law that the person liable for a nuisance on premises is surely the occupier. And I think also it has been established by authority binding on this Court—I refer to *Barker v. Herbert* (27 *The Times* L.R., 488 ; [1911] 2 K.B., 633), which has been followed in other cases in this Court—that the occupier himself is not liable if he did not create the nuisance on the land which he occupies unless, knowing of the nuisance or being in such a position that he ought with reasonable care to have known of the nuisance, he allows it to continue, and perhaps he is not liable even then. I refer to the passages in Lord Justice Fletcher Moulton's judgment in *Barker v. Herbert* (*supra*) on pages 642 and 643, and to the passage in Lord Justice Farwell's judgment at page 645 ; and therefore if Wilson had been sued for nuisance, being the occupier of this wall, which was the nuisance, I think the question to be determined in his case would have been: Did you know that there was a nuisance ? Ought you with the exercise of reasonable care to have known there was a nuisance ? And if both these questions were answered in the negative, there would have been no liability on the occupier. But there might in certain cases, it is said, have been, even in that case, a liability on the owner. And that is the ground, as I understand, on which Mr. Justice Acton has given judgment against the trustees and tenant for life. He has referred to, and as I understand followed, the case of *Todd v. Flight* (9 C.B., N.S., 377), and he has treated it as deciding what I think it does not decide, though I think in doing so he has the authority at least of Mr. Justice Lopes in the case of *Nelson v. Liverpool Brewery Company* (2 C.P.D., 311), which has been cited to us. *Todd v. Flight* (*supra*) was decided on demurrer ; that is to say, if the statements in the declaration were true, did they give a right of action against the defendant ? And cases decided on demurrer in that way are not authorities for what would be the case if there were other statements in the declaration. They are authorities on the question: the statements in the declaration being taken as true, do they give a cause of action ? Now, the statements in the declaration were these : That the defendants owned a building and stack of chimneys, which stack of chimneys were in a dilapidated, decayed, ruinous, insecure, and improper state, and in danger of falling, and the defendant, well knowing the premises—that is, well knowing that the chimneys were in a dilapidated, &c., state—let his building to an occupier, and the Court held that the allegation that the defendant let the house when the chimneys were known by him to be ruinous and in danger of falling, and kept and maintained them in that state, did give a cause of action against the defendant. It seems to me clear that, when that case is looked at, it is no authority for the proposition that if, though the chimneys were in a defective condition, the defendant did not know it and could not by reasonable care have known it, he would then be liable, though not the occupier, to the person subsequently damaged by the fall of the chimneys. And when Mr. Justice Lopes in *Nelson's* case (*supra*), to which Mr. Roberts very properly referred us, says that an action will lie against the landlord in case of a misfeasance by the landlord, as, for instance, where he lets premises in a ruinous condition, unless the learned Judge meant, as he probably did, that he must have known of the ruinous condition, that passage misrepresents, I think, what was decided in *Todd v. Flight* (*supra*). And it appears to me that you are not able successfully to attack an owner no longer in occupation, because he has let to an occupier premises on which there is ultimately found to be a nuisance, unless you can show that at the time when he let them there was then a nuisance on the premises and that he knew it. Now, in this case, without repeating the statements of fact as to the condition of this wall, it appears to me to be impossible to say that any of the defendants knew, either at the time when they let the premises or at any time afterwards till about a week before the wall fell, that there was anything wrong with the foundations of the wall. The wall had stood for centuries ; and when the city architect saw it about a month before it fell, he said: " The wall is all right ; it will stand for some time "—according to the evidence. And further, there is no evidence that I can see that any of the defendants knew that these excavations had been made in the wall by some person connected with the ownership of the inn. There is no evidence that any of them had ever been in the inn. They would have no right that I know of to enter the inn ; and I do not think it is to be taken as neglect that they have not either dug down the wall to find out what the conditions of the foundations were inside and away from the inn, or insisted on entering the inn to see if they could find out anything by looking at the wall of the kitchen in the inn. Under these circumstances it appears to me that the cardinal thing which would have to be proved to establish any liability against anybody would be knowledge of the defect which ultimately resulted in the fall, or failure to acquire that knowledge because he had failed to use reasonable care to ascertain what he should have ascertained, and the plaintiffs have failed to prove either of these things. Therefore it appears to me you can make no claim against the defendants for nuisance ; and for these reasons, rejecting the claim both on the ground of *Rylands v. Fletcher* (*supra*) and on the ground of nuisance, it appears to me that the learned Judge came to a wrong conclusion ; the judgment must be set aside and entered for the defendants with costs.

Lord Justice Lawrence.—I agree. The first question on this appeal is whether at the crucial time this property was being used by the defendants in an abnormal or unnatural manner so as to attract the principle of *Rylands v. Fletcher* (L.R., 3 H.L., 330), and so as to render any question of their negligence immaterial. Now, Mr. Justice Acton has not definitely decided that question. But, reading his judgment, I think one can say that he inclined to the opinion that the principle of *Rylands v. Fletcher* (*supra*) did not apply. I agree with Lord Justice Scrutton that the keeping of this wall by the defendants on their property was not an abnormal or unnatural use of their property in the situation in

which that property was found. The wall was no doubt originally built for two purposes, for defence and as a retaining wall. It has long since lost its use for defence, but has still for many centuries existed as a retaining wall supporting the property and the houses which have been built behind it. And I fail to see how the defendants can be charged with having brought upon their property something which is of a dangerous or unusual character. The wall has itself existed for a very long time, has apparently admirably fulfilled its purpose as a retaining wall, and was so fulfilling it down to the time when it collapsed. It seems to me that this case is not one to which the principle of *Rylands v. Fletcher* (*supra*) applies.

The second question is whether the defendants have been guilty of any breach of their duty towards their neighbour. That question depends, first of all, to my mind, on whether they were in occupation of this wall when it collapsed. The duty to the neighbour is one which, I think, must fall upon the person in occupation. And in the present case the garden behind the wall was let to Mr. Wilson, a weekly tenant ; and it is suggested that the letting was such that the wall itself was not comprised in it. I think it would require the strongest possible evidence where there was a garden or piece of ground situate as this was, bounded on the south by a wall with nothing but space and air behind that wall for a depth of 40ft., to show that that wall itself, which maintained the garden and the ground and protected it, was not comprised in the letting. It is quite true that the tenant may not have thought that he had acquired a tenancy of the wall right down to the bottom of the ground, but I think that if the matter had been tested in a Court of law that would be the only result of letting the ground as it stood. It is not the question here whether a wall separating two adjoining tenements on the same level passes with one or the other. The question is as to a wall which is essential to the enjoyment of the property which was comprised in the tenancy. And I think it would require very strong evidence to show that the landlords letting the property, as they did, had reserved to themselves the wall which was an essential part of it. I have come to the conclusion myself that the occupier was Wilson, and that as such occupier he would be liable as between himself and the landlords. Mr. Roberts, indeed, argued that the question would depend upon whether the duty of repairing the wall was cast on the tenant or on the landlords. I fail to see that. Any bargain made by the person responsible to his neighbour or to the public that another person should perform that obligation may give rise to rights as between those two contracting parties, but does not, in my judgment, in any way affect the rights of a third party, who is no party or privy to any such contract. The cases to which Mr. Roberts has referred are cases which deal with a liability as between landlord and tenant. The case of *Nelson v. Liverpool Brewery Company* (2 C.P.D., 311) does contain a *dictum*, by Mr. Justice Lopes, which carries the case further to this extent : it says that, although the *prima facie* liability is on the owner and occupier, yet the landlord may also be liable if there is a covenant to repair. Speaking with great respect for the learned Judge, I do not quite follow that reasoning. But in the present case that *dictum* would not apply, because here it is not suggested that there was a covenant by the landlords to repair. In fact, it is one of those ordinary tenancies in which, as between the parties, neither the landlord nor the tenant has undertaken the obligation to repair ; and therefore the tenant, as between himself and the landlord, is not obliged to repair, nor is the landlord, as between himself and the tenant, obliged to execute repairs. In those circumstances the *prima facie* liability of the occupier remains as against third parties.

But it would be unsatisfactory to leave the matter there. The case has been argued and fought and decided upon the question whether the defendants themselves have been guilty of negligence and of failing to abate a nuisance upon their property for a reasonable time after it had come, or ought to have come, to their knowledge. That, of course, raises a question of fact ; and, to my mind, I think that the facts on that point are hardly in dispute. I will not repeat them. Lord Justice Scrutton has fully stated them. It seems to me that in this case it would be, I was going to say, monstrous, but certainly it would be a strong thing to hold that these defendants ought to have known that these cupboards or holes had been made either in the wall or underneath the wall, which, obviously from the evidence, have led to the collapse of the wall. It is true that there are other factors which have led to it, but it is nowhere suggested that, apart from the weakness of the wall there, those factors would alone have brought down the wall. It would be wrong, to my mind, to attribute to the defendants any negligence where the wall was in excellent condition so far as they could tell, but had been undermined by the action of the plaintiffs or their predecessors in title unknown to the defendants, and without the slightest hint of anything of that kind having been done. In the circumstances, I think that no negligence ought to be attributed to the defendants, even if they are liable at all, and I think they are not. For those reasons I agree that the appeal succeeds.

Lord Justice Greer.—I agree. This appeal and the action in respect of which the appeal is brought raised certain mixed questions of law and fact which were tried before Mr. Justice Acton at Exeter Assizes and on further consideration in London. We are not differing from the learned Judge in any estimate of the respective value to be attached to the evidence of the witnesses on the one side or the other ; and so far as we are differing from him we are differing from him with regard to the conclusions of fact and with regard to the application of principles of law to the facts which he found.

The claim was a claim which rested upon what is regarded in law as a nuisance. And the first point in my judgment to be determined is whether the defendants when the action was brought were in fact in occupation of the property which caused the damage. Nine years before the damage was caused the defendants' predecessors in title, one of whom is one of the present defendants, had let to a Mr. Wilson a cottage and a garden in the position which has been referred to in my Lord's judgment, and which is detailed in the evidence. And if I look at the photograph, it is quite plain that the major portion of this old wall constituted part of the surface of the tenant's garden, the boundary consisting merely of the parapet of the wall. Now as he was the tenant of the house and garden it seems to me impossible to suppose that he was not the tenant of that portion of the wall which was part of his garden, and it seems to me equally impossible to suppose that he was not the tenant of the part of the wall which was his boundary wall as well as the part which was part of the surface of his garden. If that be so, it follows that the occupier was responsible on the principle of *Rylands v. Fletcher* (L.R., 3 H.L., 330).

Rylands v. Fletcher (*supra*) has never been applied to affect the liability of an owner who is out of possession at the time when the injury takes place. But beyond and above that, I think that the cases that have been referred to, especially the judgment of Lord Justice Farwell in *West v. Bristol Tramways Company, Limited* (24 *The Times* L.R., 478 ; [1908] 2 K.B., 14, at p. 23), show conclusively that in order to come within the doctrine of *Rylands v. Fletcher* (*supra*) it is necessary to show that the user which is complained of is something out of the ordinary, something of an unusual character to which the land has been put. Now, though the defendants did not erect this wall, they certainly took it over when they bought the property, when the property became theirs. They did not take it over as suggested, because it was a piece of antiquity ; they took it over because it was the boundary of their property and a good retaining wall for their property and without it their property could not have continued to exist. It was just as much a retaining wall as if they had built it themselves for that purpose : and therefore it seems to me on the authorities that they were only using their property in one of the ordinary ways in which property is used, and that accordingly they are outside the authority of *Rylands v. Fletcher* (*supra*). Then it was said: Assuming they are outside the authority of *Rylands v. Fletcher* (*supra*) they are still liable upon the principles laid down in the case of *Todd v. Flight* (9 C.B., N.S., 377). Now I think it is clearly established by the facts that there is no reason to suppose that when they let the property to Mr. Wilson it was in fact in a ruinous condition, or that they had the slightest notice that it was in a ruinous condition or that in the exercise of reasonable diligence they could have ascertained that it was in a ruinous and dangerous condition ; and if so, then the plaintiffs have failed to bring their case within the principles of the decision in *Todd v. Flight* (*supra*) and the cases which have followed that decision. A very large number of cases have been cited here ; but the principles applicable to the facts of this case do not seem to me to be in doubt, and it is not necessary to refer to any further authorities. I agree that the appeal must be allowed.

[Solicitors—Messrs. Parker, Garrett and Co., for Messrs. Michelmores, Exeter ; Messrs. Sparkes, Pope, Thomas, and Mathew, Exeter.]

K.B. Div. (Rowlatt, J.) 1928. June 27.

ATTORNEY-GENERAL v. RUDGE.*

Revenue—Legacy duty—Chattels settled on persons in succession—Ultimate vesting in person with absolute interest—Valuation—Whether duty payable on value at date of testator's death or at date of vesting—Legacy Duty Act, 1796 (36 Geo. III., c. 52), s. 14.

A testator bequeathed chattels to trustees upon trust to allow them, so far as the rules of law and equity would permit, to go and be enjoyed with his mansion house. The testator died in 1846, and after divers intermediate life interests the defendant became, in 1909, tenant in tail male in possession of the mansion house, and in 1924, on attaining the age of 21 years, he became absolutely entitled to the chattels, with power to sell or dispose of them. They had greatly increased in value since 1846. No legacy duty had been payable in respect of them before 1924.

Held, that legacy duty was payable on the value of the chattels in 1924, not on their value in 1846.

This was an information by the Attorney-General, which showed: —

Edward Rudge, late of the Abbey Manor House, Evesham, in the County of Worcester, and of No. 44, Wimpole-street, in the parish of St. Marylebone, in the County of Middlesex, Esquire, deceased (hereinafter referred to as "the testator"), duly made his will, dated April 24, 1843, and thereby appointed his wife, Margaret Rudge, and his friend, Adam Washington, executors thereof, and devised his mansion house, called the Abbey Manor House, aforesaid, and certain hereditaments to the use of his said wife, Margaret Rudge, during her life if she should so long continue his widow, and after her death or second marriage to the use of trustees for the term of 1,000 years from his death upon trusts which had since been satisfied and subject to the said term and the trusts thereof to the use of his eldest son, Edward John Rudge, for his life, and after the death of the said Edward John Rudge to the use of the testator's grandson, Edward Charles Rudge, for his life, and after the death of the said Edward Charles Rudge to the use of the first and every other son of the said Edward Charles Rudge successively according to seniority in tail male with divers remainders over. And the testator by his said will bequeathed all his plate and plated articles wheresoever the same might be at the time of his death, and also all his household furniture, pictures, prints, engravings, drawing books, china, glass and other articles of furniture whatsoever (except linen) which should be in or about the said mansion house called the Abbey Manor House aforesaid at the time of his death, and also his books, prints, and articles of old Japan and Chelsea china which were then in his messuage in Wimpole-street aforesaid unto the said Adam Washington and Peter Nouaille the younger in trust to permit the same to go and be held and enjoyed with the said mansion house called the Abbey Manor House so far as the rules of law or equity would permit by the person who, under or by virtue of the said will, should for the time being at law or in equity be tenant for life or in tail male in possession or in remainder expectant on the said term of 1,000 years of the said mansion house yet so that the same should not for the purpose of transmission vest absolutely in any tenant in tail male under the said will being the child of any person thereby made tenant for life who should not attain his age of 21 years. And the testator directed that as soon as conveniently might be after his death the said Adam Washington and Peter Nouaille the younger or the survivor of them, or the executors or administrators of such survivor should cause an inventory to be taken of the said plate, furniture, pictures, articles, and things thereby bequeathed as aforesaid, and this was duly done.

The testator died on September 3, 1846, and the said will, with a codicil dated May 16, 1846, which did not affect the said will so far as hereinbefore stated, was, on November 18, 1846, duly proved by the said Margaret Rudge and Adam Washington in the Prerogative Court of Canterbury.

* Reported by J. W. Hall, Esq., Barrister-at-Law.

The said Margaret Rudge died on February 25, 1870. The said Edward John Rudge died on January 29, 1861. The said Edward Charles Rudge died on December 14, 1909. The said Edward Charles Rudge had one son and no more—namely, the defendant. The defendant was born on May 31, 1903, and attained his age of 21 years on May 30, 1924.

Under the said will of the testator, the defendant became, on December 14, 1909, tenant in tail male in possession of the said mansion house called the Abbey Manor House devised by the said will as aforesaid, and became, on May 30, 1924, absolutely entitled to the said plate, furniture, pictures, articles, and things bequeathed by the said will as aforesaid.

Under the provisions of the Legacy Duty Acts, legacy duty at the rate of one per cent. became, on May 30, 1924, payable in respect of the said plate, pictures, articles, and things bequeathed by the said will as aforesaid. The defendant was accountable for the said legacy duty.

On December 1, 1925, the defendant delivered an account for legacy duty in respect of the said plate, pictures, articles, and things bequeathed by the said will as aforesaid.

In the said account the defendant gave the value of the said plate, pictures, articles, and things as the sum of £2,444 5s. The defendant alleged that the said sum of £2,444 5s. was the value of the said plate, pictures, articles, and things as at the death of the testator and was according to valuations made at that time, and contended that the legacy duty which became payable on May 30, 1924, in respect of the said plate, pictures, articles, and things was payable on the value of the said plate, pictures, articles, and things as at the death of the testator. The informant charged that this contention was not well founded, and that under the provisions of the Legacy Duty Acts the said legacy duty was payable on the value of the said plate, pictures, articles, and things as at the time when the defendant became absolutely entitled thereto.

The value of the said plate, pictures, articles, and things bequeathed by the said will as aforesaid as on May 30, 1924, was in excess of the said sum of £2,444 5s.

The Commissioners of Inland Revenue had caused application to be made to the defendant to deliver an account for legacy duty in respect of the said plate, pictures, articles, and things bequeathed by the said will as aforesaid, and in the said account to give the value of the said plate, pictures, articles, and things as on May 30, 1924, and to pay the duty which ought to be paid on such value, but the defendant had refused to deliver such account and to pay such duty.

The informant, on behalf of his Majesty, prayed as follows:—

That it might be declared that, under the provisions of the Legacy Duty Acts, legacy duty at the rate of one per cent. became, on May 30, 1924, payable on the value of the said plate, pictures, articles, and things bequeathed by the said will of the testator as aforesaid as on May 30, 1924, and that the defendant was accountable for the said duty.

That an account might be directed to ascertain the amount due in respect of the legacy duty payable on the footing of the foregoing declaration, together with interest thereon at the rate of £4 per cent. per annum from May 30, 1924, and that the defendant might be ordered to pay the amount of the said duty and interest to the Commissioners of Inland Revenue, the informant waiving such penalties as the defendant might have incurred by reason of the said duty not having been previously paid.

That all necessary and proper inquiries might be made, directions given, and accounts taken for the purposes aforesaid.

The defendant, by his answer, admitted the facts as set out in the information, but contended that legacy duty was payable only on the value of the chattels as at the death of the testator.

By s. 14 of the Legacy Duty Act, 1796: "No duty shall be paid on any articles of plate, furniture, or other things not yielding any income, and given to or for the benefit of or so as that the same be enjoyed by different persons in succession, whilst the same shall be so enjoyed in kind only by any person or persons not having any power of selling or disposing thereof, so as to convert the same into money or other property yielding an income; but if the same shall . . . come to any person or persons having power to sell or dispose thereof, or having an absolute interest therein, then, and in each and every such case the same duty shall be chargeable and paid thereon as if the same had been originally given absolutely and with full power to sell or dispose thereof. . . ."

The Attorney-General (Sir Thomas Inskip, K.C.) and Mr. J. H. Stamp appeared for the Crown; Mr. T. Simpson Pedler for the defendant.

MR. JUSTICE ROWLATT.—I think this case is really quite clear, and it has been very clearly put by Mr. Pedler for the defendant. The words to be construed are these, "the same duty shall be chargeable and paid thereon as if the same"—that is, the gift "had been originally given absolutely and with full power to sell and dispose thereof." This gift was a gift by a will made in 1843, which took effect upon the death in 1846. It vested absolutely with full power to sell and dispose thereof in 1924. At which date are the chattels, being pictures, to be valued? The difference really is in the meaning given to the word "originally." The argument for the defendant, Mr. Rudge, is that "originally" is an adverb of time, so as to make it mean this: as if the absolute gift had been given in 1843. The construction for the Crown makes "originally" an adverb going to the quality of the gift and makes the section read thus: as if the gift which is now taken had been an original gift; that is, as if it had originally come now instead of there being all sorts of events in between. That is the construction of the Crown, and it is a very simple construction. There is another difficulty in the way of the defendant's construction, and that is this; if it is to be taken as a gift in 1843, is the duty the same as would have been paid if the gift was to the person having the immediate enjoyment of it as an absolute gift, or is the duty to be reckoned as if the person now taking it had been alive in 1846 and had taken it then? It must be one or the other, because the rates of duty are different; persons may be in different relationships. I put it to Mr. Pedler, and, after some hesitation, he said: "I think the duty must be calculated as on a gift to the original person who took it then as a gift to him absolutely instead of by way of enjoyment for a time only." I think it is a most extraordinary result, because this gentleman pays, or might pay, on a different relationship from that which he bore to the testator. Now, apart from that, the other inconveniences and injustices are great, as was pointed out, and I will not repeat them, in *Attorney-General v. Cavendish* (1 Wightwick, 82) by Chief Baron Macdonald, in 1810, which was a very carefully considered case. The Court heard that case on June

1, and then, being doubtful, instead of giving a variety of discordant opinions, they had it re-argued on July 3 : then judgment was considered for three weeks. It was the judgment of the Court, and so it is a judgment of great authority. The Chief Baron goes through all the sections ; he says he has been through all the relevant sections. He must have looked at section 14, and he must have looked at section 12, which is *in pari materia ;* he examines section 22, which speaks of settled value, and he decided primarily under section 35, which has the same sort of problem involved in it, and he says clearly that the scheme of the Act is to tax at the date when the gift is received and on the value at that date. He lays that down quite clearly, and I really think it is an authority in this case. After all, it is the common sense of the matter. If you are going to tax a man upon a gift to him, tax him upon what he gets, and not upon some notional figure, either for him or against him, to ascertain which in this case would require an antiquarian research into values eighty years ago and more.

I am quite clearly of opinion that the Crown is right in this matter, and that it is entitled to judgment, with costs.

[Solicitors—The Solicitor of Inland Revenue ; Messrs. Clarke, Square and Mills.]

Court of Appeal. } 1928.
(Scrutton, Lawrence, and Greer, L.JJ.) } July 11.

MORE v. WEAVER.*

Defamation — Libel — Privilege — Absolute privilege—Letter to solicitor from client.

Defamatory written statements made to a solicitor by a client for the purpose of obtaining professional advice and assistance are absolutely privileged, at all events where they are relevant to that purpose.

Judgment of Swift, J. (44 *The Times* L.R., 546), affirmed.

This was an appeal by the plaintiff from the judgment (44 *The Times* L.R., 546) given in an action for alleged libel, tried before Mr. Justice Swift and a special jury.

The action was brought by Miss Kathleen Frances Mervin More, of Lancaster-street, W., who claimed from the defendant, Miss Flora Gertrude Weaver, damages for alleged libel which, she said, was contained in letters which the defendant sent to her (the defendant's) solicitor.

The defendant denied that the words complained of were defamatory, and pleaded that the letters were privileged.

In 1923 the plaintiff proposed to purchase the business of a private hotel and the defendant agreed to find the necessary money for that purpose, but no terms were arranged between them with regard to security or interest. It was, however, subsequently arranged that the plaintiff should give as security to the defendant a mortgage over the leases of the houses which constituted the hotel. A mortgage was accordingly prepared, but a dispute about the signing of the mortgage then took place between the plaintiff and the defendant. The defendant wrote to her own solicitor the letters which were complained of as being libellous. They were written for the purpose of his advising and assisting her to get proper security for her money and finally to obtain repayment of it.

Mr. Justice Swift held that the communications between the defendant and her solicitor were absolutely privileged, and that no action for defamation would lie in respect of such communications. Even if he were wrong in that view, and these communications were the subject of a qualified privilege only (having been published on a privileged occasion), then there was no evidence of any malice to destroy that privilege. In either event, there was no case to go to the jury, and the action failed. He entered judgment for the defendant with costs. The plaintiff appealed.

The plaintiff appeared in person ; Mr. Rayner Goddard, K.C., and Mr. O'Hagan for the respondent.

Counsel for the respondent were not called on.

Lord Justice Scrutton, in giving judgment, said that the appellant undoubtedly believed that she had a grievance against certain people. In this particular case she had brought an action against another woman for alleged libel. The defendant had lent money to the plaintiff in connexion with the purchase of the business of a private hotel. Differences had arisen between the plaintiff and the defendant with regard to the questions what security should be given for the loan, and also when and in what circumstances the loan should be repaid. During the discussion of these differences the defendant wrote certain letters to her own solicitor. In the course of some proceedings against the plaintiff these letters were made public.

The question arose whether communications from a client to his or her solicitor or from a solicitor to the client were or were not absolutely privileged. There were a few cases where untrue and defamatory communications or statements were, by the law of England, absolutely privileged, so that though they were untrue, defamatory and malicious, the law would not allow any action to be brought in respect of them.

The leading case was the absolute privilege given to a Judge. The same absolute privilege applied to counsel and also to witnesses. The question was whether the privilege went beyond Judges, counsel, and witnesses in Court. It was decided in the House of Lords in *Watson v. M'Ewan* ([1905] A.C. 480) that the privilege extended to statements made by a witness to a solicitor and his client in preparing the proof for trial. Did it extend to a client consulting his or her solicitor and making statements for the purpose of obtaining advice and discussing the matter at issue ? There had been some difference of opinion on the question whether the privilege in such a case was absolute or qualified, and it was because of that difference of opinion that the Court of Appeal, on an interlocutory appeal, had in the present action restored the statement of claim which had been struck out by the Master and the Judge in Chambers.

The difficulty had arisen because Mr. Justice Darling, in *Morgan and Another v. Wallis* (33 *The Times* L.R., 495), expressed the view that the privilege was only qualified and that the question of malice should, therefore, be investigated. On the other hand, there was the high authority of Lord Chancellor Herschell in *Browne v. Dunn* (6 R., 67, at p. 72), where he said :—

"It seems to me that when communications pass between a solicitor and those whom he reasonably believes will desire to retain him, and to whom he makes a communication in relation to that, and who

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

do retain him, the whole of these communications leading up to the retainer and relevant to it, and having that and nothing else in view, are privileged communications, that the whole occasion is throughout privileged. There is no authority, so far as I know, to the contrary, and it seems to me that to lay down any other doctrine would be very gravely contrary to the public interest."

Lord Bowen, in the same case, said, at page 80:—"I very much doubt whether, when a professional relation is created between a solicitor and client, and communications pass between the solicitor and the client with reference to the prosecution of a third person, or with reference to proceedings being taken against him, the fact that the solicitor is animated by malice in what he says of the third person would render him liable to an action, provided he does not say anything which is outside what is relevant to the communications which he is making as a solicitor to his client."

Lord Bowen was obviously inclined to the view that there was absolute privilege, provided that the communications were relevant.

If, then, statements or communications between solicitor and client were absolutely privileged, was there evidence which could be left to the jury that the communications made in the letters which passed between the defendant and her solicitor in this case were irrelevant to the matter under discussion? It would be idle to ask the jury whether these letters were irrelevant to the matter under discussion. The case was not one of qualified privilege, but of absolute privilege. There was no ground for leaving to the jury the question whether the communications were irrelevant or not, and there was no evidence on which they could hold that they were irrelevant. The appeal would therefore be dismissed, with costs.

LORD JUSTICE LAWRENCE and LORD JUSTICE GREER concurred.

[Solicitors—Messrs. Maitland, Peckham, and Co.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) } 1928. June 25.

H. v. H. (No. 2).*

Divorce — Jurisdiction — Parties domiciled in England at time of and after marriage—Desertion of wife by husband—Decree of judicial separation granted to wife—Wife's suit for divorce—Husband's protest to jurisdiction—New domicile alleged—Wife's plea of estoppel.

A wife married in England to an Englishman, domiciled in England, was granted a decree of judicial separation on the ground of her husband's desertion. He afterwards took up his abode in France. Later she filed a petition for the dissolution of her marriage. The husband appeared under protest to the jurisdiction, on the ground that he had acquired a new domicile in France. An order was made by the Registrar for the question of domicile to be tried as a preliminary issue. The wife appealed against the order on the ground that the husband, having deserted his wife, could not be heard to say that he had changed his domicile for the purpose of ousting the jurisdiction in divorce of the English Court.

Held, that jurisdiction in divorce in England depends upon domicile, and that the domicile is that of the husband; that the apparent exception to this rule stated by Lord Gorell in *Armytage v. Armytage* (14 *The Times* L.R., 480; [1898] P., 178) and *Ogden v. Ogden* (24 *The Times* L.R., 94; [1908] P. 46, at p. 78) cannot be sustained on an examination of the authorities; and that estoppel is a rule of evidence which cannot be invoked as a bar *in limine,* though such a plea may be considered at the trial of the issue of domicile.

In this case the parties were married in England in May, 1915, the husband having been born and being domiciled in England. In August, 1917, the parties ceased to live together, and in January, 1921, the wife was granted in this Division a decree of judicial separation on the ground of her husband's desertion. Early in 1928, the wife presented a petition for the dissolution of her marriage on the ground of her husband's adultery in 1927 and 1928. The husband appeared to the petition under a protest, and alleged in his answer that since September, 1923, he had acquired a domicile in France. On March 13, 1928, the registrar directed that an issue should be tried as to the domicile of the respondent. From this order the petitioner appealed and in her summons asked that, being out of time, she should be allowed an extension of time for appealing, that the order be disallowed, and alternatively that the issue be heard with the main petition upon oral evidence.

Mr. Clifford Mortimer appeared for the petitioner; Mr. C. L. Beddington for the respondent.

Mr. CLIFFORD MORTIMER, for the petitioner, said that subsequently to the decree of judicial separation the wife presented in 1921 a petition for divorce but that petition was dismissed on the wife's application on terms set out in heads of agreement dated August, 1921, followed by a settlement. One of the terms was that the parties should continue to live separate and apart as decreed by the Court. There was in the husband's answer to the present petition no denial of the charge that he was living in adultery in France. The decree of judicial separation did not absolve the respondent from his duties to his wife, and he could not now be heard to take advantage of his own wrongdoing. The case came within the exception stated by Lord Gorell in *Armytage v. Armytage* (14 *The Times* L.R., 480; [1898] P., 178) and *Ogden v. Ogden* (24 *The Times* L.R., 94; [1908] P., 46, at p. 78) to the rule that the jurisdiction in divorce follows the domicile of the husband. The basis of this exception, which had more or less dictated the practice of the Court for thirty years, was that a man could not take advantage of his own wrongdoing. He could not be allowed to say to his wife: "Although you are judicially separated from me and I have deserted you, you are still my wife and tied to me, so that you are at my mercy in regard to the tribunal for divorce. If I choose to establish myself in France, living in adultery, I can make you seek your remedy in France. If I choose to transfer my domicile from France to Germany I can make

* Reported by WILLIAM LATEY, Esq., Barrister-at-Law.

you go there." The exception stated in *Armytage v. Armytage* (*supra*) only enunciated the original principle of English law that a man who behaved in this way could not be heard to assert his inhabitance of another country. This exception was upheld in Scottish law, in *Manderson v. Sutherland* (1 F., 621, at p. 629) *per* Lord Moncrieff. Professor Dicey said that this was a possible exception (4th Edition, Conflict of Laws, at p. 295), though he certainly expressed some doubt at a later stage (p. 878) as to the validity of the exception. Westlake, however, and other authors had approved the exception. Counsel also referred to *Niboyet v. Niboyet* (4 P.D., 1, at p. 14) *per* Lord Justice Brett; *Le Mesurier v. Le Mesurier* (11 *The Times* L.R., 481: [1895] A.C., 517); *Lord Advocate v. Jaffrey* (36 *The Times* L.R., 820; [1921] 1 A.C., 146); and *Attorney-General for Alberta v. Cook* (42 *The Times* L.R., 317; [1926] A.C., 444).

Mr. BEDDINGTON submitted that whatever might be the validity of the exception stated in *Armytage v. Armytage* (*supra*) the facts of this case made it distinguishable. There having been a decree of judicial separation, the respondent was under no obligation to remain in this country. He went to France in 1923 definitely to live there and with no intention of defeating his wife's rights. In his affidavit he said:

"At the time when I determined to take up my residence in France I had no expectation that my wife might bring any matrimonial proceedings against me. I understood that the deeds of August, 1921, were a final settlement between my wife and me and made further proceedings by either party impossible and that I was free to settle wherever I pleased. . . . She has exactly the same remedies against me according to French law as she would have in the English Courts. I have nothing to gain in these proceedings by setting up a French domicile, but it would be contrary to fact and disloyal to the Court if I allowed my wife to sue in a Court which in the events which have happened has no jurisdiction."

The dictum in *Armytage v. Armytage* (*supra*), added counsel, had never been followed in a defended suit, and this was the first time that the issue had been raised in a contested suit. There was indeed no real exception to the general rule of the forum of the domicile. *Stathatos v. Stathatos* (29 *The Times* L.R., 54; [1913] P., 46) and *De Montaigu v. De Montaigu* (29 *The Times* L.R., 654; [1913] P., 154) each presented special features which made them no real exceptions. His Lordship (Lord Merrivale) in the case before the Privy Council of *Attorney-General for Alberta v. Cook* (*supra*) had cited an *obiter* passage from the judgment of Lord Cave in *Lord Advocate v. Jaffrey* (*supra*) as follows:

"As to a possible exception in a case where a husband who, having been guilty of desertion or some other matrimonial offence in this country, endeavours to deprive his wife of her remedy by changing his domicile, there is no doubt authority (which it is not now necessary to examine) for the proposition that in such a case the husband will not be allowed to set up his own wrong as an argument for prejudicing his wife's rights."

But in the Privy Council case, Lord Merrivale, in reading the decision of the Judicial Committee, had not accepted this view. On the contrary he said that the contention that a wife judicially separated from her husband was given choice of a new domicile was contrary to the general principle on which the unity of domicile of the married pair depended. Neither divorce *a mensa et thoro* nor the Matrimonial Causes Act of 1857 effected that purpose. Moreover, Mr. Beddington added, the doctrine of estoppel could apply only to a case where the acquisition of the foreign domicile was part of the husband's matrimonial wrongdoing, and that was not the case here.

LORD MERRIVALE delivered a considered judgment as follows:—

The question sought to be raised by this summons is whether there is a rule of law governing the jurisdiction in divorce whereby as between parties originally of English domicile a husband judicially separated from his wife and alleged to be afterwards guilty of adultery is disentitled to allege in proceedings by the wife for dissolution of marriage that since the decree of judicial separation he has become domiciled elsewhere.

The domicile of origin of the parties is English. They were married in England in 1915. In 1921 a decree of judicial separation on the ground of desertion was pronounced at the suit of the wife. Later in the same year she petitioned for dissolution of marriage on the ground of her husband's alleged adultery, but in pursuance of an agreement for valuable consideration made between her, her husband, and his father, the petition was, on her application, dismissed. She now petitions for dissolution of marriage on the ground that the husband has during 1927 and 1928 lived in adultery at Nice.

The respondent appeared to the petition under protest, alleging himself to be domiciled in France, and at his instance an order has been made for trial of an issue in order to determine whether he is or not domiciled in England. He has filed affidavits which make a *prima facie* case of domicile in France. The petitioner, after the time for appeal against the order for an issue has expired, applies to set aside the order, or alternatively for directions for trial of the issue upon *viva voce* evidence at the hearing of the petition. Extension of time for appeal is sought and must be allowed.

For the petitioner it was argued at the hearing of the summons that a husband domiciled in England who deserts his wife is thereupon estopped from acquiring domicile elsewhere. It was also argued that the wife so deserted is entitled to determine the forum in which proceedings as to the marriage shall be taken. In effect what is contended for is a condition as to domicile stereotyped by or upon the decree of judicial separation, or incapable of being altered without the consent of the wife.

Admittedly there is no direct authority for the proposition of law which the petitioner asserts. In old cases like *Warrender v. Warrender* (2 Cl. and F., 488), *Dolphin v. Robins* (7 H.L.C., 390), and *Pitt v. Pitt* (4 Macqueen, 627), there was discussion in the House of Lords as to whether a wife separated from her husband by a judicial decree granted at her instance may acquire domicile other than that of her husband. In *Armytage v. Armytage* (14 *The Times* L.R., 480; [1898] P., 178) Lord Gorell, then Sir Gorell Barnes, stated an opinion that in the case of a wife antecedently domiciled here and deserted here by her husband the husband "cannot be allowed [in the wife's suit for dissolution of marriage] to assert for the purposes of the suit that he has ceased to be domiciled in this country." In *Ogden v. Ogden* (24 *The Times* L.R., 94; [1908] P., 46, at p. 78) the same learned Judge made a more detailed statement in the words following: "In cases where a wife has been deserted in the country of the domicile by her husband in circumstances entitling her to sue for divorce, it has

been held that she might sue in the Courts of the country of the domicile, notwithstanding the fact that the husband has left the country and might possibly have done so with the intention of acquiring a domicile in another country. The decree in such a case is justified either by considering that the husband cannot be heard to say that he has changed his domicile, or, as some have thought, that the wife must *ex necessitate* be entitled to treat the country of the previous matrimonial domicile as still being the country of her domicile, and to require its Courts to do justice to her, because otherwise it would be impossible for a wife so situated to obtain a decree, as the respondent might keep changing his abode from place to place, asserting that he had abandoned his original domicile, and any domicile with which it were sought to fix him." The opinions expressed *obiter* in *Warrender v. Warrender* (*supra*), *Dolphin v. Robins* (*supra*), and *Pitt v. Pitt* (*supra*), and such cases do not accord with many later decisions in the supreme tribunals. The passages in *Armytage v. Armytage* (*supra*) and *Ogden v. Ogden* (*supra*) were not statements of opinion to which effect was given by the judgment of the Court, either here or in the Court of Appeal. They express, however, the considered views of an eminent Judge who, in 1908, had been for very many years engaged in administering the jurisdiction in divorce which is here exercised. On the other hand, they have not commanded the common assent of jurists (see Dicey on Conflict of Laws, 4th Edition, pp. 101 and 123); and the Judicial Committee in *Attorney-General for Alberta v. Cook* (42 *The Times* L.R., 317; [1926] A.C., 444), while it did not deal directly with the questions involved in this case, laid it down as axiomatic in the jurisdiction in divorce that one of the effects of marriage is to give to the spouses a common domicile—the domicile of the husband—that the jurisdiction to decree dissolution of marriage is the jurisdiction of the country of the domicile, and that it is a requisite of the jurisdiction to dissolve marriage that the defendant in the proceedings should be domiciled within the jurisdiction. Counsel for the petitioner frankly said in the course of his argument that he knew of no case in which effect had been given to the propositions embodied in the *dicta* from *Armytage v. Armytage* (*supra*) and *Ogden v. Ogden* (*supra*) which I have cited, and if they are authority, they define an exception to the principles most strongly emphasized in recent judgments of the House of Lords and the Privy Council that under British law the jurisdiction to decree divorce depends on domicile, that the domicile of the husband determines the domicile of the wife, and that independent authority to decree divorce cannot, consistently with English law, co-exist at the same time in two sovereign States.

When the opinions cited from *Armytage v. Armytage* (*supra*) and *Ogden v. Ogden* (*supra*) are carefully examined it becomes clear that they do not purport to lay down a rule of law. They purport rather to state the practice of the Court. It is said, however, that they necessarily involve the proposition for which the petitioner contends and must be given effect to in that sense. What, then, is the suggested rule, what is its origin, and how does it operate? It supposedly relates, as I understand, to people whose domicile of origin is English. No one has ever suggested that the residence of foreigners which gives jurisdiction to decree judicial separation stereotypes the domicile of either of them. Nor is it thought, I believe, that in the case of citizens of foreign or colonial origin, resort of an injured wife to an English Court would render the defendant in the suit legally incapable of reverting to his domicile of origin overseas, or choosing a permanent home and finding a new domicile elsewhere. If the rule exists, it would seem to have some remarkable exceptions. No such rule forms part of the Common Law Until 1857 the power of dissolution of marriage by judicial decree, to which it is supposed to be ancillary, did not exist. There was no room or use for such a rule in the Courts which exercised jurisdiction to decree divorce *a mensa et thoro*. That jurisdiction depended simply on residence. There is no such provision in any of the Matrimonial Causes Acts. So as a substantive proposition of English law the alleged rule cannot be sustained. How then and to what extent can the Court, within its due authority, give effect in practice to a resolution like that stated in *Armytage v. Armytage* (*supra*), that a husband of English domicile who deserts his wife here shall not be allowed in the wife's suit for dissolution of marriage to assert for the purposes of the suit that he has ceased to be domiciled in this country, or, as was said in *Ogden v. Ogden* (*supra*), that a wife so deserted in circumstances entitling her to sue for divorce shall be admitted to sue here "notwithstanding the fact that the husband has left the country and might possibly have done so with the intention of acquiring a domicile in another country"? It is suggested that the principle of estoppel is available.

In the 18th century jurisdiction was gained in English Courts by resort to legal fictions—supposititious residence in Cheapside, untrue averments of imprisonment in the Marshalsea or of indebtedness to the Crown, and the like, with the aid of rules of procedure which prevented the raising of issues of fact in respect of matters going to the jurisdiction. In the 20th century his Majesty's Courts do not proceed on like lines. The suggestion that a respondent should be met by an estoppel *in limine* in the matter of jurisdiction when a petition alleges a state of facts such as is forecasted in *Ogden v. Ogden* (*supra*) is a proposal to resort to a legal fiction, and not an appeal to an estoppel in the true sense. Estoppel, as has been said in numberless cases, is a rule of evidence: see *per* Lord Esher in *Seton, Laing and Co. v. Lafone* (3 *The Times* L.R., 624; 19 Q.B.D., 68), *per* Lords Justices Lindley and Bowen in *Low v. Bouverie* (7 *The Times* L.R., 582; [1891] 3 Ch., 82), and *per* Lord Justice Vaughan Williams in *Liverpool and North Wales Steamship Company, Limited v. Mersey Trading Company, Limited* (25 *The Times* L.R., 89; [1909] 1 Ch., 209). To quote an early definition, "Estoppel is when one is forbidden in law to speak against his own act or deed, yea though it be to say the truth" (Termes de la Ley: Tit. Estoppel). Estoppel prevents a man from denying the truth of some statement he has made, *per* Lord Justice Lindley in *Low v. Bouverie* (*supra*), or some representation by conduct which has induced another to alter his position, *per* Lord Justice Vaughan Williams in *Oliver v. Bank of England* (18 *The Times* L.R., 341; [1902] 1 Ch., 610). In legal proceedings waiver may work estoppel as acquiescence may in the course of a business transaction. The rule of evidence which produces estoppel operates in the trial of issues as to domicile in this Court to the same extent as in other proceedings in the High Court and not otherwise. The statute which established the jurisdiction in divorce directed that the Court should proceed upon the rules of evidence in force in the Courts of Common Law.

An issue of domicile, therefore, is not to be prejudged so as to give effect to a presumption of law, but it is to be duly tried to determine the relevant matters of fact. It may even be that the effect in point of fact of a proved desire to avoid a jurisdiction may have to be weighed together with other relevant facts, as was done, with interesting results, in the Chancery Division in the case of *Drexel v. Drexel* (32 *The Times* L.R., 208 ; [1916] 1 Ch., 251, at p. 259).

What follows from the considerations I have stated is that the respondent's allegation by way of objection to the jurisdiction of the Court that he is domiciled in France may be tried like any other issue. Upon the trial the Court will determine whether the respondent has taken up his residence in France and is in truth resident there with that intention which, coupled with residence, results in a change of domicile. There, and particularly on the last-mentioned topic, the matters which gave rise to the pronouncements in *Armytage v. Armytage* (*supra*) and *Ogden v. Ogden* (*supra*) will have whatever may be their due weight.

The application to rescind the order for trial of the issue fails. As to the mode of trial, the state of the facts makes it highly desirable that the issue shall be tried upon evidence given *viva voce*, and the proper mode of securing this will be to direct, as I do, that the issue be set down for trial with the cause, so that if the preliminary decision be in favour of the petitioner, she may forthwith proceed to establish her right to a decree. The wife will have the costs of the application.

[Solicitors—Messrs. Watkins, Phipos, and Brown ; Messrs. Mawby and Barrie.]

Court of Appeal. } 1928.
(Scrutton, Greer, and Russell, L.JJ.) } June 29.

SOWERBY AND ANOTHER v. LINDSAY (WHITELOCK AND ANOTHER, THIRD PARTIES).*

Landlord and Tenant—Lease—Construction—Rates paid in excess of fixed sum in any year of tenancy—Covenant by landlords to refund—Covenant by tenant duly and punctually to pay rates—Three half-years' rates paid in single year of tenancy—Construction of landlords' covenant to refund.

The lease of a flat beginning at midsummer at a rent of £400 per annum, payable in advance at the rate of £100 on each quarter day, contained a covenant by the lessors that in case the total sum paid by the tenant in any one year of the term in respect of rates and taxes should exceed £125, the lessors would, on production of the relative receipts, refund to the tenant the difference between the total sum paid by him as aforesaid and £125. If this difference were not refunded by the lessors within fourteen days of demand the tenant was to be at liberty to deduct such difference from the next instalment of rent. The lease contained a covenant by the tenant that he would duly and punctually pay and discharge all rates, taxes, duties, charges, assessments, and outgoings payable in respect of the demised premises.

The tenant in a year of the tenancy between midsummer and midsummer paid three half-years' rates, amounting in all to over £125, and having demanded the refund of the excess from the landlords and having failed to get payment of the same within 14 days of the demand, deducted it from his next instalment of rent.

Held (Scrutton, L.J., dissenting), that, under the landlords' covenant to refund, the tenant was entitled to make the deduction.

Decision of the Divisional Court (44 *The Times* L.R., 501) affirmed.

This was an appeal from a decision of the Divisional Court, Mr. Justice Salter and Mr. Justice Talbot (44 *The Times* L.R., 501), allowing an appeal from a decision of the Recorder of the City of London, sitting at the Mayor's and City of London Court, by which he gave judgment for the plaintiffs, Messrs. Sowerby and Another, against the defendant, Mr. John Lindsay, for £66 9s. 2d., being a quarter's rent of £100 for a flat on the fourth floor at No. 24, Park-lane, London, less certain credits amounting to £33 10s. 10d., and judgment for the defendant against the third parties for the amount payable by the defendant to the plaintiffs in respect of the claim and costs.

By a lease dated June 26, 1925, the Park-lane Flats, Limited, demised to Captain Beaumont the said flat at a rent of £400 per annum, payable in advance at the rate of £100 on each quarter day. Clause 2 (2) of the lease was as follows :—

"That the tenant will duly and punctually pay and discharge all rates, taxes, duties, charges, assessments, and outgoings whatsoever, whether Parliamentary, parochial, local, or of any other description, and including in particular water rate, which are now or may at any time hereafter be assessed, charged, or imposed upon or payable in respect of the demised premises or the owner or occupier in respect thereof (landlords' property tax in respect of the rent first hereinbefore reserved only excepted) and will also duly and punctually pay all sums payable in respect of gas, electric light, and other luminant, if any, used in the flat as shown by the separate meter or meters belonging thereto."

By clause 4 (6) : "In case the total sum paid by the tenant in any one year of the term hereby granted in respect of rates and taxes shall exceed £125, that the lessor will on production of the relative receipts refund to the tenant the difference between the total sum paid by him as aforesaid and the said sum of £125. And that if such difference be not refunded by the lessor within 14 days of demand, then the tenant shall be at liberty to deduct such difference from the next instalment of rent payable by him hereunder."

By clause 4 (1) of the lease the right to quiet enjoyment was made conditional on the tenant's performance of his covenants.

By a deed of assignment dated December 4, 1925, the Park-lane Flats, Limited, assigned their interest in the lease to the plaintiffs. By a deed of assignment dated May 26, 1927, Captain Beaumont assigned his tenancy under the lease to the defendant. In the year of the tenancy from June 24, 1926, to June 24, 1927, Captain Beaumont had paid three half-years' general rates and two water rates, making in all

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

£213 11s. 8d. On completion of the assignment of the tenancy Mr. Lindsay paid over to Captain Beaumont £88 11s. 8d., the amount by which £213 11s. 8d. exceeded £125, and Messrs. Whitelock and Storr, Captain Beaumont's solicitors, gave Mr. Lindsay an undertaking by way of indemnity in respect of that sum. The sum of £88 11s. 8d. then duly demanded of the plaintiffs having been and remaining unpaid for 14 days, Mr. Lindsay claimed to deduct the said sum from the next instalment of the rent, due on June 24, 1927. The plaintiffs thereupon sued for £100, this instalment of the rent, less certain credits of £33 10s. 10d. making £66 9s. 2d., under Order XIV. in the High Court. The defendant obtained leave to defend, claiming the right to deduct £88 11s. 8d. under clause 4 (6) of the lease, and the action was transferred to the Mayor's and City of London Court, Messrs. Whitelock and Storr being added as third parties.

The learned Recorder gave judgment for the plaintiffs for £66 9s. 2d., with costs, and judgment for the defendant against the third parties for the amount payable by the defendant to the plaintiffs in respect of the claim and costs.

The defendant and the third parties appealed. The Divisional Court (Mr. Justice Salter and Mr. Justice Talbot) held that even on the assumption that he had not duly and punctually paid these rates, the tenant, by the express terms of the lessors' covenant, was entitled to make the deduction. The tenant's covenant with regard to due and punctual payment of the rent was not a condition of the lessor's covenant to refund the excess paid over £125, and it did not qualify or modify that covenant. The Divisional Court accordingly allowed the appeal, entered judgment for the defendant, with costs, and set aside the order made against the third parties.

The plaintiffs, the landlords, appealed.

Mr. A. Grant, K.C., and Mr. Lavington appeared for the appellants; and Mr. C. A. Bennett, K.C., Mr. Sandlands, and Mr. Geoffrey Howard for the respondents.

Lord Justice Scrutton, in the course of a dissenting judgment, said that the question raised in the appeal was obviously one of some doubt. The Divisional Court had differed from the Court below and there was a difference of opinion in the Court of Appeal. He (the Lord Justice) was quite clear about the matter. The question for decision was with regard to the construction of a clause in a lease which defined the tenant's liability with regard to the rates. The clause in question limited the liability of the tenant to £125 per year and the question was how that was to be worked. He entirely agreed with Mr. Justice Talbot when he said: "The intention, I should imagine, of that clause was to apportion the rates as between landlords and tenant in this way: up to £125 per annum, it was intended that the rates should be borne and paid by the tenant, and that any excess over that should be borne by the landlord. That I have very little doubt was the intention with which that clause or paragraph was framed, and I should think probably that if one knew all the facts connected with this lease and the buildings of which probably, in fact obviously, these premises formed a part, we should find that these very same words were applied to terms beginning at different times of the year, and probably it was because the clause had to be adapted to a midsummer tenancy that the point, which I daresay was never thought of at all by the parties when they entered into this contract, has arisen." The difficulty in this case had arisen from an obvious arithmetical fact; the tenancy began at midsummer; the years of the tenancy were midsummer to midsummer, but those lease years, or tenancy years, covered three rating periods; Easter to Michaelmas, Michaelmas to Easter, and Easter to Michaelmas. The 12 months of the tenancy was mixed up with 18 months of rates, and according to the date on which the tenant paid his rates in the tenancy year—if he paid his first six months' rate before midsummer and the third six months' rate after the next midsummer—he might have actually paid only one six months' rate in one particular year of the tenancy; on the other hand, if he paid his first six months' rate after midsummer and his third six months' rate before the next midsummer, he would have paid three rates (18 months' rates) in the year; and it was easy to see that if he arranged it in that way and paid one instalment—one rate of six months—in the first year of his tenancy, and three half-years' rates in his second year, and recovered one six months' rate back from the landlord, and if he only paid one six months' rate in his third year and three six months' rates in his fourth year and again recovered from the landlord one six months' rates, and so on for the fifth and sixth years of his tenancy, he would have contrived to get for himself something which was never within the contemplation of the parties, because he would have paid less than six times £125, and would be putting the burden on the landlord, in three years, of half-a-year's rates. He (the Lord Justice) absolutely declined to believe that that was the intention of the parties and he declined to be forced to accept what he thought was a construction quite out of accordance with the intention of the parties and an unbusinesslike construction, if he could see his way to avoid it.

The language of the clause in question was as follows:—"In case the total sum paid by the tenant in any one year of the term hereby granted in respect of rates and taxes shall exceed £125 . . . ." In fact the tenant paid in one of the years of the tenancy rates for three half years. In his (Lord Justice Scrutton's) view, "paid" should be read as "payable." The clause should be read as relating to the year of the term and as meaning that in respect of the year of the term the tenant should only be liable for £125 for rates and taxes. Where a half-year's rating period was partly in and partly outside of one year of the term there should be an apportionment.

He (the Lord Justice) was quite clear that that was the intention of the parties; he was quite clear that it was business; and he was quite clear that it was justice, and those were three desirable things to get at in construing a deed. The other construction enabled the tenant to get out of paying half a year's rates every other year by choosing the time when he paid his rates. He (the Lord Justice) was quite clear that that was not the intention of the parties, and he was quite clear that it was not justice, and he desired to avoid constructions which were neither just nor businesslike and were contrary to the intention of the parties. He would therefore allow the appeal.

Lord Justice Greer said that he differed from Lord Justice Scrutton with the greatest possible hesitation, but he had formed a different opinion on the construction of the clause in question. He thought that the Judges in the Divisional Court had put the right construction on the deed in question. They had to construe two clauses in the deed—a formal document, prepared after full consideration in

order to set down what the parties had undertaken the one to the other. The first clause was clause 2 (2) of the deed, which referred to the covenant by the tenant duly and punctually to pay and discharge all rates, taxes, duties, charges, assessments, and outgoings whatsoever. It was to be observed that if punctual payment was not made, and that resulted in loss to the landlord, the landlord would be entitled to say that the tenant had broken the contract and must pay damages. Then clause 4 (6) provided: "in case the total sum paid by the tenant in any one year of the term hereby granted in respect of rates and taxes shall exceed £125, that the lessor will on production of the relative receipts refund to the tenant the difference between the total sum paid by him as aforesaid and the said sum of £125. And that if such difference be not refunded by the lessor within 14 days of demand, then the tenant shall be at liberty to deduct such difference from the next instalment of rent payable by him hereunder."

What had happened in this case was that in one year of the term the tenant paid rates, partly in respect of that year and partly in respect of the previous year, in excess of £125 by £88 11s. 8d., and the defendant claimed the right to deduct that sum under clause 4 (6) of the lease. He (Lord Justice Greer) could not read the words "the total sum paid by the tenant in any one year" and the words "paid by him as aforesaid" as meaning something quite different from what they said—as equivalent to the words, "total sum payable by the tenant in any one year" and "the total sum payable by him as aforesaid." A literal construction of the covenant did not do any injustice to the landlords, because if they did not get their rent, if too large a sum was deducted in one year because too small an amount had been deducted in the previous year, the landlords had their remedy by claiming damages, because they would be entitled to say that punctual payment had not been made. It was argued that clause 4 (6) must be read as conditional on punctual payment by the tenant of the rates and taxes. But all the members of the Court agreed that it was impossible to read the sub-clause as conditional on punctual payment. He regretted that he could not come to the same conclusion as Lord Justice Scrutton, but the words were clear and the parties must be held to the words which they had put in the document, which was a carefully considered formal document.

Lord Justice Russell said that with some trepidation he also differed from the view adopted by Lord Justice Scrutton, but he took some consolation from the fact he was in company with Mr. Justice Salter, Mr. Justice Talbot, and Lord Justice Greer on that matter. It was highly likely that Mr. Justice Talbot had made a correct guess with regard to the intention of the parties, when he used this language: "The intention, I should imagine, of that clause, was to apportion the rates as between the landlord and tenant in this way: up to £125 per annum, it was intended that the rates should be borne and paid by the tenant and that any excess should be borne by the landlord." If it were possible to construe the words used by the parties in the deed so as to effectuate that intention without using undue violence in the process, he (Lord Justice Russell) would gladly do so, but he was unable to construe the clause in any such way without essentially and radically redrafting it. It was suggested that the Court should read the words "rates and taxes" as referring only to rates and taxes relating to the particular year in question. At first sight that was an attractive suggestion, but, on looking at the matter a little more closely, that would not give effect to the intention of the parties. The words "paid by the tenant" in clause 4 (6) clearly could only relate to actual payment. It was quite impossible to strain the language of the clause and read the word "paid" as "payable." To decide in the appellants' favour here would be redrafting the clause and not construing the rights of the parties. The appeal failed and must be dismissed.

[Solicitors—Messrs. Richardson Sowerby, Holden and Co.; Messrs. Whitelock and Storr.]

K.B. Div. (Rowlatt, J.) 1928. June 22.

MORLEY v. LAWFORD AND CO.*

Revenue — Income-tax — Deduction—Guarantee given in hope of obtaining orders—Trade expense—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. D, Cases I. and II., Rule 3.

The respondents, who were asphalters, subscribed to the guarantee fund of the British Empire Exhibition at Wembley, solely, as the General Commissioners found, in the hope of obtaining preferential treatment in the allocation of contracts for asphalting work within the Exhibition grounds. They did not in fact obtain any contract at all from the Exhibition authorities. Having been called upon to pay a considerable part of the amount guaranteed, they sought to deduct the sum so paid from their profits assessable to income-tax as a trade expense.

Held, that it was not an allowable deduction.

This was a case stated by the General Commissioners of Income Tax for the Becontree Division of Essex.

On December 9, 1926, Messrs. Lawford and Co. (hereinafter called "the respondents"), who at all material times carried on the business of asphalt contractors at Bow Bridge, Stratford, appealed against an assessment to income-tax, Schedule D, in the sum of £4,006 for the year ending April 5, 1927, made upon them under the provisions of the Income Tax Acts in respect of the profits of their business.

The sole question at the appeal and on which the opinion of the Court was sought was whether a sum of £375 paid by the respondents under circumstances hereinafter appearing and charged in their accounts for the year to December 31, 1925, as a "trading expense" was an admissible deduction in computing their profits for the purpose of assessment to income-tax for the year ending April 5, 1927.

Evidence which the General Commissioners accepted was given to the following effect:—

(*a*) In the month of December, 1921, the respondents received an inquiry from the surveyors to the British Empire Exhibition, Messrs. Baker and Mallett, for asphalting work at the Exhibition. In consequence thereof the respondents submitted an estimate in writing dated December 30, 1921,

* Reported by J. W. Hall, Esq., Barrister-at-Law.

amounting to £3,617 10s., but no order resulted therefrom. In the month of January, 1922, the respondents submitted a revised estimate for such work but no order resulted therefrom.

(*b*) In or about the month of March, 1922, the respondents were informed by a Colonel Lynch as representing the British Empire Exhibition (1923), Incorporated, at an interview that if they, the respondents, were prepared to subscribe to the guarantee fund for the undertaking of the Exhibition at Wembley they, as guarantors, would receive preferential treatment over non-guarantors as regards orders for asphalting work to be done at the Exhibition. On the faith of this representation the respondents decided to become guarantors in the sum of £250 to the British Empire Exhibition Fund for the purpose of obtaining such preference.

(*c*) Shortly thereafter, at a further interview between the respondents and Colonel Lynch as aforesaid respecting the guarantee to be given by the respondents as aforesaid, Colonel Lynch informed the respondents that certain of the respondents' competitors had become guarantors to the extent of £1,000 and £250 respectively, and after consideration the respondents informed Colonel Lynch that in order not to prejudice their position they had decided to increase their guarantee originally contemplated at £250 to the sum of £500, and they in fact gave a guarantee for such sum to the British Empire Exhibition (1923), Incorporated, on April 5, 1922.

(*d*) The respondents did not receive any order or inquiry whatsoever from the Exhibition authorities.

(*e*) In the year 1925 the respondents were called upon to pay and did in fact then pay the sum of £375 under and in respect of their said guarantee.

A representative of the respondents gave evidence, which the General Commissioners accepted, that the respondents gave the said guarantee solely for the purpose of obtaining preference as regards the respondents' tenders for asphalting work to be done at the Exhibition ; that by reason of the representations made by Colonel Lynch as aforesaid they believed that as a result of such guarantee they would obtain an order or orders for such work ; and that but for such belief they would never have given the said guarantee at all.

It was contended on behalf of the respondents that the payment of £375 was ordinary business expenditure with the object and for the purpose of making ordinary business profit out of which revenue would accrue, and that it was money wholly and exclusively laid out or expended for the purposes of their trade, or alternatively that it was a loss connected with or arising out of their trade within the terms of Rule 3 of the Rules applicable to Cases I. and II. of Schedule D of the Income Tax Act, 1918, and therefore was a proper deduction from the profits for the purpose of income-tax.

On behalf of the Crown it was contended :—

(*a*) That the said sum of £375 was not money wholly and exclusively laid out or expended for the purpose of the respondents' trade and was not a loss connected therewith.

(*b*) That it was not an expense of earning the profits for the year ending December 31, 1925.

(*c*) That it was money expended for the purpose of acquiring contracts and not an expense of fulfilling any such contracts.

(*d*) That the said sum of £375 represented a capital payment and its deduction was accordingly prohibited by Rule 3 of the Rules applicable to Cases I. and II. of Schedule D of the Income Tax Act, 1918.

(*e*) That the sum of £375 was not a proper debit item to be placed against the profits of the year ending December 31, 1925.

The following cases were cited in support of the Crown's contentions : *City of London Contract Corporation, Limited v. Styles* (4 *The Times* L.R., 51), *English Crown Spelter Company, Limited v. Baker* (99 L.T., 353), *Stott v. Hoddinott* (7 Tax Cas., 85).

The General Commissioners determined, on the facts above stated and admitted, as follows :—

"We are satisfied on the whole of the evidence that Messrs. Lawford and Co. gave the guarantee, and the amount paid thereunder was money expended by them wholly and exclusively for the purpose of their trade or business and is an admissible deduction from their profits for income-tax purposes."

The inspector of taxes thereupon required the General Commissioners to state and sign a case for the opinion of the High Court.

The Attorney-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills appeared for the Crown ; Mr. Latter, K.C., Mr. du Parcq, K.C., and Mr. J. P. Eddy for the respondents.

Mr. Justice Rowlatt.—In this case, the respondents, who are asphalters, seek to deduct from their profits, or to carry into the computation of their profits, a sum of £375 which they have had to pay as guarantors to the British Empire Exhibition. They paid the guarantee with the wholly commercial and mercenary object—I am not using that word in any offensive sense—of putting themselves in a better position to get a contract for some of the asphalting which would have to be done in the grounds of the Exhibition. It so happened that although they had been solicited to give the guarantee by holding out these hopes they did not get any contract and never were even asked to tender. But I think the case would have been precisely the same had they obtained a lucrative contract.

I do not think anything turns on the circumstance that what would, as it was hoped, help them, was not the payment of any sum of money but the act of giving a guarantee which, in the event, became a payment of a sum of money. I think I must treat the case just as if the money had been paid without the intervention of the chance of escaping payment which the form of a guarantee gave them. I look at it from this point of view : Was the guarantee given for the purposes of the trade ; or rather, could it be found by the General Commissioners that the guarantee was given for the purposes of the trade ?

Secondly, I do not think anything turns upon the circumstances that the guarantee, in the hope of obtaining results, was in one year and the actual payment called for was in another year. I do not think those circumstances affect the case ; I only mention them to show that I have not overlooked them.

The General Commissioners have found in favour of the subject and they have found the facts as fully as they can find them. The Crown, however, takes up its position, as I understand it, on two grounds, which perhaps run into one another a little. The Crown says that this was a capital expenditure ; then it says that this was not an expenditure at all which was sufficiently connected with the trade. I say nothing at all about the first point, whether it was a capital expenditure, because I think that the Crown is right on the second point. I do not think that either the giving of this guarantee or the payment under it is capable of being described as a payment at all for the purposes of the trade within the meaning of the Act.

What was really the position ? This Exhibition was in contemplation and it required guaranteeing. It was an Exhibition that was designed to further every sort of trade. Incidentally it would be necessary to have the grounds asphalted, but the object of the Exhibition was to further every sort of trade, and the immediate purpose, and the only immediate purpose which it is possible to attribute to anybody, was to support that Exhibition.

Then there comes the second step in the argument, that it might occur to a prudent man that, if he was a supporter of the Exhibition, then a subsidiary stream of causation would be set in motion ; a supporter of the Exhibition would be more likely to be supported by the Exhibition when it came to the giving out of contracts than one who was not. Therefore the operation of supporting the Exhibition might be coloured by an ulterior and mercenary motive. I think that the ulterior mercenary motive was this : that it was hoped that supporting the Exhibition would influence orders in the direction of the respondents ; that patronage, like charity, might be so ordered as to begin at home.

That was the position. As I say, I think this expenditure is incapable of being held to be for the purposes of the trade.

I begin in dealing with the difficulties in the way that the Crown suggested from the classical passage in Lord Cave's judgment in *British Insulated and Helsby Cables, Limited v. Atherton* (42 *The Times* L.R., 187 ; [1926] A.C., 205) where he says : " A sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade." But I think when Lord Cave used the words " indirectly " and " immediate " and " commercial expediency " and so on he was indicating dissociation between the expenditure and the trade of a far less wide character than what I have endeavoured to indicate by using the words " ulterior motive." In all the cases that he was referring to and that can be referred to under this head the expenditure itself was, in its immediate character, a commercial expenditure or what might be a commercial expenditure in itself. In the case of *Smith v. Incorporated Council of Law Reporting for England and Wales* (30 *The Times* L.R., 588 ; [1914] 3 K.B., 674) there was a payment to one of the staff of the society concerned in that case. In the case of *Mitchell v. Noble, Limited* (43 *The Times* L.R., 245 ; [1927] 1 K.B., 719) there was a payment to one of the directors of the company ; that was the immediate nature of the payment. In the Scotch case of *Moore v. Stewarts and Lloyds, Limited* (6 Tax Cas., 501) it was a payment to gain a business control. In *Usher's Wiltshire Brewery, Limited v. Bruce* (31 *The Times* L.R., 104 ; [1915] A.C., 433) it was a payment in respect of a house belonging to the brewery company.

The payments in all those cases may be said to have been indirect and to have been made only on the ground of commercial expediency and not immediately for the purposes of the trade, but they were not anything like so remote as, in my judgment, the payment in this case, where the respondents were merely putting themselves in the position of subscribers to something in the hope that they would be favourably considered.

This case is a most important one, I think, because if the line is not to be drawn at this case, I really do not know what mercenary payments in the nature of " ground bait," as the Attorney-General put it, may not come in and be capable of being found to have been made for the purposes of the trade.

Now the nearest analogy that can be put, I think, from the point of view of the subject, is the case of expenditure on advertisement. In a figurative way you may call this perhaps an expenditure on advertisement because it was an expenditure merely made to influence customers, it was an expense not immediately of production, but it was an expense of salesmanship. But it was not the same, because the expenses of advertisement are expenses directly inviting trade to your business. This was really an expenditure which put the respondents in a class of persons who they anticipated might be favourably considered for reasons of gratitude, so to speak, by people who had business to give away.

I suppose a great many people subscribe to a great many things, buildings, and so on, in the hope that some trade may come their way in respect of that. I think that is all very much too remote. I do not think a case like this, putting it at its highest, is capable of being considered by the General Commissioners in the way in which they have dealt with it, Therefore I find that in this appeal the Crown succeeds, with costs.

[Solicitors—The Solicitor of Inland Revenue ; Messrs. Hulbert, Crowe, and Hulbert.

Chan. Div. (Maugham, J.) 1928. July 16.

IN RE HOME AND COLONIAL INSURANCE COMPANY, LIMITED.*

Companies—Dissolution—Subsequent discovery of assets—Motion to declare dissolution void—Defunct company—Removal from Register—Notice to Treasury Solicitor—Companies (Consolidation) Act, 1908 (8 Edw. VII., c. 69), ss. 223 (1), 242.

Where a limited company has been dissolved, and on the subsequent discovery of assets a motion is made under s. 223 (1) of the Companies (Consolidation) Act, 1908, to declare the dissolution void, notice of the motion ought to be given to the Treasury Solicitor since on dissolution the undistributed assets pass to the Crown as *bona vacantia*. Under s. 242, as to removal of defunct companies from the Register, the same practice should be adopted where there are undistributed assets.

This was a motion to declare the dissolution of the Home and Colonial Insurance Company, Limited, void under section 223 (1) of the Companies (Consolidation) Act, 1908, which is as follows :—

" Where a company has been dissolved, the Court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the Court to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved."

* Reported by H. Langford Lewis, Esq., Barrister-at-Law.

Mr. Lionel Cohen appeared for the liquidator ; Mr. Stafford Crossman for the Attorney-General.

Mr. COHEN said that the company's final meeting was held on May 27, 1927, and it was dissolved in November, 1927. Since then a very considerable asset had been discovered in the form of a right of action against another company under a reinsurance agreement which would have been void if it had covered marine policies by reason of the decision in *In re National Benefit Assurance Company, Limited—Ex parte English Insurance Company, Limited* (44 *The Times* L.R., 14 ; [1928] Ch., 74). The liquidator had since discovered that the dissolved company had issued no policies of marine insurance, and so there was a good debt. The only question was whether, on an application such as the present, the Attorney-General ought to be served with notice of the motion. Mr. Registrar Stiebel, in his book on Companies, had suggested (at p. 1,228) that there was some doubt as to the practice. That matter, said counsel, ought to be settled one way or the other.

Mr. CROSSMAN said that the Crown might have an interest in any assets which were undistributed, as *bona vacantia,* and the Treasury Solicitor thought that there should be a regular practice of giving him notice of any motion brought under section 223 of the Act, so that he might consider whether the Crown ought or ought not to be represented before the Court.

MR. JUSTICE MAUGHAM thought that it was inconceivable that the Crown should wish to oppose the making of such an order.

Mr. CROSSMAN said that the making of the order was discretionary, and, apart from the section, the Crown would have a vested right in the assets. In ninety-nine cases out of a hundred the Crown would not see fit to be represented, but there might be cases in which it would desire to intervene. He referred to *In re Higginson and Dean—Ex parte Attorney-General* (15 *The Times* L.R., 135 ; [1899] 1 Q.B., 325). He suggested that the same practice should be adopted in applications under section 242 of the Companies (Consolidation) Act, 1908, under which the Registrar of Joint Stock Companies could strike a defunct company off the Register. On the present motion the Attorney-General did not wish to intervene.

MR. JUSTICE MAUGHAM said that it was desirable that he should state the practice under section 223, when the Court made an order declaring the dissolution of a company to have been void. It was settled by the decision in *In re Higginson and Dean—Ex parte Attorney-General* (15 *The Times* L.R., 135 ; [1899] 1 Q.B., 325) that, on a company being dissolved in the strict sense, the whole of its assets undistributed at the date of dissolution passed to the Crown as *bona vacantia,* and that, accordingly, if the Court made an order under the section, it was in effect divesting the Crown of those assets. It followed that such an order should not be made without notice being given to the Treasury Solicitor to ascertain whether the Attorney-General should be served. The position under section 242 of the same Act in cases where there were undistributed assets appeared to be exactly the same. There the practice had been to serve the Registrar, but the same practice should be adopted as under section 223. In the present case the Attorney-General had appeared at the request of the Court, and been represented by Mr. Crossman, and, as he made no claim to the assets, the order would be made as asked for by the motion. There would be no order as to costs.

[Solicitors—Messrs. William A. Crump and Son ; the Treasury Solicitor.]

Court of Appeal.
(Lord Hanworth, M.R., Sankey and Russell, L.JJ.)
1928. July 19.

TILLING-STEVENS MOTORS, LIMITED v. KENT COUNTY COUNCIL AND ANOTHER.*

Revenue — Mechanically propelled vehicles—Duty—Petrol-electric vehicle—Electrical propulsion—Generation of electricity by internal combustion engine on vehicle—Rate of duty—Finance Act, 1926 (16 and 17 Geo. V., c. 22), Sched. I. (5).

A vehicle propelled by electricity generated by an internal combustion engine on the vehicle is not an electrically propelled vehicle within clause 5 of the First Schedule to the Finance Act, 1926, and is therefore subject to the higher duty imposed upon a vehicle mechanically propelled otherwise than by electricity.

So *held* by Lord Hanworth, M.R., and Sankey, L.J.—Russell, L.J., dissenting.

Decision of Clauson, J. (44 *The Times* L.R., 516) reversed.

This was the defendants' appeal from a decision of Mr. Justice Clauson (44 *The Times* L.R., 516).

On April 9, 1927, the plaintiffs in the action, Tilling-Stevens Motors, Limited, applied to the defendants, the Kent County Council, for a licence in respect of a petrol-electric goods vehicle, as being an electrically propelled vehicle, and paid to the defendants £21 5s. 3d. in respect of the licence duty, which sum was the proper amount chargeable under clause 5 of the First Schedule to the Finance Act, 1926, for an electrically propelled goods vehicle of the weight of the vehicle in question.

The Kent County Council refused to license the vehicle as an electrically propelled vehicle, and the plaintiffs, under protest, applied for and obtained a licence for it, at the higher rate fixed by the same clause, as a vehicle other than an electrically propelled vehicle. The plaintiffs claimed a declaration that they were entitled to repayment of the difference between the two rates.

The Kent County Council were empowered to levy and collect duties on licences for mechanically propelled vehicles. The second defendant, the Minister of Transport, was interested under the Roads Act, 1920, because the amounts for licences collected by the Kent County Council were payable to the Exchequer, and the Minister of Transport became entitled to a certain proportion of the sums which the Exchequer received.

Mr. Justice Clauson said that, in popular language, there was in those vehicles an ordinary internal combustion engine which produced the electricity which, in the electric motor, drove the rear wheels. The wheels went round because the electric motor made them revolve. That being so, the vehicles, in the popular sense, came within the category of electrically propelled vehicles as it was impossible to say that they were not electrically propelled, though it was true that petrol had some work to do. The plaintiffs had established that those particular vehicles were electrically propelled vehicles within the meaning of paragraph 5.

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* Reported by G. T. WHITFIELD-HAYES and H. C. GARSIA, Esqs., Barristers-at-Law.

The Minister and the Kent County Council appealed.

The Attorney-General (Sir Thomas Inskip, K.C.) and Mr. Stafford Crossman appeared for the Minister ; Mr. K. E. Shelley for the council ; and Sir Arthur Colefax, K.C., and Mr. Trevor Watson for the respondents.

The Attorney-General said that the real source of power was the combustion engine. The electric motor was merely a source of transmission of energy to the rear wheels. The onus was on the respondents of proving that the true source of propulsion was electricity. Electricity played an important part in every motor-car, but cars were not usually "electrically propelled." In the vehicle under consideration the clutch, the gear box, and the gear shaft were missing, but otherwise it was just like an ordinary commercial lorry.

Sir Arthur Colefax, for the respondents, said that the essential characteristic of the respondents' vehicle was the electric motor.

Mr. Shelley replied.

The Master of the Rolls (Lord Hanworth), in giving judgment, said that the appeal was brought by the defendants claiming that judgment should be entered for them, and that it should be held that the vehicle in question was properly taxed under the Finance Act, 1926, as being a vehicle other than an electrically propelled vehicle.

It was a sound rule of law, applied again and again to Finance Acts, that words used in any such Act must be given their ordinary meaning, and that the duty of the Court was to look at the substance of the matter. He thought that in dividing mechanically propelled vehicles for the purpose of taxation into those which were electrically propelled and those otherwise propelled, the Legislature intended to provide two categories easily determinable.

It did not appear necessary, or even right, to enter into a discussion which might be very suitable in a patent case but was not germane when the Court had to deal with categories not made on a scientific basis. The schedule was intended to enable persons without any scientific training to ascertain how vehicles should be taxed. If scientific knowledge were applied, it might be contended with regard to a steam engine that the name was inappropriate, as the source of power was heated coal. So, too, the ordinary motor-car was not merely a vehicle containing an internal combustion engine driven with petrol but was a vehicle requiring a battery to provide the spark from which combustion was obtained.

There was no doubt in the present case that a petrol engine caused electricity to be stored, which, in its turn, caused the vehicle to be propelled ; but the real source of power was the petrol, and, to continue to drive the vehicle, the driver replenished his petrol tank and not his accumulators. Could the vehicle, then, be called an electrically propelled vehicle as in the case of the electric brougham ? He thought not. It was necessary to divide the vehicles into categories on broad grounds and not, perhaps, with scientific accuracy.

He found himself unable to agree with Mr. Justice Clauson, who seemed to have entered on an inquiry which was too precise. He (the Master of the Rolls) thought that the vehicle in question was propelled by petrol, although the power was transmitted electrically. For those reasons he had come to the conclusion that the vehicle fell within the category of vehicles which were other than electrically propelled, that it had been properly assessed to tax, and that the appeal must be allowed.

Lord Justice Sankey said that he agreed. The point to be decided was whether the vehicle in question was electrically propelled. If so, it paid a less tax than if it was a vehicle "other than electrically propelled" under the first Schedule to the Finance Act, 1926. In *Lord Advocate v. Fleming* (13 *The Times* L.R., 216 ; [1897] A.C., 145, at p. 152) Lord Halsbury said that in dealing with taxing Acts "we have no governing principle of the Act to look at ; we have simply to go on the Act itself to see whether the duty claimed under it is that which the Legislature enacted." And in *Tennant v. Smith* (8 *The Times* L.R., 434 ; [1892] A.C., 150, at p. 154) he said that "inasmuch as you have no right to argue that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed."

In this case, then, did the expression "vehicle other than electrically propelled" apply to the alleged subject of taxation ? That was where the difficulty arose, for the word "propelled" was capable of different shades of meaning. In the present case a diagram had been put in showing three different kinds of vehicle. No. 1 had the ordinary internal combustion engine and was petrol-propelled. No. 3 was a vehicle which was seen some years ago—the electric brougham. That was beyond question electrically propelled. But the particular vehicle with which the Court was now concerned seemed to lie between these two, and the question was on which side of the line it was, petrol-propelled or electrically propelled.

A taxing Act meant to be of universal application should be construed according to the ordinary meaning of the words, and it was not proper to go into scientific considerations. To do that would be to put too heavy a burden on the taxpayer. Starting with the ordinary petrol-driven engine, one found that there were certain drawbacks—namely, the abrupt changes of gear, which were translated into shocks that travelled through the machinery. It was so stated in the plaintiffs' pamphlets. Then how was it sought to avoid that ? It seemed to him (his Lordship) that it was by altering the mode of transmission. Therefore what had been done was not to alter the character of the petrol-propelled vehicle but to improve it by giving it a different mode of transmitting power. That was confused by the fact that the petrol consumption continued as before. The vehicle remained a petrol-propelled vehicle with a different transmission. He (his Lordship) was far from saying that the matter was beyond doubt. It might be argued that the Court was legislating rather than interpreting, but he did not think that was so. For these reasons he agreed that the appeal must be allowed.

Lord Justice Russell, in delivering a dissenting judgment, said that were it not for the fact that the Master of the Rolls and Lord Justice Sankey were of opinion that the appeal should be allowed, he would have said that the judgment of Mr. Justice Clauson was beyond question right. He held that opinion so strongly that he felt bound to express it. Indeed, the matter seemed to him so clear that he began to think that he must be wrong. In his view, the problem could best be illustrated by question and answer. Why did the vehicle move ?—Because the wheels

rotated. Why did the wheels rotate ?—Because the shaft rotated. Why did the shaft rotate ?—Because of the motor driving it. What was the motive power in the motor driving it ?—Electricity. The only difference in the propulsion of that vehicle and the propulsion of an electric tram was that, in one case, the engine generating electricity was carried on the vehicle, while, in the other, it was not. No one would say that an electric tram was not "electrically propelled" because the engine which generated the electricity was driven by oil, gas, or steam. In his view, the appeal ought to be dismissed.

[Solicitors—The Treasury Solicitor ; Messrs. G. B. Hemming and Son, for Messrs. Bracher, Son, and Miskin, Maidstone ; Messrs. Godden, Holme, and Ward.]

Court of Appeal.
(Lord Hanworth, M.R., Sankey and Russell, L.JJ.)
1928. July 16.

WIGGINS v. LAVY.*

Champerty—Maintenance—Speculative actions —How far permissible.

Observations as to the circumstances in which a solicitor may take up a speculative case on behalf of a poor client, and as to the terms on which he may do so.

This was an appeal by the defendant from the verdict and judgment entered at the trial before Mr. Justice Branson and a common jury of an action which related to an unusual claim for damages for alleged maintenance and champerty brought by Mr. Harry Francis Wiggins, of Edenholme, Charton-road, Shepperton, against Mr. Frederick Lavy, solicitor, of 3, Featherstone-buildings, High Holborn, W.C.

The plaintiff alleged that between December 15, 1925, and March 15, 1927, the defendant wrongfully and without legal justification or excuse procured Miriam Schneider and Isadore Schneider, an infant, by his father and next friend, Sidney Schneider, to bring an action against the plaintiff in the Shoreditch County Court for the recovery of damages for personal injuries alleged to have been caused by the negligence of the present plaintiff or his servant ; further, that the defendant wrongfully procured, maintained, and upheld the action and carried it on at his own cost and under an agreement, as between himself and Miriam Schneider and Sidney Schneider, that they should be under no liability to him for any costs in respect of the action, but that in the event of their succeeding he should receive one-tenth of any damages which they might recover. That agreement was said to have been entered into partly orally and, as to the written part, in a letter received by Sidney Schneider from a person writing in the name of the Legal Aid Society, stating that the society's solicitor, Frederick Lavy, would be pleased to undertake proceedings on the terms set out above.

The defendant denied the allegations and denied that the plaintiff had suffered damage. The defendant pleaded that if the Legal Aid Society or any other society did any of the things alleged the society was not acting as the servant or agent of the defendant, nor was it authorized by the defendant to do any of the things alleged.

The jury found that the charges of champerty and maintenance were both made out, and returned a verdict for the plaintiff. Judgment was entered for £29 14s. 2d. damages, and costs on the High Court scale.

The defendant appealed.

Mr. A. S. Comyns Carr, K.C., and Mr. Martin O'Connor appeared for the appellant ; Sir Patrick Hastings, K.C., and Mr. W. E. P. Done for the respondent.

Mr. Comyns Carr said that he was going to contend, first, that there was no evidence to support the plaintiff's case ; secondly, that the Judge had misdirected the jury in various particulars ; and, thirdly, that the Judge had allowed evidence to be given of a large number of cases of alleged offences of a similar character, said to have been committed by the defendant, in which the Schneiders had no concern. That evidence was admitted because it was alleged that, in connexion with the Schneider case, a document was going to be proved relating to a body called the Legal Aid Society, and that similar documents existed in those other cases, so that the evidence was admissible to prove the existence of a system to which the defendant was a party or that the Legal Aid Society was an agent for the defendant. That attempt collapsed, because no document was produced in regard to the Schneider case, and the Judge ruled out secondary evidence given by Sidney Schneider as to the existence and the matter of the document. Nevertheless, the Judge, in summing up, referred to the alleged agreement, and, in any case, the jury's minds had been poisoned by the irrelevant evidence.

There was a further ground which, in itself, was enough to put an end to the case. It was that the plaintiff had proved no special damage. The necessity for that in a civil action for maintenance was laid down in *Neville v. London Express Newspaper, Limited* (35 *The Times* L.R., 167 ; [1919] A.C., 368). Here the only special damage alleged consisted of the costs incurred by the plaintiff in the Schneider proceedings in the county court. In fact, those costs were not incurred by the plaintiff, but by the Yorkshire Insurance Company, which instructed solicitors in its own name and paid the costs. That applied not only to the Schneider proceedings, but also to the present proceedings. It was suggested that that was subrogation, but the policy of insurance was the policy of the Excel Company. A mistake had been made in suing Mr. Wiggins, who was the secretary of the Excel Company, instead of suing the Excel Company. The insurance company, in the circumstances, took on itself the burden of defending the plaintiff, but that was not under any policy of insurance.

Turning to the broader issues of the case, counsel said that there was a very curious and difficult conflict in the decisions and judicial statements on the subject in question, in so far as it affected solicitors. In a number of cases the Courts had dealt with the validity or invalidity of agreements by solicitors to charge no costs or to charge out-of-pocket costs only. In "The Law Practice and Usage in the Solicitors' Profession," issued by the Law Society, the following passage occurred at p. 163 :—

"The following statement made by Russell, L.C.J., in summing up to the jury in *Ladd v. London Road Car Company* (*The Times*, March 24, 1900, p. 4), was confirmed :—

"'It is perfectly consistent with the highest honour to take up a speculative action in this sense—viz., that if a solicitor heard of an injury to a client and honestly took pains to inform himself whether there was a *bona fide* cause of action, it was consistent with the honour of the profession that the solicitor should

* Reported by H. C. Garsia and G. T. Whitfield-Hayes, Esqs., Barristers-at-Law.

take up the action—*Rich v. Cook* [1900 C.A.] 110 *Law Times Newspaper*, 94 ; *The Times*, November 20, 1900, p. 14.' "

In the present case the Judge had not left the question to the jury whether the defendant honestly believed that the Schneiders had a good cause of action. Counsel submitted that the two cases referred to in the above extract established that a solicitor was entitled to begin an action speculatively, so that his receipt of costs depended on the result of the action. If so, that was a complete answer on the question of maintenance here, as opposed to champerty.

It must be remembered that there was no existing provision for poor persons proceeding in the county court, such as existed in the case of the High Court, and, if a solicitor could not take up an action speculatively, it would be impossible for poor persons to obtain justice. His contention as to the lawfulness of a solicitor's engaging in speculative actions received support from *In re Stretton* (14 M. and W., 806) ; *Jennings v. Johnson* (L.R., 8 C.P., 425) ; *Clare v. Joseph* (23 *The Times* L.R., 498 ; [1907] 2 K.B., 369) ; and *Gundry v. Sainsbury* (26 *The Times* L.R., 321 ; [1910] 1 K.B., 645). It seemed possible that the poverty of the person so assisted might alone afford a defence to an action for maintenance : see *Neville v. London Express Newspaper, Limited* (*supra*). That case did not, it was contended, present the point being now raised, that if the defendant had a *bona fide* belief in the success of the action in the county court that would afford him a good ground of defence in the present case. To show that the defendant was guilty of maintenance, it must be shown that he assisted the Schneiders in the manner complained of without reasonable or probable cause: *Flight v. Leman* (4 Q.B., 883). He had dealt with the law on the footing that an agreeement by the defendant to act in the way alleged had been proved, but he would contend that no such agreement was proved.

Counsel then proceeded to deal with the facts, and pointed out that the defendant had a retainer in the ordinary form from the Schneiders, which lent no colour to the view that there had been any special bargain as to the costs.

The case opened on behalf of the plaintiff in the Court below was that the defendant had conducted litigation on the footing of receiving an improper interest in the fruits of the litigation, or else was maintaining an action in which he had no personal interest. In his opening, counsel for the plaintiff suggested that the defendant was, in fact, the Legal Aid Society, but that case broke down ; and, as the arrangement suggested was that the Legal Aid Society received 2s. in the pound out of any sum recovered by successful litigation brought through the society, the case that the defendant received that money was not proved. On the contrary, it was proved that the defendant had accounted for the money in all cases to the society. Further, counsel for the plaintiff referred in his opening to documents received by other persons from the Legal Aid Society, but those were not evidence against the defendant, in view of the failure to prove by receivable evidence that Sidney Schneider had ever received a similar communication. It was not suggested that the witnesses called for the plaintiff did not prove a certain relation between Mr. Lavy and the society, but they failed to prove that Mr. Lavy was the society, or that he had received any part of the 2s. in the pound.

In Hawkins's "Pleas of the Crown," Vol. 1, page 460, it was said that there was no doubt that an attorney might prosecute and defend an action "and may assist a client by laying out his own money to be repaid . . ." It was, perhaps, a question whether the poverty of a litigant was in itself enough, without charity, but in *Holden and Another v. Thompson and Others* (23 *The Times* L.R., 529 ; [1907] 2 K.B., 489) the assisting of a poor man was held to be charitable, and the offence of maintenance was held not to have been committed. At the same time, *Cole v. Booker* (29 *The Times* L.R., 295) established the proposition that charity need not be the sole motive.

Summing up his arguments on the question of champerty, counsel submitted that the document produced as coming from the Legal Aid Society was not an agreement at all, and so did not offend against the law which forbade champerty ; nor did that document purport to have any bearing on the position of the solicitor. Mr. Lavy had disproved that he had ever had 10 per cent. of the damages, and there was no foundation for the allegation. As regarded maintenance, there was no evidence to show any agreement with the Legal Aid Society and no evidence that Mr. Lavy had in any way bound himself to carry on litigation.

Sir Patrick Hastings said that the nature of the agreement entered into could not be in doubt. The Legal Aid Society had sent out documents with a figure of Justice on the top, and their substance was that the society would act for a litigant without fee or charge, but that 2s. in the pound of sums recovered would be retained. It was an attempt to start litigation on the basis that the litigant, if successful, would pay 10 per cent. of the damages obtained. That was clearly champertous. All that the respondent needed to prove was the agreement that part of the money received through that champertous bargain was to go into the pockets of those who assisted in getting it. Whether any damages had actually been obtained or not did not matter The champertous agreement was there whether anything resulted from it or not.

The Master of the Rolls (Lord Hanworth), in giving judgment, said that the appeal was argued on two grounds—(1) that the plaintiff had suffered no damage : and (2) that the defendant had not been guilty of champerty and maintenance. His Lordship reviewed the facts of the case, and said that the accident occurred on December 16, 1925, and on December 17 Mrs. Miriam Schneider, who could not write, made her mark on a document retaining the appellant as her solicitor. On December 18 the latter wrote to the driver of the vehicle which had been involved in the accident, saying that he had been consulted by Mrs. Schneider : that, from evidence before him, he believed the accident to have been caused by the negligence of the driver ; and that unless liability were admitted he was instructed to begin proceedings. The actual proceedings, however, were 11 months later, and the difference between the promptness in making the claim and actually bringing the proceedings was remarkable. From the evidence put forward in the case, it seemed impossible that Mr. Schneider could have seen the appellant before January 6, 1926, and, though Mrs. Schneider might have seen him earlier, it was difficult to say that any responsible person had seen Mr. Lavy before he wrote the letter of December 18.

After a time it was discovered that the action in the county court had been framed against the wrong person, and a letter was written on January 12, 1926, to Mr. Wiggins, the owner of the car. Delay ensued. Mr. Wiggins was employed by a company, and that company was insured against motor accidents with

the Yorkshire Insurance Company. The Yorkshire Insurance Company repudiated liability on July 8, 1926 ; but it was remarkable that the appellant had not proceeded promptly with the action according to the instructions which he had received ; it was clearly his duty to have proceeded at once.

On August 8 he wrote to Mrs. Schneider that he presumed that she did not wish him to proceed, and asking for the costs which he had incurred, and a later letter was to the same effect. When the matter came before the county court Judge there was no appearance for the Schneiders, and Mr. Wiggins's costs were taxed for the amount claimed against the appellant. Later, the appellant wrote to the Schneiders that he was willing to accept £10 10s. as his costs in the matter.

The Schneiders were, admittedly, very poor people, and it was obvious that the reason for the delay was that the appellant really did not want to bring an action. It was difficult not to believe that the claim was really made by the appellant, who was guilty of maintaining the action, to get costs for himself. In *British Cash and Parcel Conveyors, Limited v. Lamson Store Service Company, Limited* ([1908] 1 K.B., 1006), Lord Justice Fletcher Moulton said, at p. 1014 :—

"That there is still such a thing as maintenance in the eye of the law and that it constitutes a civil wrong and perhaps a crime is undoubted, and the general character of the mischief against which it is directed is familiar to us all."

Reviewing the association of the appellant with the so-called "Legal Aid Society" and the way in which its business had been carried on by Osborne and Martin, his Lordship said that it had been admitted by Osborne that when an accident occurred he had introduced the person involved to the appellant, "who took up the case for him." A book had been kept by the appellant showing the transactions which had taken place. Sometimes the persons threatened paid up without fighting. Two shillings in the pound were deducted from the amounts received, but the appellant, a solicitor of 35 years' standing, had not kept any record of those accounts. Mr. Comyns Carr deserved the gratitude of the appellant for the way in which he had conducted the appeal, but it was quite impossible to say that this was a case of the appellant merely doing his duty by his client, a poor person. Lord Russell of Killowen, in *Ladd v. London Road Car Company* (*The Times*, March 24, 1900, p. 4), said that where a solicitor acted *bona fide*, and took pains to discover whether there was a proper cause of action, it was permissible for him to take up the case for a poor person who had no money, and that case was referred to in *Rich v. Cook* (*The Times*, November 20, 1900, p. 14 ; 110 L.T. Newspaper, 94).

Speaking as Master of the Rolls, in close touch with the solicitors' profession, he (Lord Hanworth) would be sorry to say anything which might make a decision in a doubtful case more difficult. It was hard to define the exact terms on which a solicitor might take up a speculative case for a poor client and when he might not. But to compare the cases of *Ladd* (*supra*) and *Rich* (*supra*) and the other authorities on the point with the action of the appellant in the present case was a travesty. There was, therefore, clear evidence of maintenance. The evidence of champerty was less clear, but it could not be said that there was no evidence of it.

But in *Neville v. London Express Newspaper, Limited* (35 *The Times* L.R., 167 ; [1919] A.C., 368), it had been held that an action for maintenance could not succeed without proof of special damage. In the present case Mr. Wiggins was the secretary of a company which was insured with the Yorkshire Insurance Company. The Yorkshire Insurance Company, acting in accordance with the best traditions of insurance companies, had assumed responsibility, though Mr. Wiggins himself was not an insured person at all. The insurance company had employed their own solicitor to defend the proceedings, and the costs of the solicitor were the subject matter of the claim in the action. There was, therefore, no case of any special damage to Mr. Wiggins, the plaintiff in the action, and on that technical ground the appeal must be allowed.

LORD JUSTICE SANKEY and LORD JUSTICE RUSSELL gave judgments to the same effect.

[Solicitors—Messrs. Wyeth and Co. ; Messrs. Horner and Horner.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) } 1928. July 23.

LYSAGHT v. LYSAGHT.*

Divorce — Permanent maintenance — Calculation of amount—Wife's ownership of valuable jewellery—Whether to be taken into account.

In fixing the amount of permanent maintenance for a wife who has obtained a decree of divorce the Registrar is entitled to take into consideration the fact that she is the owner of valuable jewellery which could be sold so as to produce an income.

This was an appeal from the report of the Registrar fixing the amount of a former wife's permanent maintenance after a decree absolute at £2,000 a year, the respondent being Mr. John Lisle Lysaght, an owner of racing stables.

Sir Ellis Hume-Williams, K.C., and Mr. J. H. Watts appeared for the petitioner ; Mr. Bayford, K.C., and Mr. Bush James for the respondent.

SIR ELLIS HUME-WILLIAMS, for the petitioner, submitted that the Registrar had departed from the proper practice with regard to the calculation of the joint incomes in capitalizing a pearl necklace belonging to the petitioner at some £4,000 and reckoning that she enjoyed the income from that amount. If a man possessed valuable Old Masters, like Raeburns or Gainsboroughs, and did not choose to sell them, would the Court be justified in treating the potential income from the proceeds of a sale as his actual income ?

His LORDSHIP said that if a man had a large hidden treasure in an Ali Baba's cave the Court might encourage him to realize it in circumstances such as these. His Lordship held that the Registrar had properly taken into consideration the wife's possession of the £4,000 pearl necklace, and he would not vary the amount of maintenance ordered—namely, £2,000 a year. In view of the fact that both parties were comparatively young and the possibility of remarriage, the respondent would secure that amount on the petitioner. If the petitioner remarried her allowance would be reduced from £2,000 to £1,250.

[Solicitors—Messrs. Arthur Pyke and Co. ; Messrs. Whites and Co.]

* Reported by WILLIAM LATEY, ESQ., Barrister-at-Law.

K.B. Div.
(Lord Hewart, C.J., Acton and Branson, JJ.)
1928. July 17.

REX v. INVESTORS' REVIEW, LIMITED— EX PARTE WHEELER.*

Practice—*Subpœna duces tecum*—Setting aside —Procedure—Whether by way of rule *nisi*— Rules of the Supreme Court, Order LII., r. 2.

By reason of Order LII., r. 2, of the Rules of the Supreme Court, the procedure by rule *nisi* cannot be used by a proposed witness in an action for the purpose of setting aside a *subpœna duces tecum* as being oppressive and an abuse of the process of the Court.

This was a rule *nisi* calling on the first defendants in a libel action of *Rolls Razor* (1927), *Limited v. Investors' Review, Limited, and the London Caledonian Press, Limited,* to show cause why a writ of *subpœna duces tecum* issued by the Investors' Review, Limited, and served on Sir Arthur Wheeler, Bt., should not be set aside as being oppressive and an abuse of the process of the Court.

Mr. Clement Davies, K.C., Sir T. Willes Chitty, K.C., Mr. Cartwright Sharp, and Mr. Baillieu showed cause for the Investors' Review, Limited ; Mr. Jowitt, K.C., and Mr. St. John Field supported the rule. Mr. James MacMillan held a watching brief for the second defendants.

Mr. Clement Davies said that the matter arose out of an action for alleged libel begun by Rolls Razor (1927), Limited, in respect of a paragraph published by the defendants on January 7, 1928.

In the pleadings publication was admitted, and there was no justification. The claim being solely for libel and not for slander of goods, the only issues were :—(1) Were the words a libel ? (2) What were the damages ? On the latter question, the dealings of Sir Arthur Wheeler (one of the promoters of the plaintiff company) might be most material, and the Investors' Review, Limited, issued a subpœna requiring him to attend and produce various books.

While he (counsel) was quite ready to deal with the merits, he first submitted that these proceedings were misconceived. This was an application "in an action," and, therefore, under Order LII., rule 2, no motion or application to show cause was to be made. The proper course was to apply to a Master in Chambers, from whom the case could go in the ordinary course to the Judge in Chambers. The subpœna issued out of the Central Office, not the Crown Office, and it could be dealt with only on the civil side of the Court, not on the Crown side.

The Court intimated that they would treat this as a preliminary objection going to jurisdiction, and decide it before considering the merits.

Mr. Jowitt contended that the application was not "in an action." Sir Arthur Wheeler was not a party to the action, and if he had had the temerity to appear before the Master he would have been driven from the judgment seat.

Mr. St. John Field, following on the same side, said that it was impossible to frame a summons in Chambers which would be accepted by the Central Office.

Mr. Clement Davies, in reply, referred to *Jacques v. Harrison* (12 Q.B.D., 136 ; and, in the Court of Appeal, 165), where strangers were allowed to intervene "in an action" even after judgment. The application was made first in Chambers.

Sir Willes Chitty (who was requested by the Court to follow Mr. Clement Davies) said that the matter had nothing to do with the Crown Office, and ought never to have got near the Crown Paper. The subpœna issued from the Central Office, and if it were to come before the Court at all, it should have been in the Civil Paper. But, in whichever paper it was, it should have been by motion on notice (assuming a motion was right at all). The rule abolishing rules *nisi* in an action was to save the costs of two hearings. If this was not a proceeding in an action it was difficult to know what it was. It arose out of a subpœna issued in an action by a party to the action to attend and give evidence in the action. It was a complete fallacy to say that a third party could not apply in an action. There were numerous cases, and, in particular, applications to set aside a subpœna had been made in Chambers.

The Lord Chief Justice (Lord Hewart), in giving judgment, said that the words of the rule *nisi* granted on June 25 were :—

"It is ordered that Monday, July 9 next, be peremptorily given to the defendants, the Investors' Review, Limited, to show cause why a certain writ of *subpœna* issued on behalf of the said defendants commanding the said Sir Arthur Wheeler to attend at the trial of a certain action, 1928, R. No. 115, in which Rolls Razor (1927), Limited, are the plaintiffs and the said Investors' Review, Limited, and the London Caledonian Press, Limited, are the defendants, to give evidence on behalf of the said defendants, the Investors' Review, Limited, and to produce at the trial aforesaid the documents set out in the said writ of *subpœna,* should not be set aside : Upon the grounds that the issue of the said writ was oppressive and an abuse of the process of the Court, Upon notice of this order to be given to the said defendants in the meantime."

That order *nisi* having been granted, it was now urged on behalf of the defendants that these proceedings were entirely misconceived. An objection, in the nature of a preliminary objection, was taken, and was taken at the first moment, because the proceedings on the previous occasion were, of course, *ex parte.* They said that this proceeding was governed by the Rules of the Supreme Court, and in particular by Order LII., r. 2, which was in these terms :—

"No motion or application for a rule *nisi* or order to show cause shall hereafter be made in any action or (*a*) to set aside, remit or enforce an award, or (*b*) for attachment, or (*c*) against a sheriff to pay money levied under an execution."

It was argued that the application with which the Court was now dealing was an application in an action. On the other hand, it was contended that, though it had reference to and was concerned with an action, yet it was not an application in an action. The distinction was evidently a fine one, and the question was on which side of the line the matter fell.

It was clear that this application was not made by either party to the action. It was made against the first defendants, but not by the plaintiffs. It was sought by a proposed witness in the action to set aside a *subpœna* issued in the action by a party to the action, under the title of the action, calling on him to give evidence in the action. Admittedly, if such an application had been made by a party to the action it would have been "in the action."

It was to be observed that Order LII., r. 2, said : "No motion or application for a rule *nisi* or order to

* Reported by J. W. Hall, Esq., Barrister-at-Law.

show cause shall hereafter be made in any action"; it did not say "in any action by any party to the action"; the matter was left quite general. One looked, therefore, for some authority to show that the words "by any party" should be imported. There was no such authority, and the suggestion involved the application of a very familiar fallacy. No doubt in some of the cases the decision was based on the fact that the application was made by a party to the action; but no decision enumerated all the cases that could fall within Order LII., r. 2; still less could it be said that an application was not "in an action" because it was made on behalf of a proposed witness in the action. Nevertheless, Mr. Jowitt said that there could not be an application in an action except by a party to the action. But many applications were made by persons not parties to the action at all stages from the service of the writ to setting aside the judgment and execution.

The preliminary objection, he thought, should be upheld. The contrary contention depended on the introduction of words limiting the generality of the rule. It would be a limitation of a crucial and far-reaching character to read in the words "by any party to the action."

The attention of the Court had been directed to numerous cases in which a writ of attachment for contempt had been asked for. Not much illumination was to be derived from them in this case, because when one compared the Rules of the Supreme Court with the Rules of the Crown Office one found that special provision was made for those cases.

MR. JUSTICE ACTON and MR. JUSTICE BRANSON agreed.

[Solicitors—Messrs. Chamberlain and Co.; Messrs. Clifford Turner, Hopton and Lawrence; MR. A. Russell Jones.]

K.B. Div. (Roche, J.) 1928. July 20.

VLASSOPOULOS v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED.*

Insurance (Marine)—General average—Accident — Repairs — Items recoverable — York-Antwerp Rules, 1924.

The respondents insured the claimant's steamer by a policy providing that general average was to be adjusted according to the York-Antwerp Rules of 1924. The ship was chartered to go to Bordeaux to load for Cardiff, the charterparty also providing that average, if any, should be settled according to those Rules. During loading at Bordeaux the foremast broke, and damage was done to the ship. For the purpose of repair she was moved to another dock within the port and the shipowners incurred expenses as follows: (1) Wages and provisions of crew; (2) cost of handling and discharging cargo for the purpose of repairs; (3) cost of coal consumed in going in and out and keeping steam up; and (4) expense of towing in and out and mooring and port expenses, and cost of coal consumed in shifting the vessel. While staying at Bordeaux the ship was in no danger. On completion of repairs and loading she left for Cardiff, and while she was at sea she fouled some wreckage without any negligence of those on board her and though there was no immediate danger she was made unfit to encounter the ordinary perils of the sea, and the master put into Cherbourg, as a port of refuge, and had repairs effected. The expenses at Cherbourg were similar to those at Bordeaux. On a case stated by an arbitrator,

Held, (1) that the cost of repairs in each case was recoverable as particular average; (2) that the other expenses at Bordeaux could not be claimed as general average, since no danger was in operation there; and (3) that the other expenses at Cherbourg could be claimed as general average since, though there was no immediate danger, the vessel was not fit, without repair, to encounter the perils of the sea.

This was an award stated as a special case for the purpose of obtaining the opinion of the Court on the question whether certain expenses incurred by a shipowner were properly described as general average.

Sir Robert Aske appeared for the shipowner; Mr. G. P. Langton, K.C., and Mr. F. M. Vaughan for the underwriters.

SIR ROBERT ASKE, in opening, said that the question for decision was whether certain expenses were the subject of general average. There had been a difference of opinion among average adjusters and underwriters, and this was regarded as a test case. The items in dispute were:—

"(1) The wages and provisions of the crew of a vessel in a port for repairs; (2) the costs of handling and discharging cargo in the repairing port for the purpose of executing the repairs; (3) the cost of coal consumed in going in and out of the repairing port and keeping steam up there; and (4) the expense of towing in and out of the port, and the mooring and port expenses there, and the cost of coal consumed in shifting the vessel."

By a policy dated December 27, 1926, the respondents insured the hull and machinery of the Makis, a steamer belonging to the claimant. By the policy general average was to be adjusted according to the York-Antwerp Rules of 1924. The Makis was chartered to go to Bordeaux to load pitwood for Cardiff, and the charterparty also provided that average, if any, should be settled according to the York-Antwerp Rules, 1924.

The Makis went to Bordeaux and began to load, but on January 10, 1927, while loading was proceeding, the foremast broke and certain damage was done to the vessel. For the purpose of repair the Makis was moved to another dock within the port of Bordeaux, and repairs were executed to enable the adventure on which the ship, cargo, and freight were engaged to be safely completed. While staying at Bordeaux the Makis was at no time in danger. For the purpose of executing the repairs some of the cargo had to be shifted on board and some of it had to be landed. During the time occupied by the repairs expenses were incurred by the shipowners for (*a*) repairs, (*b*) wages and provisions of crew, (*c*) coal consumed in shifting into and out of dock and keeping up steam in dock, (*d*) towage, boatmen, mooring and unmooring, (*e*) handling cargo on board,

* Reported by W. B. THOMPSON, Esq., Barrister-at-Law.

(*f*) discharging cargo, (*g*) surveyor's fees and incidentals.

The repairs were completed on January 22, 1927, and loading was completed and the Makis left for Cardiff on January 28, 1927.

On January 29, 1927, while the Makis was at sea, her propeller fouled some wreckage without any negligence of those on board her, and was rendered unfit to encounter the ordinary perils of the sea. In consequence thereof the master put into Cherbourg on January 30, and had repairs effected there. The putting into Cherbourg was necessary for the common safety of the ship, cargo, and freight, and the repairs done there were necessary for the safe prosecution of the voyage, though from the time of fouling the wreckage until arrival at Cherbourg, and until the repairs there were completed, neither the Makis nor her cargo or freight was in any immediate danger. To effect the repairs at Cherbourg, part of the cargo had to be handled on board and part had to be discharged.

The expenses incurred at Cherbourg were similar to those incurred in effecting the repairs at Bordeaux. The repairs were completed on February 17, 1927, and the Makis arrived at Cardiff on February 20 and completed discharge on February 24.

The question raised by the case was whether the above expenses, other than for repairs and surveyor's fees, for which liability was admitted, could be claimed as general average on a true construction of the York-Antwerp Rules and the contract between the parties. The arbitrator had held that they could not.

Sir Robert Aske submitted that the York-Antwerp Rules, 1924, did not correspond with the law of any country. He referred to Chalmers on Marine Insurance, 3rd edition, page 120 ; Arnould on Marine Insurance, section 983 ; and the Marine Insurance Act, 1906, section 66 ; he submitted that the general principles of average were stated in the lettered Rules A to G, and then particular cases were dealt with in the numbered rules which followed. The handling on board and the discharge of cargo at Bordeaux and Cherbourg in this case were directly covered by Rule X (*b*). That rule provided that:—

"The cost of handling on board or discharging cargo fuel or stores, whether at a port or place of loading call or refuge shall be admitted as general average when the handling or discharge was necessary for the common safety or to enable damage to the ship caused by sacrifice or accident to be repaired if the repairs were necessary for the safe prosecution of the voyage."

The item of wages of the crew was dealt with by Rule XI., and was referred to in Carver on Carriage by Sea, section 405. Counsel submitted that the wages both at Bordeaux and at Cherbourg were payable under the Rule.

Coal consumed while under repair was covered by Rule XX. ; and the cost of towage, boatmen, and coal consumed in shifting were covered by Rule X. (*a*) so far as related to Cherbourg ; but as to shifting from one dock to another at Bordeaux, he could not say that it was covered. Port expenses at Cherbourg might be covered by the words "the expenses of entering such port" in Rule X. (*a*), but in any case they must come within the general Rules A or C.

Mr. Langton submitted that the rules must be construed as if they were written in and formed part of the contract, and the clauses must be taken as a whole. Taken literally, Rule X. was to some extent in conflict with Rule A and Rule C, and must be limited so as to come within the general principles "when and only when" in A, and "direct consequences" in C. The fall of the mast at Bordeaux did not put either ship or cargo in peril, and general average only arose in a time of danger. (*Svendsen v. Wallace* (13 Q.B.D., 69, at p. 84)).

Where there was any ambiguity in the Rules the ordinary English law must be applied. The two casualties here were not on the same basis. So far as regarded the Cherbourg casualty, he could only contend that it was not a case of general average because there was no "peril" within Rule A and no "direct consequence" within Rule C. There was an apprehension of peril, but no existing peril—*Joseph Watson and Son, Limited v. Firemen's Fund Insurance Company of San Francisco* (38 *The Times* L.R., 752 ; [1922] 2 K.B., 355).

As to the Bordeaux case, the Rules were never meant to apply to an accident which happened before the ship started from her port of loading. That was obvious from Rule XI. He referred to Scrutton on Charterparties, 12th edition, Appendix 5, rule 11.

Sir Robert Aske replied.—The York-Antwerp Rules, 1924, came into existence that general average might be taken out of the ordinary law of England and of any other country, but the underwriters' case here depended on the application of principles of English law. General average could arise as well at the port of loading as at any other point on the voyage.

Mr. Justice Roche, in giving judgment, said that the case raised points of interest and of some novelty under the York-Antwerp Rules, 1924. He stated the facts and said that Cherbourg, in this case, was a port of refuge. The cost of repairs in each case was recoverable as particular average ; he was not concerned with the question whether other of these items also were recoverable as particular average. He only had to say whether the arbitrator was right in holding that none of them were general average items.

The Rules of 1924 constituted a new departure. They began with certain general principles under letters and were followed by numbered Rules. The underwriters contended that, with regard to Cherbourg, the circumstances did not come within the principles in Rules A and C. In his view, the true construction of the contract was that the parties intended the Rules to bind them to the exclusion of any law of this or any other country, and Rules X. and XI. must be read with A and C. The intention of the Rules was to state the general principles and then to deal with specific items, not merely as illustrations but to say "and in particular" as provided in the numbered Rules.

So far as the expenses at Cherbourg were concerned, he held that they fell within either Rule X. (*a*), Rule X. (*b*), or Rule XI., and were also within A and C. The finding that the Makis was not in "immediate" danger at Cherbourg did not affect the position, for the arbitrator had already found that she was not fit to encounter the perils of the sea, and there was no need for the peril to be "immediate."

With regard to the expenses at Bordeaux, he held that none of the disputed items were within Rules X., XI., or XX. The claimant really relied on the second part of Rule X. (*b*), dealing with damage "by accident," but the accident there must, he thought, be one which put either the ship or the adventure in danger. To let in repair of accidental damage where there was no danger in operation would be contrary to the spirit of the Rules. Those expenses were not within Rule A or Rule X. (*b*).

The award would, therefore, be varied accordingly.

[Solicitors—Mr. R. A. H. Clyde ; Messrs. Ince, Colt, Ince and Roscoe.]

Prob., Divorce, and Adm. Div. (Lord Merrivale, P.) } 1928. July 16.

SHERWOOD v. SHERWOOD.*

Divorce—Decree absolute for wife—Permanent maintenance—Husband's disposable income—Calculation of tax.

In estimating the disposable income of a divorced husband in order to ascertain the amount of permanent maintenance to be paid to his former wife, deductions in respect of income-tax and supertax, allowable from his gross income, are the normal amount of such taxes chargeable against him. An abnormal income-tax charge made in a particular year in respect of much greater earnings in a previous period cannot be deducted from the gross income for the purpose of calculating the disposable income *in futuro*.

Dayrell-Steyning v. Dayrell-Steyning (38 *The Times* L.R., 898 ; [1922] P. 280) explained.

On July 29, 1927, the wife in this case was granted a decree *nisi* for the dissolution of her marriage on the ground of the husband's adultery. There were two children of the marriage, sons, born in June, 1915, and November, 1916, respectively, the custody of whom was granted to the petitioner. She was granted alimony *pendente lite* at the rate of £2,000 a year, and on December 14, 1927, presented a petition for permanent maintenance, in which she alleged that the respondent derived an income of £15,000 a year from his practice in curative processes, in addition to income from investments and the possession of certain other property. By his answer the respondent said that he had a net income of £6,153 10s. in 1925, £3,959 2s. in 1926, and £1,258 6s. in 1927 ; his income from investments was £1,090. By her reply the petitioner said that in 1923 the respondent made about £20,000, in 1924 over £19,000, and in 1925 nearly £14,000. The reason for the diminution in income was the respondent's illness, from which he had recovered.

The decree *nisi* was made absolute on February 20, 1928, and on May 25, 1928, the registrar made an order awarding the petitioner £600 a year free of tax, as maintenance for the joint lives of the parties, of which £400 a year, free of tax, was to be secured for her life on securities to be agreed. The registrar also ordered the respondent to pay to the petitioner £150 a year, free of tax, for the maintenance of each of the two children. The registrar gave his reasons for this award as follows : He found that the respondent's net income for 1927, derived from fees and from investments, after discharging tax and supertax and paying £400 as premium on an accident insurance policy, was £1,900. The petitioner had about £107 a year of her own. The respondent's gross income for 1927 was £7,500. The registrar explained in his report that, following *Dayrell-Steyning v. Dayrell-Steyning* (38 *The Times* L.R., 898 ; [1922] P. 280), he had allotted maintenance at the rate of one-third of the disposable amount of income which remained in the respondent's hands after paying the expenses of earning it. The petitioner took out a summons to vary the order of the registrar, and after hearing arguments in chambers Lord Merrivale adjourned the summons into court.

Mr. Noel Middleton appeared for the petitioner ; Mr. Cotes-Preedy, K.C., and Mr. Bush James were for the respondent.

LORD MERRIVALE, after detailing the facts above summarized, said that the questions were what was the maintenance proper to be ordered under the statute for the petitioner during the joint lives of her and her former husband, how much of that should be secured, and whether some provision should be made for the successful petitioner if she survived the respondent. It was the rule not to allot a sum to the petitioner out of the income received by the respondent in the past but to order a provision for her for the future. In order to ascertain, as far as might be done, what would be the respondent's income when the order should come into operation, regard was had to the income which he had enjoyed, at any rate in recent years. When the potential income was ascertained, so far as was practicable, the normal course was to allot about one-third of the expected income of the respondent (when the wife's income was nil or negligible) to the petitioner.

The PRESIDENT continued:—A difficulty arose before the learned registrar as to figures concerning the earnings of the respondent in a series of years, and it was argued that he had become liable to pay out of a typical year's income a very heavy amount in income-tax and supertax. The parties debated before the learned registrar the effect of the direction which was given by the Court in the case of *Dayrell-Steyning v. Dayrell-Steyning* (38 *The Times* L.R., 898 ; [1922] P., 280), which was to the effect that, in apportioning maintenance to a wife upon the principles on which the Court acts, the amount should be apportioned out of the disposable income of the husband, after meeting his liability for taxes, and that amount should come to the wife under the same conditions of freedom from taxes as affected the residue which remained in the hands of the husband ; that is, that one should not be paying a greater sum of tax out of a notional amount of income and providing the other with a disproportionate income, tax free. *Dayrell-Steyning v. Dayrell-Steyning* (*supra*) had no other effect than that, and I do not think the language in which the judgment in that case is expressed is reasonably capable of any other interpretation than that. It was said by reason of some possible construction of that direction that the position of the respondent here was exceptional in this way. He had a very large income in normal years, derived from exertions which required personal skill on his part, and a high degree of confidence on the part of the persons who put themselves in his hands for treatment. He was not a registered medical practitioner, but he was a practitioner in curative processes, and obviously his personal skill and the confidence that he inspired were material factors. It was also material that he should be in good health. By reason of ill-health his earning capacity ceased during a substantial time, and, no doubt, he was left with the prospect of relying to a very considerable extent upon the resources which he had saved and accumulated. He had at that time accumulated funds which, at any rate at the face value of the investments, represented a sum of between £30,000 and £40,000, but that had been a good deal reduced. In the years before 1926 the respondent was earning an income which was assessed for taxation at £17,000 or £18,000 annually.

* Reported by WILLIAM LATEY, Esq., Barrister-at-Law.

In 1926 that became greatly reduced, and the reduction continued during, at any rate, part of 1927. The income from earnings became little better than nominal as compared with the great earnings there had been. Then in 1927 the respondent's health improved, and it was agreed between the parties that he had quite recovered and was able to proceed to earn such an income as he had been accustomed to earn.

When the matter came before the learned registrar he had before him proof which he accepted, and about which the parties had not cavilled, that the taxable income of the respondent for the year 1927 would not be less than £7,500. That represented such earnings as he was able to make during that year and such income as he derived from investments. There was the one side of the account for the purpose of determining upon what basis the wife's maintenance in future should be computed. In the year 1927 the respondent was liable for income-tax and supertax to the amount of between £5,000 and £6,000, and acute conflict arose between the parties whether, basing the income for the calculation in future upon the earnings and income from investments for the year 1927, the registrar ought to deduct from the total income the amount payable by the respondent in that year in respect of income-tax and supertax. In view of the fact that it had to be determined what maintenance should be provided in future for the wife until further order it seems a startling proposition, but the husband's representatives contended before the registrar and before me that the income out of which the wife's maintenance was to be awarded was the residue of income remaining in 1927-28, after payment, or provision for payment, of the King's taxes which fell due in respect of that year, which left, of course, in that year a very small amount of total net income, something like £1,900.

It was argued for the wife that the calculation which is here made is a calculation which is to have future effect in determining what should be hereafter the maintenance allotted to the wife out of the income which is hereafter capable of being earned or is securable by the husband out of his investments. Before the registrar the respondent's contention prevailed, and the respondent, who had had past earnings at the rate of £15,000 to £20,000 a year, and had a prospect of having as good earnings for the future, was held to discharge his obligation towards the wife if he were ordered to pay her an income for the joint lives at the rate of £600 a year—a little less than a third of the residue of his normal income for 1927—and to secure £400 of that sum. Provision was made for each of the children at the rate of £150 per annum.

The question is whether the direction of the Court in *Dayrell-Steyning v. Dayrell-Steyning* (*supra*) properly has this result. That direction was that, for the purpose of computing the husband's income, a proportion of which, under the practice of the Court, would go to the wife, the husband's income should be regarded as the disposable amount which remains in his hands after he has provided the necessary expenses for earnings, including income-tax and supertax (at that time it included also excess profits duty). I cannot conceive that that direction can be supposed to have this startling result. The question here is what the husband is able to provide out of his earnings and income in future years for his wife by way of maintenance. How it affects that problem, that in a past year the husband, by reason of great earnings in years previously to that, should have been liable for income-tax which left him a small margin only out of his income in that year, I fail to understand.

It seems to me clear that a mistake has been made, and that the wife is entitled to an allotment of income out of such income as the respondent may be confidently expected to receive from year to year. Nobody professes to put that amount at less than £7,500 gross, *i.e.*, from investments and earnings. The question is, what allowance in respect of that is proper to be made by reason of the husband's obligation to meet taxes as they fall due from year to year. As far as one can see the taxes which fall due in this year, and which seem likely to fall due in coming years, do not amount to more than something under £2,200. That is the sum which must be deducted from the total income so that what may be apportioned shall be the disposable amount remaining in the husband's hands, or the balance of the £7,500 after providing for the taxes from year to year. The sum which is left is the sum of £5,300 a year. Assuming in favour of the husband that the provision for the maintenance of the children is a liability which ought to be taken into account, this leaves an income of £5,000 a year net after providing for taxes. If you take into account an income which it was said by the wife is derived from property, you still have a substantial sum in excess of £4,800 a year, and it seems to me that, applying the ordinary principles which are applied by the Court, the amount to be allotted to the wife should be a sum during the joint lives of £1,600 a year until further order.

As to the amount secured, that depends upon the property in the way of investments or otherwise. Some evidence was given before me on that matter, but it was shown that, notwithstanding changes in investments in recent times, there is still a capital value realizable in the market at the present time of very nearly £22,000, representing an income of nearer £1,100 than £1,000 a year. I see no hardship in confirming the order that there should be secured to the wife for her life the maintenance which the learned registrar's order provided, that is, maintenance at the rate of £400 a year. Looking at the matter as a whole, I do not see any reason for disturbing the terms of the order which provides for the maintenance for the time being of the children. The variation that I make in the order is to substitute for the allotted sum of £600 a year for their joint lives the amount of £1,600 a year, of which £400 will be secured to the wife for life.

On the application of counsel for the respondent leave was given to appeal on security being given for the petitioner's costs of appeal in any event.

[Solicitors—Messrs. Lewis and Lewis; Messrs. Croft and Russell.]

K.B. Div.
(Lord Hewart, C.J., Acton and Branson, JJ.) } 1928. July 19.

REX v. JUSTICES OF THE COUNTY OF LONDON—EX PARTE LOCKE, LANCASTER AND W. W. AND R. JOHNSON AND SONS, LIMITED, AND OTHERS.*

Rating—Metropolis—Quinquennial valuation—Appeal to quarter sessions—Congestion of business—Impossibility of hearing before date fixed by statute—Parties not ready—Dis-

* Reported by J. W. Hall, Esq., Barrister-at-Law.

cretion of quarter sessions to adjourn hearing —Valuation (Metropolis) Act, 1869 (32 and 33 Vict., c. 67), s. 42 (13).

By s. 42 (13) of the Valuation (Metropolis) Act, 1869, "The justices may hold the assessment sessions at any time after the 1st of February in the same year, which will enable them to determine all appeals (except where a valuation list or a valuation is ordered) before the ensuing 31st March."

Held, that when it is impossible for the justices to dispose of their list by March 31 they have jurisdiction after that date to hear an appeal of which notice was given at the proper time, and, if the parties are not ready for trial as soon as the justices are able to hear the appeal, the justices have a discretion to postpone the hearing so that they may have proper materials before them.

This was a rule *nisi* for a *certiorari* to bring up and quash a decision of the County of London Quarter Sessions, given on February 15, 1928, in an appeal by the Port of London Authority against the quinquennial valuation list of 1925 of the Poplar Assessment Committee in respect of the valuation of the Port of London Authority's docks in Poplar. The result of the appeal by the Port of London Authority was the reduction of the gross value from £310,580 to £130,000, and of the rateable value from £114,576 to £30,000, subject to a case being stated for the opinion of the Court. The main ground on which the rule was granted was that the decision of Quarter Sessions was given after March 31, 1926, contrary to the provisions of section 42 (13) of the Valuation (Metropolis) Act, 1869; or, alternatively, that if Quarter Sessions were entitled to hear quinquennial appeals after March 31 in the year in which such appeals were heard they could only do so where pressure of work involved that happening, and that, in the present case, adjournments of the hearing till 1928 were due entirely to arrangements made for the convenience of the parties to the appeal.

The rule was obtained at the instance of Messrs. Locke, Lancaster and W. W. and R. Johnson and Sons, Limited, Messrs. Hawkins and Tipton, Limited, and Mr. George James Loosemore, ratepayers of the Borough of Poplar. The following facts appeared from the affidavit filed on their behalf:—

(*a*) In the quinquennial valuation list made, signed, and deposited in 1925 by the Metropolitan Borough of Poplar, acting as Overseers of the Parish of Poplar, in accordance with the Valuation (Metropolis) Act, 1869, certain hereditaments occupied by the Port of London Authority in the parish were assessed at £310,580 gross and £114,576 rateable.

(*b*) The assessment committee of the Metropolitan Borough of Poplar, after hearing an objection to the list made by the Port of London Authority, affirmed the assessment and the list on or about December 3, 1925.

(*c*) On January 14, 1926, the Port of London Authority duly gave notice of appeal to the County of London Quarter Sessions.

(*d*) The appeal was duly entered, and the assessment committee gave notice of their intention to appear as respondents.

(*e*) On March 23, 1926, counsel for the appellants moved that the appeal should stand out of the list *sine die*. By consent, the motion was allowed.

(*f*) Thereafter, by agreement between the parties, the hearing was postponed, and in November, 1927, was still being postponed.

(*g*) In November, 1927, the parties discussed a date for the hearing, and on December 29, 1927, the Court purported to fix February 14 and 15, 1928.

(*h*) The delay in bringing on the hearing was entirely due to the action of the parties.

(*j*) On February 14 and 15, 1928, the Court purported to hear the appeal and reduced the assessment to £130,000 gross and £30,000 rateable.

The result would be that a sum of £124,797 would have to be repaid to the Port of London Authority (which had been paying rates on a rateable value of £90,000, the figure in the old valuation list) by the Borough Council of Poplar. That sum would have to be paid by the ratepayers and would involve a further rate of 3s. in the pound. The rates were already 24s. in the pound. Since 1926 a number of valuable hereditaments then rated had become and were still unoccupied and not rateable.

By section 42 of the Valuation (Metropolis) Act, 1869:—

"With respect to the times within which proceedings under this Act and the Acts incorporated herewith are to be done the following provisions shall have effect: that is to say. . . .

"(13) The justices may hold the assessment sessions at any time after the 1st of February in the same year, which will enable them to determine all appeals (except where a valuation list or a valuation is ordered) before the ensuing 31st March."

The Clerk to the County of London Quarter Sessions, in an affidavit, stated that Quarter Sessions, sitting as Assessment Sessions, did not sit in Quarter Sessions. Appeals were not entered for hearing at Quarter Sessions, and the Court had power under section 26 of the Valuation (Metropolis) Act, 1869, to adjourn from time to time. The limitations of time in the case of appeals to Quarter Sessions, as such, did not apply to appeals under that Act. Owing to the impossibility of hearing and determining all appeals by March 31, it had been the practice for many years not to force on the hearing of appeals where the investigation of facts and accounts of great length and complication were involved and the parties desired time for consideration. Even if the appeals were not settled, many questions of detail were agreed.

The present applicants had no *locus standi* before Quarter Sessions, and had no greater interest on which to found the application than all other ratepayers in the borough.

On numerous occasions the clerk, as he deposed, communicated with the solicitors to the parties with a view to fixing a date for the hearing. The Chairman accepted the reasons given as reasonable and proper for not putting the appeal in the list for hearing. The parties were in agreement as to the postponement, and the assessment committee would be estopped from taking the point now raised, but had supplied the applicants with particulars on which to base their application.

Ninety-nine appeals only were entered against the first valuation lists of 1870, over 3,000 against the 1920 list, and over 2,000 against the 1925 list, 36 of them from Poplar.

The provisions of the Act would be unworkable if the dates mentioned in it were held to be mandatory. It was impossible for all appeals to be heard before March 31. Under the Act they could not be heard before February 1, and Quarter Sessions had other business which had to be taken.

On March 23, 1926, this appeal, with others in which the Port of London Authority were appellants, relating to their hereditaments in other parishes, were ordered to stand over till the May sessions. On November 24, 1926, all the other appeals except the Poplar one were allowed by consent.

If £124,797 had to be repaid to the appellants they, as ratepayers, would have to bear their share of any increased rate. The delay had not prejudiced the applicants, for the net rateable value of the borough had increased by £2,935.

Mr. Whiteley, K.C., and Mr. E. H. Tindal Atkinson showed cause for the justices; Mr. Konstam, K.C., and Mr. E. H. Tindal Atkinson for the Port of London Authority; Mr. Scholefield, K.C., and Mr. H. A. Hill supported the rule. Mr. Sydney Turner and Mr. R. C. Lancaster attended on behalf of the Poplar Assessment Committee, but did not intervene in the argument.

Mr. WHITELEY said that Quarter Sessions were substituted for the old Assessment Sessions by the Local Government Act, 1888. The result was that, allowing for their other business, they had only about three weeks for hearing appeals before March 31. The Court of Appeal in *Reg. v. London Justices* (9 *The Times* L.R., 652; [1893] 2 Q.B., 476) held that the date was mandatory, subject to certain qualifications and practical limitations. If the delay were due to an extraordinary amount of business or other cause not within the control of the parties, the Court could hear the case at any time after March 31.

The LORD CHIEF JUSTICE observed that it was remarkable that there should have been no authority between 1893 and 1928.

Mr. KONSTAM submitted that when once it became impossible to hear all the appeals by March 31 the matter was at large, and the Court would not interfere with the discretion of Quarter Sessions.

He was stopped by the Court.

Mr. SCHOLEFIELD said that it was conceded that the scheme of the Act was to provide for the speedy disposal of appeals, and when one heard that this decision might involve an additional rate of 3s. in the pound one could realize the necessity for expedition. So far as the business of the Court was concerned, this case could have been heard a year or more before it was in fact heard.

The LORD CHIEF JUSTICE.—It is said against you that when once the statutory date is necessarily passed there is no further limitation.

Mr. SCHOLEFIELD.—My contention is that the jurisdiction extends so long as the necessity exists, and that means the necessity of the Court, not the wishes of the parties. Here the Court was urging the parties to fix a date for trial.

Mr. JUSTICE ACTON.—Surely the law must mean that there must be time for a proper and adequate trial by March 31, and if the parties say—and say reasonably—"We cannot be ready for trial by that date," is not that an impossibility in the sense of an impossibility of a proper trial?

Mr. SCHOLEFIELD.—I submit not. The power of adjournment in the Act is expressly limited to a date before March 31.

Mr. HILL followed, and contended that, inasmuch as the jurisdiction of Quarter Sessions was dependent on statute, its powers of adjournment were dependent on statute, and section 34 of the Valuation (Metropolis) Act, 1869, had cut down the general power of adjournment.

Mr. HILL submitted that the power of sessions to adjourn beyond March 31 depended on the application of the maxim *Lex non cogit ad impossibilia*, and, as soon as it became possible to hear, the jurisdiction to adjourn further was gone.

The LORD CHIEF JUSTICE.—"Possible to hear" must mean "possible to hear adequately."

The LORD CHIEF JUSTICE (Lord Hewart), in giving judgment, said that on January 14, 1926, notice of appeal was duly given by the Port of London Authority against the assessment of certain hereditaments in the quinquennial valuation of 1925. On February 1 the case for the appellants was lodged and on February 20 the case for the respondents was lodged. On March 23 the Court of Quarter Sessions allowed the appeal to stand over till May. On that date it was common ground that there was a number of appeals in the neighbourhood of 2,000 pending, of which over 400 were disposed of by March 31. The appeal of the Port of London Authority was disposed of on February 14 and 15, 1928, and the assessment was reduced subject to a case to be stated. It was in these circumstances that the applicants for the rule argued that the order so made in February, 1928, was *ultra vires* and void.

That contention was based on the provisions of section 42 (13) of the Valuation (Metropolis) Act, 1869, and other sections of that statute were referred to for the purpose of enforcing the argument that according to the scheme of the legislation these appeals were intended to be disposed of by March 31 of the year in which they arose. It was said that if delay occurred the sins of the fathers were not exactly visited on the children, but that at least the delay of the rating authorities resulted in unequal distribution of rates among ratepayers of different years. It was argued that only necessity could justify the postponement of the case beyond March 31. Much had been said upon the doctrine of necessity, but it was difficult to see how necessity was to work equally between those at the top and those at the bottom of the list.

Aequa lege necessitas
Sortitur insignes et imos.

The matter had been considered in *Reg. v. London Justices* (9 *The Times* L.R., 652; [1893] 2 Q.B., 476), and it was significant that in 35 years there had been no subsequent decision. The Court was informed that the practice here complained of had been consistently followed during these 35 years. In that case Lord Esher, M.R., stated that the limitation was not "merely directory" and said at p. 488:—

"I think it is imperative; but I shall have presently to state what practical limitation or explanation I think can be put upon it; but I think it is a limitation of time enacted, and imperatively enacted, by the statute. . . . This Act must be read as all enactments are, subject to their not being made absurd by matters which never could have been within the calculation or consideration of the Legislature, and I think we must say that the Act is satisfied if the parties have entered their appeal within such a time as, according to the ordinary practice of the Court, would enable that particular case to be heard and determined by March 30, and that therefore the glut of business in the Court, and the inability of the Court to cope with it, is not to be brought into play against the parties, who, as far as they are concerned, have obeyed the imperative enactment of the statute by putting down their appeal at a time which would enable the Court, according to its ordinary course of practice, to hear and determine the case by March 30."

Similar language was used by Lord Justice Bowen

and Lord Justice Kay. Indeed, while Lord Esher regarded the language as imperative, Lord Justice Bowen regarded it as having a midway position between imperative and directory, and Lord Justice Kay regarded it as directory only. But the judgment of Lord Esher might be taken as having settled the law.

In the present case it was common ground that these conditions were duly fulfilled. It was common ground that it was impossible for the Court to dispose of its list by March 31, and the Court had the uncontradicted evidence of the clerk to the Court of Quarter Sessions that

"The Court of Quarter Sessions did not allow time to pass by without seeking to bring the appeal to hearing, but was always ready and willing to hear the appeal. The Court from time to time had to consider and did consider the reasons for delay, and exercised its discretion in allowing postponements and ultimately fixing the date of hearing."

In his Lordship's opinion, when once the conditions prescribed by the Act were satisfied in the manner explained by Lord Esher, and a postponement of the hearing to a date beyond March 31 had taken place, it became a question for the discretion of Quarter Sessions to fix a date when the hearing was to take place. It seemed to him idle to suggest that some sort of hearing might have taken place before February, 1928. The hearing required was a proper hearing on proper materials, and when the Court had exercised its discretion in granting adjournments so that proper materials might be before it, the High Court could not embark on the insoluble problem whether, on each occasion, on the materials before it, the discretion of Quarter Sessions was exercised in an ideal manner.

In this case there was no ground for the suggestion that Quarter Sessions had no jurisdiction or that its order was void.

MR. JUSTICE ACTON and MR. JUSTICE BRANSON agreed.

[Solicitors—Messrs. E. W. and Bruce Beal ; Mr. J. D. Ritchie ; Messrs. Charles G. Bradshaw and Waterson ; Mr. W. H. Thompson.]

House of Lords.
(Lord Buckmaster, Viscount Dunedin, Lord Phillimore, Lord Blanesburgh, and Lord Warrington of Clyffe.) 1928. July 18.

ENGELKE v. MUSMANN.*

International Law — Diplomatic privilege — Action to recover rent—Entry of appearance under protest—Plea of privilege by defendant —Consular secretary attached to German Embassy—Intervention of Attorney-General on behalf of Foreign Office.

In an action for arrears of rent due under a lease of a dwelling-house the defendant entered a conditional appearance under protest, and pleaded that being an official of the German Embassy he was protected by diplomatic privilege. It appeared that he was a "consular secretary" formerly working at the German Consulate, but that he had been transferred to the German Embassy. The Attorney-General upon the instructions of the Foreign Office appeared and informed the Court that the defendant was recognized by the Foreign Office as being on a list comprising the suite of the German Ambassador.

Held, that the statement of the Attorney-General on the instructions of the Foreign Office as to the status of a person claiming diplomatic privilege was conclusive.

Decision of the Court of Appeal (43 *The Times* L.R., 685 ; [1928] 1 K.B., 90) reversed.

This was an appeal from an order of the Court of Appeal (43 *The Times* L.R., 685 ; [1928] 1 K.B., 90) affirming, by a majority, an order of Mr. Justice Shearman, in Chambers, whereby an appeal from a refusal of the Master to order the appellant to be cross-examined on certain affidavits put in by him in support of a claim for immunity from civil process on the ground that he was in the service of the German Ambassador was allowed and the appellant was ordered to attend for cross-examination.

The questions raised by the appeal were (1) whether a statement by the Attorney-General on the instructions of the Foreign Office as to the status of a person claiming diplomatic privilege was conclusive ; and (2) whether, having regard to the materials available in the Courts below, the appellant, who claimed diplomatic immunity from civil process, should be ordered to be cross-examined in the Courts of this country on the affidavits in which his claim was preferred.

The facts sufficiently appear from the judgment of Lord Buckmaster.

Mr. Jowitt, K.C., Mr. Pritt, K.C., and Mr. W. T. Monckton appeared for the appellant ; Mr. Ritter for the respondent ; and the Attorney-General (Sir Thomas Inskip, K.C.) and Mr. Drucquer for the Attorney-General.

LORD BUCKMASTER.—My Lords, the privilege affording ambassadors and other accredited representatives of foreign countries immunity from all writs and processes is an ancient doctrine of the common law declared in terms by the Diplomatic Privileges Act, 1708 (7 Anne, c. 12).

No question is raised on this appeal affecting the existence or the extent of this protection. The sole point for determination is the method by which the status of any person who claims the benefit of this privilege is to be determined. For the appellant it is contended that the statement of the Attorney-General on the instructions of the Foreign Office is for this purpose conclusive, while the respondent asserts that any such dispute should be determined in the ordinary way according to the usual rules of evidence. The present appeal arises out of the following circumstances : On July 28, 1926, the respondent issued a writ in the King's Bench Division of the High Court claiming against the defendant rent alleged to be due under a lease dated August 18, 1924, and damages for breach of covenant. A conditional appearance was entered by the defendant and a summons was issued by him asking that the writ might be set aside on the ground that he had been a consular secretary on the staff of the German Embassy, London, since November 25, 1920, and had been notified as such to the British Foreign Office and that his name appeared in the Diplomatic List issued by the British Foreign Office. It is unnecessary to follow the varying fate of this application before the Master and the Judge for,

* Reported by H. B. HEMMING, Esq., Barrister-at-Law.

pursuant to leave, another summons was issued by the appellant on October 26, 1926, asking the same relief as before. On this application, as on the former, the appellant filed an affidavit ; prolonged and fruitless proceedings in Chambers ensued until, finally, on March 4, 1927—eight months after the issue of the writ—Mr. Justice Shearman made an order that the appellant should attend for cross-examination on his affidavit, at the same time granting leave to appeal against his order. The appellant availed himself of this permission and appealed to the Court of Appeal, who, on June 23, 1927, confirmed the order of Mr. Justice Shearman, the Master of the Rolls dissenting, and from their judgment this appeal has been brought. In form, therefore, this appeal is against an order for cross-examination, but in substance the dispute is far more important.

On the first day of the hearing of the appeal the Attorney-General informed the Court on their invitation that the defendant "has been appointed as a member of the staff of the German Ambassador under the style of consular secretary and has been received in that capacity by the British Government. His name has been submitted to the Foreign Office by the Ambassador in the usual way, and his position as a member of the Embassy is, and has been since December, 1920, recognized without reservation or condition of any sort. He has been engaged, during the last 12 months at any rate, as a member of the staff of the commercial division of the Embassy. As such he has been obliged to take part from time to time in the general work of the Embassy staff, and particularly as regards the ciphering and deciphering of telegrams, that is, telegrams between the German Ambassador and his Government. He is responsible in all that he does to the German Ambassador." He further added that he had himself communicated with the Foreign Office, had ascertained and accepted and was able to say that he was satisfied that the information was correct as to the defendant's position at all relevant dates. If this statement as to status be accepted, no question arises upon the construction of the statute ; the defendant would then be entitled to the benefit of the privilege that he invokes. Lord Justice Scrutton, with whom Lord Justice Sargant agreed, felt himself unable to accept this statement as binding ; to do so would, in his opinion, be contrary to principle and unsupported by authority. I find myself unable to agree with this conclusion.

So far as the question of principle is concerned, the case decided in this House of *Duff Development Company v. Government of Kelantan* (40 *The Times* L.R., 566 ; [1924] A.C., 797) is a clear authority that the method of proving status either of sovereigns, or of the ambassadors who are their representatives, is by the very method that is challenged in the present case. The statute, however, draws no distinction between the ambassador and what, in the language of the Act of Parliament, is described as the "domestic or domestic servant of any such ambassador," and it seems difficult to understand, when the principle is admitted in regard to the one, that it should not apply in relation to the other ; for the privilege is the same in each case. With regard to the sovereignty of a particular State and whether or not a particular person is a sovereign ruler, the case referred to makes the general principle plain. As Lord Finlay said, at page 813 :—

"It has long been settled on any question of the status of any foreign power, the proper course is that the Court should apply to His Majesty's Government, and that in any such matter it is bound to act on the information given to them through the proper department. Such information is not in the nature of evidence ; it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognizance."

Lord Dunedin expressed the same opinion in these words, at page 820 :—

"It seems to me that once you trace the doctrine for the freedom of a foreign sovereign from interference by the Courts of other nations to comity, you necessarily concede that the home sovereign has in him the only power and right of recognition."

Now the acceptance and recognition of persons who form the staff of an ambassador are matters which, having regard to the practice in the conduct of foreign affairs, are equally based on the comity of nations and necessarily also within the cognizance of the Crown acting through the Foreign Office. They are in a position to know what are the duties performed and the persons who perform them, and it is plain that, though they trust the list put forward if it appears from their knowledge to be a list which might reasonably be accepted, yet the list itself is scrutinized, inquiries are made and, if necessary, persons are removed for sufficient reasons. That some such practice is contemplated under the Act itself is plain from the section which provides that no person shall be proceeded against for the arrest of a servant of the ambassador unless his name shall have been registered in the office of one of the principal Secretaries of State and transmitted to the Sheriffs of London and Middlesex, who are to hang the list up in some public place. This, of course, is a negative provision and does not show that the list should be accepted as evidence ; but it does contemplate the preparation of a list of persons for whom immunity is claimed and its publication in the manner therein provided. The list is not conclusive, nor is it the list itself on which reliance is to be placed, but on the statement of the Crown, speaking through the Attorney-General, that a particular person at the critical moment is qualified to be upon the list. When this statement has been made it is difficult to see how it can be questioned without the introduction of proceedings which in the person of the ambassador himself, and equally of his wife and family and staff, it would obviously be undesirable to institute.

But apart from the question of principle, it appears to me that there is valuable information to be found in the authorities. In the case of *Crosse v. Talbot* (8 Mod. Rep., 288) a question arose whether a particular person was on the staff of the Duke of Holstein's Resident here, and a certificate was produced that he was the *valet de chambre* of such Resident at certain wages. The Court, however, held that he appeared to be a mere nominal servant and that he consequently was not within the privilege, but the certificate of the Resident as to what his status actually was does not appear to have been challenged. In cases like *Seacomb v. Bowlney* (1 Wilson, 20), and *Triquet v. Bath* (3 Burr., 1478), the dispute was, in fact, tried upon affidavit and the only questions determined were whether these affidavits showed that the status was adequate to secure the protection. The latter case is interesting because it explains the origin of the passing of the statute of Anne. In *Heathfield v. Chilton* (4 Burr., 2015), the dispute was as to whether the person in whose service the defendant, who had been arrested was, was himself within the privilege. Lord Mansfield there said: "The application is not by the Attorney-General. . . That indeed would have shown that the Crown thought this person entitled to the character of a public minister. It now remains uncertain what his proper

character is." Lord Mansfield also added that the registration of a particular person's name in the Secretary of State's office was not a condition precedent to his right of protection. In the case of *Fisher v. Begrez* (1 Cr. and M., 117), the question was whether a chorister was within the protection, and it was there held that the certificate itself was not a sufficient authority that the defendant was, as a chorister, a domestic servant, and therefore privileged.

Beyond this, the earlier cases throw little light upon the question, and this is possibly due to the fact that in all those cases, the defendant being the subject of arrest, application was immediately made on affidavit for his release ; and that the matter could be tried by affidavit, if no intervention took place and if the defendant so liked, is not in dispute. The later cases are more instructive.

In *Macartney v. Garbutt* (6 *The Times* L.R., 214; 24 Q.B.D., 368) a question arose whether a British subject accredited to Great Britain by a foreign government as a member of its Embassy was liable to distress on the furniture of his house for rent. Such distress had been levied and had been paid out by the plaintiff, who brought an action to recover back the sum. In the course of his judgment, Mr. Justice Mathew said that the plaintiff was an English subject, had been appointed by the Chinese Government English secretary to the Chinese Embassy, and had been received in that capacity by the British Government ; his name had been submitted to the Foreign Office in the usual way, and his position as a member of the Embassy recognized without reservation or condition of any sort. He would, therefore, seem to be clearly entitled to the privileges of the *Corps Diplomatique*. The importance of this statement is that the learned Judge bases his judgment upon the reception of the person as Secretary by the British Government, the submission of his name to the Foreign Office and his recognition by them. Now those circumstances could only be proved either by a person speaking on behalf of the Crown, as representing the Foreign Office, or by such person giving evidence and being subject to cross-examination, but, as soon as the matter is based upon the reception and recognition by the Foreign Office, it seems impossible to suggest a reason why such recognition should be good in the case of the Ambassador and bad in the case of his staff.

In the case of *The Parlement Belge* (5 P.D., 197) there is a very important statement by Lord Justice James. Lord Justice Brett appears to have doubted whether the recognition of an ambassador by the Crown could be accepted if the person in question had not, in fact, been sent as an ambassador, but Lord Justice James states (at p. 199) that that question is outside the authority of any municipal court, and adds: "I apprehend that we should be bound to act on the representation of the Foreign Office." And, in *In re Suarez* (34 *The Times* L.R., 127 ; [1918] 1 Ch., 176), it was decided in the Court of Appeal that a letter from the Foreign Office under the hand of an Assistant Secretary of State, stating that a Minister's name has been removed from the diplomatic list, is sufficient evidence that he had ceased to hold diplomatic office at the date of the letter.

It is, of course, obvious that the privilege claimed has serious results, as it excludes from their remedies in the Courts the persons with whom members of the ambassador's staff may have incurred obligations, and it is possible that it is open to abuse. It is of the essence of all privilege that it may be abused, but that question has nothing to do with the matter which we are called upon to decide ; the merits of the dispute out of which this question has arisen are in no way before us for consideration. The privilege itself depends upon maintaining the obligations of international law and the comity of nations. It would, indeed, be unfortunate if, after recognition had been afforded by His Majesty through the Foreign Office to persons as holding on the ambassadorial staff posts which entitled them to the privilege and after a statement as to their position had been afforded on behalf of the Crown through the Attorney-General, it was to be disregarded by the judiciary ; for, in such circumstances, the ensuing contest could not possibly enure to the public good.

Viscount Dunedin.—My Lords, I entirely concur with what has been said by the noble and learned lord on the Woolsack as to the unfortunate way in which this case was begun. Had the question remained merely as to whether the cross-examination was permissible upon an affidavit in which the appellant set forth his own status, I should have been of opinion with the Court below. But, in truth, the whole case was altered *funditus* when the Attorney-General intervened.

The respondent tried to convince us that, if this case was decided in favour of the appellant, it was opening the door to the granting of diplomatic privilege to the Consular Service. It is nothing of the sort. Mr. Engelke will enjoy diplomatic privilege not because he is styled Consular Secretary, but because he, as an accredited member of the Ambassador's household, has privilege as such and does not forfeit it because he does some consular work. In the case of *Duff Development Co. v. Kelantan Government* (40 *The Times* L.R., 566 ; [1924] A.C. 797), in this House it was pointed out that the acknowledgment of diplomatic privilege entitling to immunity from being sued in the tribunals of this country rests on comity, and that the Statute of Anne does no more than confirm the Common Law and annex certain penalties to those who transgress it. Mr. Engelke is, in the words of the statute, "a domestic of the Ambassador." In the Oxford Dictionary "domestic" as a substantive is defined as "a member of the household, one who dwells in the house, an inmate" ; and there is a quotation of 1656, "from that time he had his accesses to His Majesty's person as a domestique without ceremony." To prove that he is so rests on the fact that it has been brought to the notice of the Court through the Attorney-General, as the mouthpiece of the Foreign Office, that Mr. Engelke was presented to the Foreign Office as belonging to the personal staff of the Ambassador in the list supplied by him to the Foreign Office and accepted as such by the Foreign Office. In such a case the comment which I made in *Duff's* case (*supra*), and which I think was quoted by the Master of the Rolls, seems to me directly in point. The Attorney-General, in his very careful statement, shows that the acceptance of the list is no matter of necessity, but that it is subjected to careful scrutiny. This seems to me to obviate the possibility of abuse, or of such an extension of privilege as the inclusion of the whole consular service. The judgment of the Court of Appeal should be reversed and a declaration made that the appellant is entitled to diplomatic privilege.

Lord Phillimore.—My Lords, The plaintiff in this case brought an action claiming certain relief against the defendant in respect of the lease of a

house. The defendant, who claims diplomatic privilege as one of the staff of the German Embassy, entered a conditional appearance and took out a summons for an order that the writ be set aside. In support of this summons he filed an affidavit by his solicitor, speaking partly to the deponent's own knowledge, but mainly upon information and belief. This affidavit was rejected, perhaps unfortunately, by Mr. Justice Talbot as being insufficient even to raise the point. Thereupon, the defendant filed his own affidavit, and then a further affidavit on his own behalf, and the plaintiff being minded to contest the accuracy of the statements contained in these affidavits applied to cross-examine the defendant upon them. The defendant, upon the instructions of the Ambassador declined to submit himself to cross-examination and after the matter had been to and fro in a not very edifying series of applications to Master and Judge it came before the Court of Apeal.

Before that Court the Attorney-General appeared, instructed by the Foreign Office, to give certain information as to the status of the defendant, and after he had given that information, the Court nevertheless, by a majority, affirmed the decision of the Judge at Chambers directing that the defendant should attend for the purpose of cross-examination. It is from this order of the Court of Appeal that the appeal has now been brought to your Lordships' House.

The description which the defendant gave of himself and which has been given of him by the Foreign Office is, that he is a consular secretary on the staff of the German Ambassador, and the argument for the plaintiff rested on the expression "consular" with a suggestion that an attempt was being made to get diplomatic privileges for a person who was not truly diplomatic but only in the consular service. For reasons which will appear in the course of this opinion, it is not necessary to go very deeply into this point, but I may observe that the positions of diplomat and consular *employé* are not mutually exclusive, and that indeed it has been in the past not uncommon to clothe a consul or consul-general with certain diplomatic functions and thereby to give him a diplomatic status. But the question before your Lordships turns on other matters.

If this case now turned upon the question whether the defendant should be cross-examined upon his affidavit or not, it may be that the result would be unfavourable to him. Where an application is made to stop a suit *in limine* and the application rests upon a disputed matter of fact, it would be right that the evidence should be scrutinized. On the other hand, where an applicant is claiming that he is privileged from litigation it seems a strange result if he is forced to litigate in order to obtain his exemption from litigation.

But as the defendant is now content to rely solely upon the certificate of the Foreign Office delivered to the Court by the Attorney-General, it is unnecessary to consider the question of cross-examination.

The objection taken on behalf of the plaintiff to the reception of this certificate and the criticism of its weight seem to me to rest upon misapprehensions as to the nature of diplomatic privilege.

By international law, which is part of the common law of this country, an Ambassador, by which term I intend to include diplomatic agents of all sorts—the stately Ambassador, in the restricted sense of the word, the special envoy, the resident Minister, and the Chargé d'Affaires—is sent by the one country and received by the other upon the terms that he has among his other diplomatic privileges immunity from legal process in the Courts of the country which receives him. The reasons for this immunity are well expressed in *Magdalena Steam Navigation Co. v. Martin* (2 El. and El., 94).

This immunity, being accorded to him in order that he may transact his Sovereign's business, is a privilege which he cannot waive unless under direction from his Sovereign.

The Ambassador further requires, in order that he may effectually do his Sovereign's business, that there should be a like immunity for his personal family, that is to say, his wife and his children, if living with him, his diplomatic family, as it is sometimes called, that is to say, his counsellors, secretaries and clerks, whom I take to be intended by the word "domestic" in the Statute of Anne, and his ordinary servants, described in the statute as "domestic servants," with a possible reservation in the case of domestic servants who are nationals of the receiving country. The privilege of all these persons is a derived privilege, created for the benefit of the Ambassador, and may be waived by him, but should, unless waived, be taken by them for the Ambassador's benefit.

But just as the receiving State may intimate that a proposed Ambassador will not be agreeable to it, and will be refused, so if the Ambassador tenders a person as a domestic or domestic servant, the receiving State may refuse to accept and recognize the man as such, and when the person tendered is a subject of the receiving country, conditions may be made. In old days, a resident Minister or Chargé d'Affaires was not infrequently a subject of the receiving country, distinguished from an envoy who, as the derivation of the word shows, would be sent from the one country to the other. I take it that in living memory our business at the Court of the ruler of Afghanistan was conducted on this footing. But generally now, the Ambassador is a subject of the sending and not of the receiving country, and is therefore said to be extra-territorial. But his domestic servants, or some of them, will almost certainly be subjects of the receiving country, and in certain cases some members of the staff may be drawn from the receiving country. The case of *Macartney v. Garbutt* (6 *The Times* L.R., 214; 24 Q.B.D., 368) affords such an instance. Sir Halliday Macartney was appointed English secretary to the Chinese Legation and, as the case narrates, his appointment was communicated to and accepted by the Foreign Office without conditions, though, as he was a British subject, it might have been made subject to the condition that no privilege was claimed for him. The Siamese Legation has had, to my knowledge, similar English secretaries, but whether they were accepted by the Foreign Office conditionally or unconditionally I know not.

When we come to the ordinary domestic servant, it may well be that, if he be a British subject, the Foreign Office may intimate that they cannot accept him so as to give him privilege. But according to English law (which may in respect of the domestic servant who is a national go somewhat beyond general international law), when once the man is tendered as a domestic or as a domestic servant, and the tender is accepted, the status is created and the privilege attaches.

When therefore the certificate from the Foreign Office was delivered by the Attorney-General, it was not, as suggested on behalf of the plaintiff, a piece of hearsay evidence, a mere narrative of what the Ambassador had told the Foreign Office. It was a statement of what the Secretary of State, on behalf of His Majesty, had done, not what he was doing

ad hoc, or what he was believing and repeating, but what the Foreign Office had done. The certificate is no attempt on the part of the Executive to interfere with the Judiciary of the country. The status which gives the privilege has been already created by the Crown in virtue of its prerogative in order to administer its relations with a foreign country in accordance with international law.

For the plaintiff, reliance was not unnaturally placed upon a number of cases, principally in the 18th century, where privilege was asserted by an application to discharge the defendant, supported by an affidavit of the facts, whether made by or on behalf of the defendant ; and it was submitted that this was the only way in which the status (except in the case of the actual Ambassador) could be proved, with a further submission that the proper consequence would be that the deponent might be cross-examined. It would seem that the privilege might be claimed and proved in this manner, but there were reasons for this procedure which no longer exist, and there are objections to it in principle which seem to me to make it a less desirable course.

In these 18th century cases, the defendant seems always to have been a British subject. I should gather that in most of them he was not on the Sheriff's list, and I would insist upon this, not because of the direct importance of the list, but because he would have been on the list if he had been made known to the Foreign Office, and accepted as one of the Ambassador's retinue, and it follows, therefore, that he never had been tendered and accepted, and was reduced to proving his privilege in fact by showing his service.

My next observation would be that, according to the procedure of those days, process was initiated by arrest of the person, and that a defendant had perforce to submit so far to the jurisdiction as to procure his release by giving bail. Further, I would observe that counsel have told your Lordships that the result of their researches is that cross-examination upon affidavit was an unknown form of procedure till introduced by the Chancery Procedure Act of 1852, so that the affidavit of the 18th century was merely a solemn mode of making a claim. It was indeed the only way, as far as I know the old procedure, because I conceive that a suggestion on the roll would not be applicable, and that the only form of process would be by a rule *nisi* supported by affidavit.

Such defendants, not having been made known to the Secretary of State, could not well expect to have the benefit of the procedure suggested by Lord Mansfield in *Heathfield v. Chilton* (4 Burr., 2015). I quote his words: "I find this is not an application by the Attorney-General, by the direction and at the expense of the Crown. That, indeed, would have shewn that the Crown thought this person intituled to the character of a public minister."

The case of *Fisher v. Begrez* (1 Cr. and M., 117) is perhaps the most favourable to the plaintiff. There the claim of privilege was disallowed, and there are expressions in the report to the effect that the certificate from the Secretary of State was not conclusive ; but what is referred to is not a real certificate, but the Sheriff's list, and the reason given is that a man may well have been put on the list as being at the time in the suite of an Ambassador, and yet be no longer in that capacity. There was not, as in this case, a certificate *de praesenti*. It may be further noticed that the claim for privilege was made in respect of a writ of *fi. fa.*, so that the case must have proceeded to judgment without any such claim having been made, and it seems to have been an afterthought.

The case of the Russian Ambassador, which led to the Statute 7 Anne, c. 12, is related by Lord Mansfield in the case of *Triquet v. Bath* (3 Burr., 1478), and is given more at length in Blackstone's commentaries, 2nd ed., Vol. 2. p. 255, repeated by Stephen. Blackstone got his account from *Boyer's Annals*, to which I have referred. Lord Mansfield, following, I think, the train of thought which he expressed later in *Heathfield v. Chilton* (*supra*), seems rather to complain that in that case there was no direct intervention by the Attorney-General. He observes as follows: "If proper application had been immediately made for his discharge from the arrest, the matter might and doubtless would have been set right. Instead of that, bail was put in, before any complaint was made." I do not, however, know what the unfortunate Ambassador could have done. His carriage was stopped, he was dragged out of it with violence and taken to a sponging house, where he had to remain till two distinguished persons put in bail for him. He then went straight to the Queen to complain, and the whole diplomatic corps joined in protesting, whereupon the delinquents were summoned before the Privy Council, of which it is stated that the Lord Chief Justice Holt was sworn a member, apparently in order that he might sit. One of the persons complained of was discharged, but the rest were committed to prison, and the Attorney-General was directed to file an information against them, on which they were convicted, judgment being reserved, in order to consider the international law ; but the Czar having been mollified by the passing of the Act of Parliament, and the presentation of an elaborately engrossed copy, desired that they should not be punished, and they were accordingly released.

It does not appear that any steps were taken to vacate the bail bond or dismiss the suit. Probably, any such step was deemed unnecessary. There was intervention by the Crown, but after a different fashion.

I have already observed that in my judgment there are objections in principle against driving a defendant to the course adopted in the 18th century cases. The object to be attained is immunity from the vexation of litigation with its impediments to the discharge of the functions of the domestic or domestic servant, as illustrated in the case of *Magdalena Steam Navigation Company v. Martin* (*supra*). Absolute freedom is difficult to procure. Litigation, as Lord Justice Mellish observed in *Ex parte Edwards* (L.R., 9 Ch. 138), usually begins *ex parte*, and a defendant served with a writ must enter an appearance, even if it be only a conditional appearance, or he will have judgment against him, and he must follow up appearance by a summons to set aside the writ. All this is unfortunate, and is intended to be provided against in our country by the Statute of Anne and the Sheriff's list. But the only compensation, if it be compensation, is to give the defendant his costs. If possible, there should be no further interference with him, but if he is put to file an affidavit it is a further step in *de facto* submission. If he has to attend for cross-examination, it is a further submission and not unlikely to interfere with the discharge of his other duties. Where the man's chief has not taken the precaution of tendering the man and procuring his acceptance, the man may still have to prove his status *aliunde*. But where the man has been tendered and accepted, the joint act creates a status, which can only be removed

by showing that his duties have ceased or that he has engaged in trade.

My Lords, if I am not mistaken, when a question arises in the Law Courts as to whether a ruler is a Sovereign, and a proper Secretary of State is consulted, the right answer is not "A.B. is a Sovereign," but "A.B. is recognized by his Majesty as a Sovereign." So, I think, the exact inquiry in this case is not whether the defendant is a member of the ambassadorial staff but whether he has been accepted and recognized by the Crown as such a member, and it appears to me that he has so been.

Therefore, my Lords, I think that this appeal should be allowed.

LORD WARRINGTON OF CLYFFE.—My Lords, the appellant is defendant in an action brought against him by the respondent Musmann for the recovery of rents and damages for breach of covenants contained in a lease dated August 18, 1924, made between the respondent of the one part and the appellant of the other part of certain premises at Hampstead.

The appellant having entered a conditional appearance applied to have the writ and all subsequent proceedings set aside on the ground that he is a consular secretary on the staff of the German Embassy and, therefore, entitled to immunity from civil proceedings.

In support of this application he filed affidavits stating the nature of his employment and making the claim to immunity.

On March 4, 1927, Mr. Justice Shearman, on an appeal from a decision of Master Moseley, given in Chambers on February 15, 1927, ordered the appellant to attend for cross-examination, but gave leave to appeal.

The appeal came before the Court of Appeal on April 12 and May 30 and 31, 1927. The Attorney-General attended and at the request of the Court informed them that the appellant had been appointed a member of the staff of the German Embassy, under the style of consular secretary, and had been received in that capacity by the British Government, that his name had been submitted to the Foreign Office by the German Ambassador in the usual way, and that his position as a member of the Embassy was and had been since December, 1920, recognized without reservation or condition of any sort. He gave the Court certain further information as to the particulars of the appellant's employment which it is not necessary to state in detail, and stated that he gave the information both on the instructions of the Foreign Office and on his own responsibility as Attorney-General.

On June 23, 1927, the Court of Appeal by a majority (Lords Justices Scrutton and Sargant—the Master of the Rolls dissenting) made an order affirming the order of Mr. Justice Shearman. This is an appeal from that order.

On November 25, 1927, the Attorney-General lodged a petition to this House praying leave to intervene in this appeal and to lodge a case and to be heard thereon. The prayer of this petition was granted by the Appeal Committee, reserving to the respondent Musmann the right to take on the hearing of the appeal such preliminary objection to the Attorney-General being heard as he might be advised.

The Attorney-General accordingly lodged a case and appeared before your Lordships, but the respondent objecting to his being heard, and the Attorney-General stating that the printed case contained all that he desired to say, he did not address any argument to your Lordships.

The real question, therefore, and it is an important one, is whether in such a case information given by the Attorney-General in the circumstances stated above as to the diplomatic status of a person claiming immunity from civil process is conclusive as to the fact of such status. If it is, then cross-examination on an affidavit with the object of displacing the effect of the information would be irrelevant and useless and ought to be refused.

It must be borne in mind that all that is directly in issue is the fact of the appellant's status. Whether, that fact being established, a defendant is entitled to the immunity that he claims is a further question, which might have to be determined by the Court. In the present case, however, it does not appear that there is in issue any question of law or fact other than that of status.

It is now well settled that in certain matters connected with our relations with Foreign States it is for the Court to take judicial notice of the facts relating thereto, and further that in all matters of which the Court takes judicial cognizance the Court may have recourse to any proper source of information, and there is no question that in such a case as the present the source of information actually applied to was the proper source.

The information so obtained is not in the nature of evidence ; it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognizance, and the Court is bound to act on such a statement. (See the opinion of Lord Finlay in *Duff Development Co. v. Kelantan Government* (40 *The Times* L.R., 566 ; [1924] A.C., 797, at p. 813).

It is admitted that amongst the matters of which the Court is bound to take judicial cognizance are the status of an Ambassador himself and even that of a mere chargé d'affaires. In the case of *Macartney v. Garbutt* (6 *The Times* L.R., 214 ; 24 Q.B.D., 368) it would seem, though it is not quite clear, that the Court acted on information obtained from a Government Department, in that case the Home Secretary, as to the status of the English Secretary of the Chinese Embassy. But when once it is established, and I think it is, that the Court takes judicial cognizance of the status of any member of a Foreign Embassy, it is impossible on any principle to draw a distinction between one class of member and another and to say that the rule applies to the first and not to the second.

The Attorney-General states explicitly in paragraph 26 of his case that it is a necessary part of his Majesty's prerogative in his conduct of foreign affairs and his relations with foreign States and their representatives to accord or refuse recognition to any person as a member of a foreign ambassador's staff exercising diplomatic functions. The fact of recognition is of course peculiarly within the knowledge of the department according it, and a statement by or on behalf of the department that it has been accorded to any person must, in my opinion, come within the principles above referred to and be conclusive as to the status of that person.

It may be added that the Attorney-General states in his printed case that, for the purpose of obtaining recognition of the members of an ambassador's staff exercising diplomatic functions, a list of such members is furnished from time to time to the Secretary of State by every ambassador. The list is not accepted as of course on behalf of his Majesty, and after investigation it not infrequently happens that recognition is withheld from a person whose name appears upon the furnished list, either because his diplomatic status is in doubt, or because the number

of persons for whom status is claimed appears to the Secretary of State to be excessive.

I have not thought it necessary to discuss the many cases which were cited in this House. It is enough to say that some of them support and no one of them is opposed to the view that I have above expressed.

I have also thought it unnecessary to say anything about the statute of Anne. It is well settled that the questions that we have been discussing do not depend on the statute but are principles of common law, having their origin in the idea of the comity of nations.

For the reasons above expressed I am of opinion that this appeal should succeed and the orders of the Court of Appeal and Mr. Justice Shearman should be discharged, and a declaration made as proposed from the Woolsack. The appellant does not ask for costs and the order will therefore be without costs here or below.

LORD BLANESBURGH concurred in the judgment of Lord Buckmaster.

[Solicitors—Messrs. Buckeridge and Braune; Messrs. Waterhouse and Co.; the Treasury Solicitor.]

K.B. Div.
(Acton and Branson, JJ.) 1928. July 12.

MORELLI v. FITCH AND GIBBONS.*

Sale of Goods—Implied condition—Merchantable quality—Bottle of wine—Defect in bottle—Injury to purchaser in uncorking—Liability of seller—Sale of Goods Act, 1893 (56 and 57 Vict., c. 71), s. 14 (2).

This was an appeal by the defendants from a decision of his Honour Judge Crawford, sitting at the Edmonton County Court.

The defendants, Messrs. Fitch and Gibbons, were the licensees of an off-licence shop known as "The Cross Keys," Edmonton Green. On January 21, 1928, the plaintiff, Mr. Charles Morelli, of Bury-street, Edmonton, purchased at the shop a bottle of Stone's ginger wine. He took the bottle home, and while he was extracting the cork by means of a corkscrew the neck of the bottle came away, with the result that he sustained considerable injuries to his left hand. In an action for damages the County Court Judge found that the bottle was bought by description from the defendants, who dealt in goods of that description; that there was a defect in the bottle rendering it unfit for the purpose for which it was required; and that the bottle was not of merchantable quality. He awarded the plaintiff £21 damages.

The defendants appealed.

Sir Reginald Mitchell Banks, K.C., and Mr. E. T. Rhymer appeared for the appellants; Mr. F. Soskice for the respondent.

MR. JUSTICE ACTON.—This is an appeal from a decision of his Honour Judge Crawford in a case tried before him in which the plaintiff, Mr. Charles Morelli, claimed from Messrs. Fitch and Gibbons, the defendants, damages for personal injuries arising out of a breach of the defendant's alleged implied warranty of fitness in regard to a bottle supplied under a contract of sale.

The facts are very short and very simple, but they give rise, no doubt, as Sir Reginald Mitchell Banks has said, to a question of some importance to those who deal in wares of the kind with which this case is concerned. The plaintiff was a person who, desiring to purchase a certain kind of cordial or wine, went to the shop of the defendants, who are retail dealers in wines and spirits, and apparently other cordials and so forth, which they sell in bottles, and the plaintiff was a person who had dealt with them on several occasions in the ordinary course of their business before the particular purchase with which we are concerned. On January 21, 1928, he went into the shop and was served by the wife of the manager, a Mrs. Martin. He asked her for a bottle of ginger wine, and upon her saying interrogatively, "2s 6d.?" he said, "No, I want Stone's ginger wine at 2s. 9d." She then got a bottle of this particular kind of ginger wine from the shelf, wrapped it up in paper, handed it to Mr. Morelli, who paid the sum of 2s. 9d. for it, took the bottle away with him and went home. Passing over matters which I do not think need be repeated, though they appear in the facts, what took place next was that Mr. Morelli, desiring to consume the contents of this bottle of ginger wine, applied a corkscrew to the cork in the bottle and, holding the bottle in his left hand, pulled the corkscrew with his right hand. The result was that the neck of the bottle came away altogether from the bottle; the bottle fell to the ground and the hand, that is to say the left hand, with which Mr. Morelli had been holding the bottle, was somewhat severely cut, and it was in respect of the cuts upon that hand and the consequences thereof that this action for damages was brought as on a breach of warranty arising out of the contract of sale between him and the defendants. In the result the learned Judge arrived at certain findings of fact which he has set out with great care in his note of the trial which is now before us. Those findings were as follows: "(1) I believed and accepted the evidence given by the plaintiff. I find that his evidence is accurate in all material respects. (2) I find that the corkscrew used was proper and suitable for the purpose of extracting the cork. (3) I find that the plaintiff attempted to extract the cork in a reasonable and proper manner and with due care. (4) I find that the bottle broke when the cork was so being extracted. (5) I find that there was some defect in the bottle which rendered it unfit for the purpose for which it was required by reason of its being in such a condition that when the cork was being extracted in a proper and reasonable manner it broke and that by reason of such defect it was not of merchantable quality. (6) I find that the bottle of ginger wine was bought by description from the defendants and that they dealt in goods of that description." It is upon these facts, and the findings at which the learned Judge arrived upon the facts, that this appeal is brought by the defendants, who contend that the learned Judge was wrong in law in the conclusions at which he arrived.

Under finding No. 5 there is one point to which perhaps it is expedient to refer in passing in order that it may be laid aside. The finding under that head, that there was some defect in the bottle which rendered it unfit for the purpose for which it was required, seems by implication to have some reference to subsection 1 of section 14 of the Sale of Goods Act, 1893, but it is, as I understand, common ground between counsel upon either side that the question which the learned Judge was asked to determine and did determine accordingly was a question outside and independent of subsection 1 of section 14

* Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.

and was a question arising under subsection 2 of section 14, the familiar words of which are as follows: "Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed." It is perhaps strictly unnecessary, but desirable for sake of clarity, to point out that if the present action was founded upon the assumption that there was in this case such an implied condition as is dealt with in subsection 2 of section 14 of the Sale of Goods Act, 1893, and a breach of that implied condition, the plaintiff treated, as he was entitled to do, the breach of that condition as a breach of warranty and sought damages accordingly for a breach of warranty.

The question then arises whether, as Sir Reginald Mitchell Banks has argued, the learned Judge was wrong in the conclusion at which he arrived. The argument that he was wrong really began with the contention that the learned Judge was wrong in law in finding, as he did, under clause 6 of his findings, that the bottle of ginger wine in question was bought by description from the defendants. Now that which was bought, as appears from the evidence, in regard to which there is no controversy or question, was a bottle of Stone's ginger wine, which appears to be a well-known brand of that kind of cordial, at the price of 2s. 9d., which appears to be the well-known and recognized price for a bottle of that particular commodity. Having regard to the decision in the case of *Wren v. Holt* (19 *The Times* L.R., 292; [1903] 1 K.B., 610) and the later case of *Bristol Tramways and Carriage Company v. Fiat Motors, Limited* (26 *The Times* L.R., 629; [1910] 2 K.B., 831), it seems to me clear that there was here, as the learned Judge has decided, a sale by the defendants to the plaintiff of a bottle of ginger wine at the price of 2s. 9d. by description, and there is no question in the present case that the defendants deal in goods of that description. In this context perhaps special reference should be made to the passage to which our attention has been drawn in the case of *Bristol Tramways and Carriage Company v. Fiat Motors, Limited* (*supra*), in the judgment of Lord Justice Farwell at p. 840. The learned Lord Justice there says: "The implied condition that the goods are of merchantable quality applies to all goods bought from a seller who deals in goods of that description, whether they are sold under a patent or trade name or otherwise; the only proviso in subsection 2, namely, examination by the buyer, is negatived by Mr. Justice Lawrance's finding of fact in this case. The phrase 'merchantable quality' seems more appropriate to a retail purchaser buying from a wholesale firm than to private buyers, and to natural products, such as grain, wool, or flour, than to a complicated machine, but it is clear that it extends to both: the definition of 'goods' in section 62 makes that word include 'all chattels personal other than things in action and money,' and 'quality of goods' includes their state or condition." It seems to me clear that, having regard to these decisions, and especially to the passage which I have quoted from Lord Justice Farwell, it is impossible to say that the learned Judge was not perfectly right in coming to the conclusion that there was here a sale of goods, namely, this bottle of Stone's ginger wine, by description by the defendants to the plaintiff. It, therefore, clearly appears, in my opinion, that the bottle of Stone's ginger wine was a chattel which was bought by description from sellers who dealt in goods of that description, although they were not the manufacturers thereof, and, therefore, according to the provisions of subsection 2 of section 14 of the Sale of Goods Act, 1893, there was, as the learned Judge decided, an implied condition that the goods should be of merchantable quality.

That being so, upon the findings of fact of the learned Judge, which are, indeed, not assailed for the purpose of the present appeal, it seems to me impossible to say that the learned Judge was wrong in arriving at the conclusion that there was a breach of that implied condition or warranty that the goods should be of merchantable quality. That there was some defect in the bottle which rendered it unfit for the purpose for which it was required is, as I have pointed out, a matter which we can pass over, but the defect was one which also rendered it not of merchantable quality. With regard to the proviso to the subsection, it equally appears from the findings of the learned Judge that the defect which he finds to have existed in this bottle, as the result of which it broke and injured the plaintiff's hand, was a defect from which no such examination as was available to the plaintiff of the article which he had purchased would or could reasonably have revealed to him.

In these circumstances my decision is that the learned Judge was right throughout in the conclusion of law at which he arrived upon the facts as he found them, and that there was no reason whatever why it was not open to him to find the facts as he did. Although it is outside our province to enquire into the facts, if there is evidence to support those facts, I think it may fairly be said that there can be little doubt that any tribunal of fact would have arrived at the same conclusion on the facts as that at which the learned Judge arrived.

In these circumstances, in my opinion, this appeal fails and ought to be dismissed.

MR. JUSTICE BRANSON.—I agree. The first ground upon which it was contended on behalf of the appellants that the learned Judge was wrong was that he was wrong in law in holding that the purchase in this case was a purchase by description within section 14, subsection 2, of the Sale of Goods Act, 1893. In support of that contention reference was made to a passage in the judgment of Lord Justice Vaughan Williams in *Wren v. Holt* (19 *The Times* L.R., 292; [1903] 1 K.B., 610, at p. 615), in which he says: "I do not think, taking the generally accepted view of lawyers as to the meaning to be attached to the words 'by description' as applied to a sale, that a sale of goods over a counter, where the seller deals in the description of goods sold, is a sale of goods by description within this subsection." I confess that the meaning of the learned Lord Justice is not very clear to my mind, and were it not for the fact that in that case the sale, which the Court held was in substance a sale of Holden's beer over the counter, was held to be a sale by description, I think one might have to consider further the question of the meaning of that passage. But in view of the decision of the Court of Appeal in *Wren v. Holt* (*supra*), that a sale of beer in a beerhouse, which upon the findings of the jury the Court held to be in substance a sale of Holden's beer, was a sale by description and brought the case within subsection 2 of section 14, it seems to me to be clear beyond argument that the sale in this case of Stone's ginger wine across the

counter was equally a sale which the learned County Court Judge, acting as the tribunal of fact in this case as the jury acted in the other, was entitled to find to be a sale by description so as to bring the case within subsection 2 of section 14.

The same thing follows from a consideration of the case of the *Bristol Tramways and Carriage Company v. Fiat Motors, Limited* (26 *The Times* L.R., 629 ; [1910] 2 K.B., 831). I do not propose to refer to that again, as my Lord has read the most relevant passage in the case in the course of his judgment.

The next point taken was that there was no evidence upon which the learned County Court Judge could come to the conclusion that this bottle was not of merchantable quality, for it was contended that the defect in it, which caused it to break, was not a defect which an ordinary reasonable examination would have disclosed, and, therefore, inasmuch as the plaintiff, if he had been minded to resell, could have resold it, it could not be said that the bottle was not of merchantable quality. In my view, that contention is entirely unsound. I think that the question whether the article is of merchantable quality or not depends upon the true state of the article and not upon whether its state can be discovered by a reasonable examination of it. That that is so seems to me to follow quite clearly from the proviso to subsection 2 of section 14 of the Sale of Goods Act, 1893, which makes it clear that, even if the buyer has examined the goods, the implied condition makes the seller liable for a latent defect in those goods. This ground also to my mind fails, and the result is that I agree that the learned County Court Judge has come to a correct conclusion on the law of this case. I agree, if it is open to one to express an opinion on a question of fact which has been decided by the learned Judge, that upon the evidence I should probably have come to the same conclusion myself. In the result I think this appeal should be dismissed, with costs.

Leave to appeal was granted.

[Solicitors—Messrs. Avery, Son, and Fairbairn ; Messrs. Palmer and Robinson.]

Court of Appeal.
(Lord Hanworth, M.R., Lawrence and Sankey, L.JJ.)
1928. July 16.

WELD v. PETRE.*

Mortgage—Redemption—Shares in company—Non-payment of interest—Retention of shares by mortgagee for long period but without foreclosure—Subsequent increase in value of shares and payment of dividends—Summons to redeem—Delay—Laches—Claim for dividends received in excess of mortgage interest—Relief granted on summons—Rules of the Supreme Court, Order LV., r. 5 *a*.

In 1900 B. mortgaged shares in a company to L. to secure a loan with interest, the shares being afterwards registered in the mortgagee's name, and further shares being added to them. Dividends were received by L. sufficient to clear the interest up to 1908, when they ceased, and the shares became of little value, L. retaining them, without foreclosing. In 1916 dividends were resumed, and they and the value of the shares increased enormously, so that by 1921 L. had received dividends sufficient to pay off the loan and interest. L. died in 1923, and in 1926 the plaintiffs, who were entitled to the equity of redemption in the shares, took out a summons claiming redemption, and also repayment of the excess of the amount of dividends received by L. or his executors over and above the amount due under the mortgage.

Held, affirming a decision of Russell, J. (44 *The Times* L.R., 457), that equity would not deprive a mortgagor of his right to redeem if the debt had been or could be repaid, the security was still available, and the position of the mortgagee had not been altered to his prejudice by the delay ; also that the limit of twelve years applicable by the Real Property Limitation Act, 1874, in the case of a mortgage of realty would not, by equitable principles, be extended so as to support a plea of delay and laches and be made applicable to a mortgage of personalty.

Held, further, reversing the decision of Russell, J. (*supra*), that an order for payment of the excess claimed against the mortgagee could, by the provisions of Order LV., r. 5 *a*, be obtained upon originating summons.

This was an appeal from a decision of Mr. Justice Russell (44 *The Times* L.R., 457). The facts are fully stated in the report of the case below, but were, more briefly, as follows :—

The plaintiffs were entitled to the equity of redemption in shares of a limited company, and they took out a summons to redeem them, and also for repayment of money received in dividends in excess of that due under the mortgage. The defendants, the executors of the mortgagee, resisted, on the ground that the plaintiffs had lost their right through long delay and laches, and that, on equitable principles, the Court ought to refuse them the relief sought.

The shares in question, which were originally 300 Ordinary shares of £5 each, fully paid, in the Cornbrook Brewery Company, Limited, were the property of Mr. Henry Weld-Blundell, who mortgaged them in February, 1900, to Mr. Joseph Francis Lescher to secure a loan of £1,000 for three months with interest at 6 per cent. The shares were registered in the mortgagee's name on December 10, 1900, and the mortgagor died on September 5, 1901. His executors were his widow, the plaintiff Mr. Herbert Joseph Weld, and Mr. William Dalglish Bellasis.

The executors were unable or unwilling to pay off the £1,000, and in July, 1902, they offered the mortgagee 200 more shares as additional security. These were registered in his name on August 14, 1902. The estate of the mortgagor proved insolvent, but his brother Charles, who was a large creditor, came to the rescue and took over some of the assets at the value of £8,534 and then settled these assets for the benefit of his brother's widow and daughter by a settlement dated September 1, 1902. Among the assets so acquired and settled were the 500 shares subject to the mortgage and other shares of the same company. The interest which fell due to the mortgagee on August 5, 1903, was not punctually paid, and as a result the mortgagee obtained further

* Reported by H. C. Garsia and G. T. Whitfield-Hayes, Esqs., Barristers-at-Law.

securities from the trustees of the settlement to the extent of another 100 shares, which were registered in his name on October 16, 1903.

Mr. Lescher, the mortgagee, was thus in possession of 600 shares of £5 each. A dividend which he received at the rate of 2 per cent. less tax cleared the interest on the loan up to February 4, 1904, and by means of similar dividends interest was cleared up to February 5, 1908. In 1908 the mortgagee became desirous of having his loan repaid because, according to his letters, he had been appointed chairman of petty sessions and did not wish, while in that position, to be a holder of brewery Ordinary shares. A correspondence ensued, in which the mortgagee threatened to sell and to take legal proceedings, and which culminated in a letter of June 18, 1908, from the mortgagee to the trustees' solicitors : "I have your letter of the 15th inst. The course you therein recommend will incur further pourparlers which is not my intention—and I mean acting promptly and at once, however unpleasant such a course may be."

Mr. Lescher, however, did nothing at all. He never sold or foreclosed. Bad times came to the company and no dividend was paid on its Ordinary shares, nor was there any trace during this time of Mr. Lescher's demanding or receiving interest on the £1,000. During the War prosperity came to the company, and in respect of 1916 and following years substantial dividends free of tax were paid on the Ordinary shares to the mortgagee. In 1920 the 600 shares of £5 each were subdivided into 3,000 shares of £1 each, and 1,500 bonus shares were allotted to Mr. Lescher.

The prosperity of the company was well known to the trustees of the settlement, for they held other Ordinary shares of the company. Besides this, the plaintiff, Mr. Herbert Joseph Weld, who was one of the trustees, had throughout been a director of the company. By 1921 the dividends received by Mr. Lescher were sufficient to pay off the loan.

On January 5, 1923, Mr. Weld, who was also the solicitor to the trustees, wrote a letter addressed to Mr. Lescher : "Adverting to the advance made by you to the late Mr. Henry Weld-Blundell on security of some Cornbrook shares, it has been suggested to me by one of the family that I should approach you in the matter in view of the fact that by this time your debt must have been largely reduced, if not paid off, out of the dividends. Would you be prepared to transfer the shares back to Mrs. Weld-Blundell and her daughter on payment of the principal due together with a reasonable rate of interest over the whole period during which the debt has run ? As you are no doubt aware, Mrs. Henry Weld-Blundell and her daughter are not well off, and I shall be glad if you will give the matter your consideration." Mr. Lescher never received that letter. He died on January 7, 1923, and the letter was answered by his daughter, who said the matter was for the executors and lawyers, whose address she gave.

The defendants were the executors of Mr. Lescher and proved his will in April, 1923. In the same year the company issued further bonus shares, with the result that 2,250 Ordinary shares were added to Mr. Lescher's holding, so that the total holding had become 6,750 shares.

On October 4, 1926, the trustees' solicitors wrote to the solicitors to Mr. Lescher's executors claiming to redeem the security. Correspondence ensued, but the right to redeem was disputed on the ground that, owing to the delay and laches of the applicants, either the right to redeem had been lost or the Court would withhold its assistance. Eventually a summons for redemption was issued on July 30, 1927.

Mr. Justice Russell held that equity would not deprive a mortgagor of his right to redeem if, when the right was asserted, the debt had been or could be repaid and if the security was available and no one's position had been altered in the meantime. He therefore made an order on the mortgagee's executors to reassign the shares to the plaintiffs, but made no order as to any excess over the principal moneys and interest received by the mortgagee on the ground that a personal order for payment against a mortgagee could not be obtained by originating summons, but only in proceedings commanded by writ.

The defendants appealed.

Mr. Spens, K.C., and Mr. Evershed appeared for the appellants ; and Mr. Jenkins, K.C., and Mr. B. A. Hall for the respondents.

Lord Hanworth, M.R.—It is quite unnecessary to restate the facts, which are fully and accurately set out in the judgment of Mr. Justice Russell. I agree with his summary of the facts arising upon the evidence, and upon them that the plaintiffs are *prima facie* entitled to the order for redemption that they seek.

I agree also that there was no bargain by which Mr. Lescher could be supposed to have acquired or held the shares freed from any right to redeem them. Nor was any foreclosure carried out by Mr. Lescher. It appears to me that his attitude as expressed in his letter of the 18th June, 1908, shows that he recognized that he was a mortgagee, and that he refrained from taking the course which he appreciated was an unpleasant one, and left the matter to drift as it was—a loan the repayment of which was remote, secured by a mortgage of shares which were of small (if any) value.

So the matter rested, at any rate up to 1916, for there was no change in the relevant facts. It was not until the dividends were declared and received by Mr. Lescher that this dormant transaction was quickened into life by a part payment of the arrears of interest which had continued to acrue. The country was then in the throes of the Great War and I see no reason to suppose that immediate activity or assertion of their rights by the parties on either side was to be expected or called for.

There is no Statute of Limitations which applies to bar the right of redemption, and the appellants rely upon delay and laches for such a time as ought to lead the Court to refuse the relief asked for, on the ground that the Court will take the standard of the Statute of Limitations as the measure to be approximately applied, and that, as there was no recognition by Mr. Lescher of his position as a mortgagee later, at any rate, than June, 1908, a twelve years period and more had elapsed before this summons was issued on the 30th July, 1927.

It is said that the Real Property Limitation Act, 1874, provides such a limit or standard of 12 years. Lord Justice Lindley in *Jay v. Johnstone* (9 *The Times* L.R., 125 ; [1893] 1 Q.B., 189, at p. 191) says that the key to that Act is to be found in the preamble and in section 9. The preamble says "whereas it is expedient further to limit the times within which actions or suits may be brought for the recovery of land or rent and of charges thereon." Section 7 applies the twelve years limit to actions and suits by a mortgagor in cases where the mortgagee has obtained possession, or receipt of the profits of any land or receipt of any rent comprised in his mortgage,

and section 8 applies the same limit to actions to recover any sum secured by any mortgage . . . or otherwise charged upon or payable out of any land or rent. Neither of these sections refers to mortgages of personalty.

Then by section 9, the sections of the Act 3 and 4 William IV., Cap. 27, except those specifically mentioned, are retained "in full force and shall be construed together with this Act." The excepted sections are section 2 which refers to making an entry upon or to recover land ; section 5, to a reversioner's right to recover land ; section 16, which provides in respect of actions to recover land and allowance of time to persons under a disability, with a total limit of the allowance, under section 17, of forty years ; section 23, which imposes a limit of twenty years where there is possession of land under an assurance of a tenant in tail which does not bar the remainders ; sections 28 and 40, which are the sections replaced by sections 7 and 8 of the Act of 1874.

It thus appears that, except in the case of land and charges upon it, no alteration is made bringing the limits down from twenty to twelve years ; and that the other limits remain in full force.

In my judgment, there is no ground whatever for the application of the twelve years rule to proceedings for the redemption of a mortgage of personalty. Such an attempt at a so-called analogy was rejected by Mr. Justice Kay in *Mellersh v. Brown* (45 Ch. D., 225), and in *In re Powers* (30 Ch. D., 291) the Court of Appeal decided that a bond for a sum of money which, if paid by the surety, would have entitled him to the benefit of the mortgage of land on which the sum was lent to the mortgagor at the request of the surety, was not secured upon land and was not affected by the twelve years limit. The distinction between claims relating to land and to personalty are in my judgment clearly and explicitly retained, and there is no basis for applying a twelve years limit in the present case.

I have had the advantage of reading the judgments which will be delivered by Lords Justices Lawrence and Sankey and in view of the exhaustive examination of the cases cited to us, and others, it appears to me to be quite unnecessary to go over the same ground. I agree with them in relation to both the appeal and the cross-appeal, and with the order proposed by Lord Justice Lawrence.

Lord Justice Lawrence.—The main question on this appeal is whether the plaintiffs have lost their right to redeem the shares in question.

It is admitted that there is no Statute of Limitation which applies to the case, and consequently that there is no statutory bar to the plaintiffs' claim for redemption.

The appellants however contended that the Court ought to act upon the analogy of the Statute of Limitations relating to land, and consequently ought to hold that the plaintiffs' claim for redemption was barred after a lapse of twelve years from the date of the last acknowledgment by the mortgagee in the month of June, 1908.

The proposition that the Court in the case of a mortgage of property other than land ought to act upon the analogy of the Statute of Limitations relating to land was emphatically negatived by Mr. Justice Kay upwards of 37 years ago in the case of *Mellersh v. Brown* (45 Ch. D., 225) which, so far as I know, has never been questioned. The learned Judge in the course of his judgment states as follows (45 Ch. D., at p. 229) : "If the Legislature has enacted that there shall be that limit with regard to real estate and has not so enacted with regard to personal estate, on what ground am I to follow that analogy ? It is not an analogy between the arrears of interest recoverable on a legal debt and those recoverable on an equitable debt. No doubt equity in the case of an equitable debt follows the simple analogy afforded to it by the law applicable to a legal debt ; but I never heard that a Court of Equity is under any obligation to follow as regards personal estate the analogy of a statute which applies to real estate. That is not an analogy within the application of the rule that equity follows the law ; but the reasoning is that whereas the Legislature has enacted that in the case of a charge on real estate only six years' arrears of interest shall be recoverable against the estate, and whereas it has not enacted anything of the kind with regard to personal estate : therefore—what? I should have thought the result was inevitable that as to personal estate the rule is not to be observed and the idea of there being any analogy is one which I do not understand." The cases of *London and Midland Bank v. Mitchell* (15 *The Times* L.R., 420 ; [1899] 2 Ch., 161) and *In re Stucley* (22 *The Times* L.R., 33 ; [1906] 1 Ch., 67) furnish further examples of the Court's refusal to apply the analogy of limitations relating to land to mortgages of property other than land. Although the cases to which I have referred were cases in which a mortgagee was claiming foreclosure, yet the principle on which they were decided, in my opinion, applies equally to a case such as the present where a mortgagor or his assignee is claiming redemption, with the result that the old decisions in which the Courts of Equity before the Real Property Limitation Act, 1833, either by analogy or in obedience to a statute barring a remedy at law, adopted the same period as a bar to equitable relief (the reasons for which adoption were clearly stated by Lord Redesdale in *Hovenden v. Lord Annesley* (2 Sch. and Lef., 607, at pp. 630-632), have no application to the present case. On these grounds I am of opinion that the contention of the appellants that the Court ought in this case to act on the analogy of the Real Property Limitation Act, 1874, is not well founded.

Further, it is clear that as the mortgagee has acknowledged the plaintiffs' right of redemption at a date less than 20 years before the commencement of this action the appellants cannot successfully maintain that the Court ought to presume a release by the plaintiffs of their equity of redemption.

In the absence of any statutory bar or any presumption of a release, the question in the present case resolves itself into whether the Court ought to refuse relief on the ground of acquiescence or laches.

The difference between acquiescence and laches was clearly pointed out by the House of Lords in *Archbold v. Scully* (9 H.L.C., 360). I need only quote the following passage from the speech of Lord Wensleydale (9 H.L.C., at p. 383): "Where there is a Statute of Limitations the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing ; it means more than laches. If a party, who could object, lies by and knowingly permits another to incur an expense in doing an act under the belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce ; but the fact of simply neglecting to enforce a claim for the period during which the law permits him to delay, without losing his right, I conceive cannot be any equitable bar."

In the present case the appellants have adduced

no evidence whatever tending to show that either the mortgagee during his lifetime or the appellants since his death has or have altered his or their position on the faith of the plaintiffs' inaction. Had it been proved that any such alteration had taken place I am of opinion that a much shorter period of delay than the one in question here would have constituted a sufficient ground for refusing relief. In the absence of any such proof, however, it is plain that the appellants cannot rely upon acquiescence as a defence to the plaintiffs' claim, and I did not understand Mr. Spens seriously to contend that they could. In the result the only ground upon which the appellants can found their argument against relief is delay or laches, which for present purposes I treat as synonomous terms.

The principle applicable to a case where long delay is set up as a defence to equitable relief is stated by Sir Barnes Peacock in the following well-known passage in the judgment of the Privy Council in *Lindsay Petroleum Co. v. Hurd* (L.R., 5 P.C., 221, at p. 239) : "Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

In *Erlanger v. New Sombrero Phosphate Company* (3 App. Cas., 1218) Lord Blackburn, after quoting the above passage says (3 App. Cas., at p. 1279) : "I have looked in vain for any authority which gives a more distinct and definite rule than this ; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty ; but that, I think, is inherent in the nature of the inquiry."

In *Masonic and General Life Assurance Company v. Sharpe* (8 *The Times* L.R., 194 ; [1892] 1 Ch., 154, at p. 168) Lord Justice Lindley stated that the rule that staleness of demand as distinguished from the Statute of Limitations and analogy to it may furnish a defence in equity to an equitable claim was settled at least as early as *Smith v. Clay* (Amb., 645), and after referring to *Lindsay Petroleum Company v. Hurd* (*supra*) and *Erlanger v. New Sombrero Phosphate Company* (*supra*) said : "A defence based on staleness of demand renders it necessary to consider the time which has elapsed and the balance of justice or injustice in affording or refusing relief." The learned Lord Justice, in holding that the delay in that case was no bar, laid stress on the fact that the appellants there had lost no evidence nor any remedy, and on the fact that they had adduced no evidence to prove that their testator had been induced by the plaintiffs' delay to alter his position for the worse.

The real difficulty lies in applying the principle enunciated in these cases to the facts of the present case.

In the first place, I think that counsel for the appellants were right in their contention that the delay ought, in the circumstances, to be considered as having commenced in June, 1908, and as having continued until the month of October, 1926, when the plaintiffs definitely asserted their present claim—that is to say, for a period of 18 years and 4 months. During this period the plaintiffs made no payments of principal or interest in respect of the mortgage debt, nor did they in any way assert their right to redeem ; after June, 1908, neither the mortgagee nor the appellants did anything which amounted to a recognition of the plaintiffs' right to redeem. In these circumstances, the fact that the dividends which were received by the mortgagee did not amount to a sufficient sum to pay off the mortgage until the year 1921 does not, in my opinion, operate to cut out from the period of delay the years which elapsed before that date. The fact that a mortgagee is in receipt of the income of the mortgaged property (be such income large or small) and that in case of redemption he is bound to give credit for such income against the amount owing on his security does not, in my opinion, prevent time from running against an owner of the equity of redemption who neither pays any principal or interest in respect of the mortgage debt nor asserts his right to redeem. Nor do I think that the fact that the plaintiffs were under no personal liability to the mortgagee prevents time from running against them as owners of the equity of redemption. If the mortgage in the present case had been a mortgage of land, I am clearly of opinion that the plaintiffs' claim to redeem would, under the Real Property Limitation Act, 1874, have been barred in June, 1920.

It cannot be denied that a mortgagor who sleeps on his rights, for such a long interval of time as has occurred here, runs a very serious risk of finding when he at last awakes and bestirs himself that the mortgagee has in the meantime altered his position on the faith of the delay and that his right to relief has been lost. But I know of no case where mere delay of less than 20 years has of itself been held a sufficient ground for refusing relief to a mortgagor of personal estate claiming to redeem the mortgage.

Counsel for the appellants in support of their argument on this point relied upon the cases of *Floyer v. Lavington* (1 P. Wms., 268) and *Lockwood v. Ewer* (9 Mod., 275). These cases, however, do not, in my opinion, assist the appellants' contention. In both the period of delay was more than 20 years ; moreover, in both there were special circumstances which pointed to there having been acquiescence and not merely delay. In the former (where the delay was apparently 60 years) the mortgage debt was to be repaid by half-yearly instalments and the mortgagee had sold the rentcharge, the subject-matter of his security, to a purchaser, who had settled it. In the latter (where the delay was more than 20 years) the mortgagee had been compelled to pay calls on the stock, the subject-matter of his security, and further had sold out the stock and "united it to his own gross stock," whatever this may mean. In

Brooks v. Muckleston ([1909] 2 Ch., 519), another case cited to us, the delay was 48 years. Counsel for the appellants also relied upon the following observations of Lord Redesdale in *Hovenden v. Lord Annesley* (2 Sch. and L., 607, at p. 636): "I think the rule has been so laid down, that every new right of action in equity that accrues to the party, whatever it may be, must be acted upon at the utmost within 20 years. Thus, in the case of redemption of a mortgage, if the mortgagee has been in possession for a great length of time but has acknowledged that his possession was as mortgagee, and therefore liable to redemption, a right of action accrues upon that acknowledgment. But if not pursued within 20 years it is like the case at law of a promise of payment beyond the six years, and *non assumpsit infra sex annos* pleaded: and so in every case of equitable title (not being the case of a trustee whose possession is consistent with the title of the claimant), it must be pursued within 20 years after the title accrues. This was so considered by Lord Camden, in *Smith v. Clay* (3 Bro. C.C., 639 *n*), referring to *Jenner v. Tracy* (3 P. Wms., 288*n*), that the same length of time should bar a redemption that would bar any other equity." This passage does not help the plaintiffs, as the period there referred to is 20 years. Further, I am clearly of opinion that there is no rigid rule that every equity must be acted upon at the utmost within 20 years, and if not so acted upon will be barred. Every case must obviously depend upon its own circumstances, and Mr. Spens freely admitted that he could not support any such hard and fast rule. Moreover, both Lord Redesdale in *Hovenden v. Lord Annesley* (*supra*) and Lord Camden in *Smith v. Clay* (*supra*) when referring to the right of redemption being barred after 20 years evidently had in mind a mortgage of land.

In my opinion, therefore, the delay which has taken place in the present case is not of itself sufficient to disentitle the plaintiffs to relief.

The next matter to be considered is whether anything has taken place during the interval which would render it practically unjust to give the plaintiffs their remedy. The only facts relied upon by the appellants in support of their contention on this point are, first, that the shares became valuable and that by the month of July, 1921, the mortgagee had received dividends sufficient to pay off the total amount due to him under his mortgage, and, secondly, that the mortgagee died in the month of January, 1923, and it is alleged (although there is no evidence on this point) that estate duty has been paid on the shares on the faith that they formed part of the mortgagee's estate.

The facts so relied upon do not, in my opinion, render it inequitable to grant the relief claimed by the plaintiffs, nor, so far as I can see, is there any obstacle in the way of granting such relief. Nobody has been prejudiced by the delay. The mortgagee retained the shares up to the time of his death, and they are now in the hands of the appellants, as his executors, who have refrained from distributing them as part of the mortgagee's estate pending the decision of the Court in the present case. There is no difficulty in accounting for the dividends received by the mortgagee and by the appellants. There has been no expenditure in connexion with the shares, and the appellants have not lost any evidence or remedy. Moreover, the mortgagee had notice that the plaintiffs were trustees of the equity of redemption and therefore he must be taken to have known that they could not properly abandon their equity of redemption, whilst the plaintiffs may have placed some reliance upon the fact that the mortgagee could not properly sell the shares without first giving them a reasonable notice, and could not foreclose without making them parties to the proceedings and giving them an opportunity to redeem.

The fact that the plaintiffs were acquainted with the affairs of the company and ought to have known that the mortgage debt had been paid off in 1921 does not, in my opinion, in the circumstances afford any ground for refusing relief, though it would, in my opinion, have been conclusive against the plaintiffs if the appellants could have proved that the mortgagee had altered his position for the worse on the footing of such payment off and in the belief that the plaintiffs had abandoned their right to redeem. If it be the fact that the appellants have included the shares in their residuary account and have paid estate duty on them, such fact does not, in my opinion, in the circumstances constitute a sufficient ground for refusing relief. The appellants have placed so little reliance upon this fact that they have not even mentioned it in their evidence. They, no doubt, relied on being able to obtain a return of the duty if the Court were to hold that the plaintiffs were entitled to redeem.

On the whole, I have arrived at the conclusion that nothing has happened during the interval between June, 1908, and October, 1926, long though it was, to render it inequitable now to make a decree for redemption, and, accordingly, that Mr. Justice Russell was right in holding that the plaintiffs were entitled to such a decree.

The learned Judge has, however, declined to insert in the decree an order for payment by the defendants to the plaintiffs of the amount by which the mortgagee and his estate have been overpaid, on the ground that such an order is not one which can be obtained on an originating summons. With the greatest respect for the opinion of the learned Judge, I cannot agree with his decision on this point.

Order lv., rule 5*a*, provides (*inter alia*) that a mortgagor may take out as of course an originating summons for redemption, reconveyance and delivery of possession by the mortgagee.

The common redemption judgment against a mortgagee in possession where it is alleged that he has been overpaid contains an order on him to pay to the mortgagor the amount, if any, which shall be certified to be due from him in excess of the amount due for principal, interest, and costs (see Seton, 6th edition, Vol III., p. 1926). In my opinion, there is nothing in rule 5*a* which prevents the Court from making such an order upon an originating summons. It is not like the case of a mortgagee endeavouring to obtain, in addition to the usual foreclosure decree, a personal judgment against the mortgagor for payment of the mortgage debt. Such a personal judgment cannot be obtained on an originating summons, because it forms no part of the common order for foreclosure, and therefore does not come within Order lv., rule 5*a*. The order in a redemption action for payment by a mortgagee of the amount by which he has been overpaid, in my opinion, stands on an entirely different footing. Such an order is properly contained in a common order for redemption, because it is incidental to and consequential upon the main relief granted by such an order. An owner of the equity of redemption on redeeming is entitled to a return not only of the mortgaged property itself, but also of the fruits of that property (in the shape of income or otherwise) received by the mortgagee in excess of the amount due on his security. To hold that the Court could not make an order for the payment of such excess on an originating

summons would mean that although the Court could, on such a summons, grant the main relief to which the plaintiff was entitled, an action would have to be commenced by writ before it could grant the incidental relief. Moreover, after a decree for redemption, there could be no defence to an order for the payment of the excess which the mortgagee could not raise in chambers before the Master on the making of the necessary certificate of the amount due in respect of the excess.

In the result, I am of the opinion that the plaintiffs succeed on their cross-appeal. The insertion of the order asked for by the plaintiffs involves remodelling the order by the learned Judge.

The appellants have, by their counsel, admitted assets for the purposes of this action, and on this footing the proper order to make on this appeal is, in my judgment, as follows:—

Dismiss the appeal with costs.

On the plaintiffs' cross-appeal: Discharge order of Mr. Justice Russell, and in lieu thereof order as follows:—

Let the following enquiry and accounts be made and taken, that is to say: 1, an enquiry of what shares are now subject to the mortgage or charges in the originating summons mentioned. 2, An account of what is due to the defendants under and by virtue of the said mortgage or charges and for their costs of this action and costs to be taxed. 3, An account of what is due to the defendants under and by virtue of the said mortgage or charges and for their costs of this action and costs to be taxed. 4, An account of the dividends on the shares for the time being subject to the said mortgage or charges received by Joseph Francis Lescher, decd., and by the defendants, the executors of his will since his decease, or any of them or by any other person or persons by the order or for the uses of the said J. F. Lescher, or of the defendants or any of them or which without the wilful default of the said J. F. Lescher or of the defendants or any of them might have been so received. And let what shall appear to be due on taking account No. 3 be deducted from what shall appear to be due to the defendants on account No. 2 and the balance be certified. And let, upon the plaintiffs paying to the defendants what, if anything, shall be certified to be due to them after such deduction as aforesaid, the defendants transfer the shares now subject to the said mortgage or charges to the plaintiffs or as they shall direct free and clear, &c., and deliver up, &c. But in default of the plaintiffs' paying to the defendants what shall be certified to be due to them after such deduction within the time aforesaid, let this action be dismissed out of this Court with costs to be taxed, &c. But if it shall appear on taking the said accounts that there is nothing due to the defendants, let the defendants within 21 days after the Master's certificate transfer the said shares, &c. And let the defendants within the time aforesaid pay to the plaintiffs the amount if any which shall be certified to be due from the defendants in excess of the amount due to them as aforesaid (the defendants having admitted assets of the said J. F. Lescher for that purpose), such amount to be certified. Liberty to apply.

The appellants must pay the costs of the plaintiffs' cross-appeal.

Lord Justice Sankey stated the facts, and continued.—Admittedly, no Statute of Limitations applies, but the defendants contend that equity should follow the law. They say that at the beginning of the last century equity in dealing with mortgagees of land followed or acted in the analogy of the statute, and held that where a mortgagee of land had been in possession for 20 years equity would not readily assist the mortgagor to recover the property, and that the doctrine of stale demand would bar his claim.

Then the defendants say that, by analogy, the rule was applied in cases of mortgages of personalty.

So far the argument proceeds on the lines referred to in Coote on Mortgages, 9th edition (1927), at p. 1093: "Before the passing of the statute for the limitation of actions relating to real property, there was no statutory limitation of time within which a suit in equity might have been brought for foreclosure of the equity of redemption in mortgaged land. But the statute 21 Jac. I., c. 16, s. 1 (*b*), enacted that no entry into lands, tenements, or hereditaments should be made but within 20 years after the right or title to the same should have accrued or descended. The Courts of equity . . . adopted the statutory rule by way of analogy and applied it to similar cases in equity, and accordingly precluded a mortgagee of land from bringing a suit in equity for foreclosure more than 20 years after his cause of action at law for ejectment had arisen."

By the Real Property Limitation Act, 1833, the period within which actions for the recovery of land must be brought was fixed at 20 years next after the time at which the right to bring such action should have first accrued, and by the Real Property Limitation Act, 1874, the period was fixed at 12 years.

The defendants' argument then proceeded that equity should follow or act upon the analogy of this later statute, and should apply the period of 12 years to mortgages of personalty, and that, therefore, in this case, the Court should not assist the plaintiffs to redeem the shares, having regard to the fact that the last acknowledgment made by the mortgagee that he was holding as mortgagee was as far back as 1908.

It may be remarked that there is no case in the reports which supports any such contention, and no recognized text-book which gives any countenance to it.

The rule begins to emerge in *Floyer v. Lavington* (1 P. Wms., 268), decided in 1714, and apparently disclosing a very great lapse of time—viz., 60 years. Lord Chancellor Cowper conceived "the rent charge to be not redeemable at so great a distance of time, and that this Court had heretofore gone too far in permitting redemptions."

In *Lockwood v. Ewer* (9 Mod., 275), decided in 1742, Lord Hardwicke refused to decree a redemption. He said (9 Mod., at p. 278) that it would be of mischievous consequence if he should decree a redemption, for the bill would never have been brought if the East India Stock had not increased in value, which was merely an accident, and could not have been foreseen at the time the mortgage was made. The time there was over 20 years. In *Aggas v. Pickerell* in 1745 (3 Atk., 225) a plea of limitations was allowed to a bill for redemption after a mortgagee of land had been in possession of the mortgaged premises at least 30 years, the Lord Chancellor (Lord Hardwicke) saying, "How is it possible to give a greater allowance to length of time than the statute of limitations does?"

In Case 114, Anon., in 1746 (3 Atk., 313), the Lord Chancellor (Lord Hardwicke) apparently was not prepossessed in favour of the plaintiff, whom he described as a "prowling assignee" of the equity of redemption of land, but he said "the rule in relation to redemptions . . . which was analogous to the Statute of Limitations is a very right and proper rule." He added (3 Atk., at p. 314): "I am of opinion that though no single circumstance, abstracted from the rest, will be sufficient to entitle

the plaintiff to a decree, yet, taking them altogether, they are of weight enough to entitle the plaintiff to a decree."

That I conceive to be the true rule. Taking the circumstances altogether, are they of weight enough to entitle the plaintiff to a decree ?

In *Smith v. Clay* in 1767 (3 Bro. C.C., 640*n*) it is said : "The reporter having been favoured with a more accurate note of Lord Camden's judgment in this case than has hitherto appeared in print, he flatters himself the publication of it will be acceptable to the profession and has therefore inserted it here." The note itself is in fact from Lord Camden's own handwriting in his notebook and states : "A Court of Equity which is never active in relief against conscience, or public convenience, has always refused its aid to stale demands, where the party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith, and reasonable diligence. . . . Laches and neglect are always discountenanced, and therefore from the beginning of this jurisdiction there was always a limitation to suits in this Court."

In that case it was held that a bill of review may be barred by delay of 20 years, but the Lord Chancellor goes on : "As the Court has no legislative authority it could not properly define the time of bar by a positive rule to an hour, a minute, or a year ; it was governed by circumstances. But as often as Parliament had limited the time of actions and remedies to a certain period in legal proceedings, the Court of Chancery adopted that rule and applied to similar cases in equity. For when the Legislature had fixed the time at law it would have been preposterous for equity (which by its own proper authority always maintained a limitation) to countenance laches beyond the period that law had been confined to by Parliament. And therefore in all cases where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar."

I do not think that this means that a Court of equity is always to adopt the period fixed by Parliament, for, by the hypothesis in this particular case, no period has been fixed by Parliament. The Court is governed by the circumstances of each case. See, too, *per* Lord Redesdale in *Hovenden v. Lord Annesley* (2 Sch. and L., 607, at p. 636), where he reviews the previous cases, and *per* Sir Geo. Jessel, M.R., in *Sutton v. Sutton* (22 Ch. D., 511, at p. 515). In *Archbold v. Scully* (9 H.L.C., 360) Lord Campbell, the Lord Chancellor, said (9 H.L.C., at p. 371) : "The real question in the case seems to me to be whether the appellant is barred by the lapse of time between 1835 and 1857, when his bill (or cause petition) was filed. If any new rights had been created in this interval or if anyone would be prejudiced by the delay, that is, by the appellant being now enabled to make good his claim, I should be clearly of opinion that he is barred by laches or acquiescence or whatever name may be given to his long sleep over his rights. But I do not discover any obstacle of this sort to the relief which he prays."

Lord Wensleydale made the same remarks (9 H.L.C., at p. 383). In *Erlanger v. New Sombrero Phosphate Company* (3 App. Cas., 1218), a great authority on the common law, Lord Blackburn, uttered a note of warning on the principles of delay, although the matter under discussion had nothing to do with that now under consideration. Quoting from *Lindsay Petroleum Company v. Hurd* (L.R., 5 P.C., 221), he says (3 App. Cas., at p. 1279) : "In every case if an argument against relief which otherwise would be just is founded upon mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable." "I think," he continued in his own words, "from the nature of the inquiry it must always be a question of more or less, depending on the degree of diligence which might reasonably be required and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend upon the turn of mind of those who have to decide, and must therefore be subject to uncertainty."

It is not necessary to go through all the cases, because they are only illustrations of the application of the rule to the particular facts of the case, and those cited show what facts have from time to time been taken into consideration. Two examples are : *London and Midland Bank v. Mitchell* (15 *The Times* L.R., 420 ; [1899] 2 Ch., 161) and *Brooks v. Muckleston* ([1909] 2 Ch., 519), decisions of Mr. Justice Stirling and Mr. Justice Joyce respectively.

Story's Equity Jurisprudence, 12th ed. (1877), at page 1030, states, in my view, the true rule. The learned author begins by saying, "Let us now pass to a brief consideration of the doctrine of equity applicable to mortgages and pledges of personal property," and contends that in mortgages of personal property, although the prescribed condition has not been fulfilled, there exists, as in mortgages of land, an equity of redemption which may be asserted by the mortgagor if he brings his bill to redeem within a reasonable time. That, in my view, is the difference in principle between mortgages of land, as governed by statute, and mortgages of personalty, the redemption of which depends upon equitable doctrines founded upon what is just and reasonable, having regard to all the circumstances of the case.

Nowhere is it suggested in the text-books that the period of 20 years should now be reduced to 12.

In Robbins' Law of Mortgages (1897), page 742, the law as to redemption of mortgaged personalty is stated as in Coote, and no suggestion is made of a 12 years' rule. In Fisher's Law of Mortgage, 6th ed. (1910), page 717, the question of the remedy in equity for redemption of pledges of goods and stock is discussed ; again with no mention of a period of 12 years. The author says: "The privilege of redemption will be sparingly allowed if the action appear to have been brought on account of an accidental increase in the value of the pledge." With regard to a pledge, it is suggested it may be redeemed at any time during the lifetime of the pledgor, except during outlawry.

It will therefore be seen that there are no decided cases and no text-books of authority which support the contention that the Court should now adopt the 12 years' rule.

I doubt the wisdom of laying down a hard and fast rule in equity, that any particular number of years should bar a mortgagor's right to redeem personal property : that would be to make equity governed by an Act of Parliament, whereas Parliament has not thought fit to legislate for this particular case.

In my opinion, the Court, in deciding the problem, must have regard to all the circumstances of the case. Unreasonable delay may bar the mortgagor's right to redeem. What is reasonable is a question of fact. No doubt, length of time is a material con-

sideration and an important fact. On the other hand, an equally important fact is the consideration whether there has been any change in the position of the mortgagee or anyone claiming under him, so as to make it neither just nor convenient nor, indeed, possible to restore the parties to the original position. Again, the recognized legal exceptions contained in the statute which prevent time from running must be taken into consideration. Beyond that there is the fact, in the present case, that, for some years during the period in question, a war was going on, during which some people did not insist upon or put forward their rights. In the present case the sole question, in my view, is whether the delay of the mortgagors in applying to redeem is such that it ought to bar their right. Here there has been no such change in the position of the parties as to make it impossible to restore them to their original position. To that position they can be remitted without difficulty, without inconvenience, and without injustice to themselves or prejudice to third parties. That there has been delay must be conceded. If the period is taken, as the learned Judge in the Court below took it, from the date when the debt was satisfied, in 1921, it is clear that the subsequent delay is not sufficient to bar ; but I do not think that the Court ought to adopt the period of 12 years contended for by the appellants, and even if the delay has to be reckoned from June, 1908, I see nothing to compel us, having regard to all the circumstances, to say that it is so long that it ought to bar the plaintiffs' claim.

In my opinion the appeal should be dismissed.

Upon the cross-appeal I wish to say nothing except that I agree with what has been said by the other members of the Court.

[Solicitors.—Messrs. William A. Crump and Son ; Messrs. Gregory, Rowcliffe and Co., for Messrs. Weld and Weld, Liverpool.

K.B. Div. (Salter, J.) } 1928. July 25.

LITTAUER GLOVE CORPORATION v. F. W. MILLINGTON (1920), LIMITED.*

Company—Residence—Foreign State—Jurisdiction of State Courts—Test of residence.

To constitute residence by a British company in a foreign State so as to render the company subject to the jurisdiction of the Courts of that State, the company must to some extent carry on business in that State at a definite and reasonably permanent place.

His Lordship gave judgment for the defendants in this action, which raised the question whether under international law, a judgment of the Supreme Court of the State of New York was enforceable in the English Courts when the defendants were a corporation and were only present in that State by means of a director doing business there.

The action was brought by the Littauer Glove Corporation, an American company, of 235, Fourth-avenue, New York, who claimed (*inter alia*) from Fred W. Millington (1920), Limited, of Industry House, 57, Dale-street, Manchester, £5,369 16s. 9d., being the equivalent of $23,868, alleged to be due from the defendants under a judgment of the Supreme Court of the State of New York, dated May 9, 1922. Interest was claimed from that date.

The defendants denied that the American Court in question had any jurisdiction over them.

Mr. C. T. Le Quesne, K.C., and Mr. Frank Gahan appeared for the plaintiffs ; Mr. Singleton, K.C., and Mr. E. Stewart-Brown for the defendants.

Mr. Singleton said that the defendants' contention was that, if the plaintiffs ever began an action against them in the State of New York, and if the Court there adjudged that the plaintiffs should recover the amount sued for—neither of which matters was admitted—that Court had no jurisdiction over the subject matter of the action. They (the defendants) were not subjects of, or resident, or present, or domiciled in, and owed no allegiance to, the State of New York, and were not subject to the jurisdiction of the Court. They did not appear in the action and were never served with any process.

To succeed, the plaintiffs must prove that the defendants had a fixed place of business in the State of New York, so as to make them resident and liable to the jurisdiction of the Court there. He cited *Emanuel v. Symon* (24 *The Times* L.R., 85 ; [1908] 1 K.B., 302) ; *Turnbull v. Walker* (9 *The Times* L.R., 99) ; *Schibsby v. Westerholz* (L.R., 6 Q.B., 155) ; *Carrick v. Hancock* (12 *The Times* L.R., 59) ; *Dunlop Pneumatic Tyre Company, Ltd. v. Actien-Gesellschaft für Motor und Motorfahrzeugbau vorm. Cudell and Company* (18 *The Times* L.R., 229 ; [1902] 1 K.B., 342) ; *La Bourgogne* (15 *The Times* L.R., 28 ; [1899] P. 1 ; affirmed 15 *The Times* L.R., 424 ; [1899] A.C., 431) ; *Haggin v. Comptoir d'Escompte de Paris* (5 *The Times* L.R., 606 ; 23 Q.B.D., 519) ; *Actiesselskabet Dampskib "Hercules" v. Grand Trunk Pacific Railway Company* (28 *The Times* L.R., 28 ; [1912] 1 K.B., 222) ; *Saccharin Corporation, Limited v. Chemische Fabrik von Heyden Aktiengesellschaft* ([1911] 2 K.B., 516) ; *Allison v. Independent Press Cable Association of Australasia, Limited* (28 *The Times* L.R., 128) ; *Okura and Co., Limited v. Forsbacka Jernwerks Aktiebolag* (30 *The Times* L.R., 242 ; [1914] 1 K.B., 715) ; *Egyptian Delta Land and Investment Company, Limited v. Todd* (44 *The Times* L.R., 747).

Mr. Richard H. Millington, managing director of the defendant company, said that he went to the United States in 1922. He was in New York four or five nights, and stayed at an hotel. He did business for his company in New York and various other places which he visited. He was served personally with the writ in the American action in the office of the Union Mills, New York, to which address some of his letters had been sent. His company owned no property of any kind in the United States. They took no part in the proceedings against them, and entered no appearance.

In cross-examination by Mr. Le Quesne, the witness said that at one time it was his and his brother's custom to be in New York in the early part of the year. They went to buy, not to sell, goods.

That concluded the case for the defendants.

Mr. W. H. Wilson, called on behalf of the plaintiffs, said that on March 30, 1922, he served Mr. R. H. Millington with the writ in the New York action.

Mr. Le Quesne said that the question was whether the defendant company were resident in the State of New York so as to come within the jurisdiction of the Court there. He submitted that it was not necessary for him to show that the defendants were carrying on their business at a fixed place. It was not disputed that it was not necessary to show that the

* Reported by W. E. Hurt, Esq., Barrister-at-Law.

company were carrying on the whole of their business where the debt was incurred, and he contended that the defendants were carrying on business wherever they were buying goods.

His LORDSHIP.—Do you say that a company resides wherever its commercial travellers put up?

Mr. LE QUESNE.—Yes ; I submit that the company is resident by its travellers, and would be subject to process of the country in which they happened to be. For income-tax purposes it has been held that a company can be resident in several places at once.

Counsel cited, in addition to cases referred to by Mr. SINGLETON, *Logan v. Bank of Scotland* (20 *The Times* L.R., 640 ; [1904] 2 K.B., 495) ; and *New York Life Insurance Co. v. Public Trustee* (40 *The Times* L.R., 430 ; [1924] 2 Ch., 101, at p. 120).

His LORDSHIP, in giving judgment, said that the action was partly brought on a judgment of the Supreme Court of the State of New York in respect of goods sold and delivered.

The plaintiffs were manufacturers in the State of New York ; the defendants were an English limited liability company. The defendants' registered office and principal place of business were in Manchester, and they had branches in London and elsewhere. They were clothiers' merchants, buying from manufacturers in various parts of the world and selling to wholesalers.

The chairman of the defendant company was Mr. Fred Millington, and the managing director was his brother, Mr. Richard Millington, who had given evidence.

It had been the practice for one of them to visit the United States on purely business visits, the object being that they should see samples and make purchases.

In 1922 Mr. Millington arrived in New York on March 17, and left on that day for St. Johnsville, about eight hours distant. The principal suppliers of the defendant company in the United States were the Union Mills Corporation at St. Johnsville. That corporation had a sales office in New York at 377, Broadway. Mr. Millington stayed at St. Johnsville two days. After that he returned to New York, and then visited Tennessee, Georgia, and Philadelphia, and in each of these States he placed orders.

On March 28 he returned to New York and stayed at an hotel. While in New York he made some use of the office of the Union Mills Corporation. He said that he transacted no business there except what he did with that corporation, seeing samples and buying goods.

On March 30 he was served at that office with some process of the Supreme Court of the State of New York, and on March 31 he went to St. Johnsville for the week-end.

On April 1 the plaintiffs took out a summons against the defendants. On April 3 Mr. Millington returned to New York, and on that day, while he was in the office of the Union Mills, he was served with process in the present matter. He entered no appearance, took no step in the proceedings, and did not submit to the jurisdiction of the American Court. On April 4 he sailed for England. The plaintiffs proceeded with their action and obtained judgment in default of appearance.

He (his Lordship) had to decide whether at the time of the beginning of the action—namely, April 1, 1922—the defendant company were resident in the State of New York so as to have the benefit and be under the protection of the laws of that State.

What was meant by saying that a business corporation was resident in a foreign jurisdiction for that purpose? That depended on whether, on the day in question, it was carrying on business in the foreign State so that it could fairly and properly be said to be then resident in that State. If the defendant company were resident in the State of New York on April 1, 1922, where in that State were they resident? Mr. Le Quesne said that they were resident in Broadway, New York, but there must be some place of residence on which one could put a finger. There was no suggestion that the name of the defendant company was in any way displayed at the address in Broadway, or that any letter-paper of the company was used there, or that any business was done there except what the company did with firms in other parts of the United States. If the defendant company were resident in Broadway, it would follow that they were resident wherever Mr. Millington did business. He was, however, nothing more than a commercial traveller on that tour.

If the company had 40 or 50 travellers ranging all over the world, was it to be said that the company were resident wherever the travellers put up at an hotel and took orders ? He (his Lordship) did not rely on the expression "fixed place," but on what was the fair meaning of "residence." The inference which he drew from the cases cited was that there must be some carrying on of business at a definite and, to some reasonable extent, permanent place. There was no residence within the jurisdiction on the part of the defendant company, and the action on that point must fail.

There would be judgment for the defendant company, with costs, so far as this was an action on a foreign judgment, and the rest of the case would go to the Official Referee.

[Solicitors—Messrs. Morris, Ward-Jones, Kennett and Co. ; Messrs. Gregory, Rowcliffe, and Co., for Messrs. Hill, Dickinson, and Co., Liverpool.]

House of Lords.
(Viscount Sumner, Lord Atkinson, Lord Buckmaster, and Lord Warrington of Clyffe.)

1928.
July 23.

EGYPTIAN DELTA LAND AND INVESTMENT COMPANY, LIMITED v. TODD.*

Revenue—Income - tax—Company—Residence—Real business abroad—Whether resident in this country—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. D, Cases IV. and V.

A company which is registered in this country but carries on its real business abroad does not necessarily reside in this country, so as to be liable to income-tax, because it is obliged by law to perform in this country certain duties which cannot be performed abroad, such as having a registered office and keeping a register of shareholders. For income-tax purposes a company resides where its real business is carried on.

Decision of the Court of Appeal (43 *The Times* L.R., 275 ; [1928] 1 K.B., 152) reversed.

This was an appeal from an order of the Court of Appeal (43 *The Times* L.R., 275 ; [1928] 1 K.B., 152), affirming an order of Mr. Justice Rowlatt (43 *The Times* L.R., 70), on a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the City of London.

* Reported by H. B. HEMMING, Esq., Barrister-at-Law.

The question raised by the appeal was whether a company incorporated under the Companies Acts must necessarily be held to be resident in the United Kingdom, although it merely fulfilled the strict statutory requirements cast on it by those Acts, and its business and affairs were entirely controlled, managed, and carried on outside the United Kingdom.

The appellant company was incorporated in 1904 under the Companies Acts with a nominal capital of £500,000. Its main objects were to acquire, hold, sell, let, or otherwise dispose of and deal in land situate in any district in Egypt served, or thereafter to be served, by railways belonging to the Egyptian Delta Light Railways, Limited, and to develop the resources of such lands in such ways as might seem capable of improving the property and undertaking of the company.

In 1907, in pursuance of special resolutions passed in that behalf, the business of the company was transferred to Cairo, and since that date had been controlled, managed, directed, and carried on entirely in Cairo, with the following results. In 1907 all the London directors retired, and a new board of directors was appointed, consisting of four members all permanently resident in Cairo. Since 1907 there had been no meeting of directors in the United Kingdom ; the secretary-general of the company resided in Egypt ; the seal had been removed to and was kept in Egypt ; the minute books and all the books of account had been removed to Egypt, and remained there ; and the banking account of the company was with the National Bank of Egypt at Cairo. The company's former account with the London agency of the same bank had never been formally closed, but was only used by the London agency for debiting small disbursements, not exceeding £8 or £9 in any year, made by the agency on instructions from Egypt, no cheques being drawn on the account.

The register of transfers was kept in Cairo, where transfers of shares were passed before being registered in London. Dividends were declared in and paid exclusively from Cairo. All meetings of the company were held in Cairo. The reports of the directors were sent out from Cairo, and there was a duplicate register of shareholders in Cairo. To comply with the requirements of the Companies Acts there was a registered office of the company in London, at which the registers of members and directors and also a register of bearer warrants were kept. To meet those statutory requirements the company paid a fee to Mr. F. J. Horne, who carried on the business of secretary of public companies, and who provided them with a registered office at his address at Gresham House, Old Broad-street, where the name of the company, together with the names of five other companies, appeared on the door. For those services and for small incidental expenses Mr. Horne received £35 per quarter, which he paid into an account in his own name with the London agency of the National Bank of Egypt. No separate room or part of a room was appropriated to the company.

The General Commissioners found that the London secretary's position was purely formal, and that he had no authority to do anything more than the law required the company to do here.

Assessments to income-tax having been made on the company under Schedule D on rents and interest on mortgages for the six tax years 1919-20 to 1924-25, the company appealed.

The General Commissioners, distinguishing *Swedish Central Railway Company, Limited v. Thompson* (41 *The Times* L.R., 385 ; [1925] A.C., 495), found that the company was not resident in this country for the purposes of the Income Tax Acts, and allowed the appeal.

Mr. Justice Rowlatt reversed the decision of the General Commissioners, and the Court of Appeal (the Master of the Rolls (Lord Hanworth), Lord Justice Sargant, and Lord Justice Lawrence) affirmed his judgment.

Mr. Macmillan, K.C., the Hon. Geoffrey Lawrence, K.C., and Mr. Bremner appeared for the appellants ; the Attorney-General, who, when the case was argued, was Sir Douglas Hogg, K.C., and Mr. R. P. Hills for the Crown.

VISCOUNT SUMNER.—My Lords: The General Commissioners' finding, upon evidence which was sufficient to support it, was in favour of the subjects. It can only be challenged upon some ground of law sufficient to enable the Inland Revenue to succeed, which they overlooked. Accordingly the respondent contends, and necessarily so, that incorporation under the Companies (Consolidation) Act, 1908, with the attendant statutory obligations, in itself and as a matter of law makes a British company a "person resident in the United Kingdom" within the Income Tax Act, 1918. If this had been merely a factor to be considered along with others relating to the company's affairs it would have been, like other questions of fact and of degree, a matter for the General Commissioners and their finding in favour of the appellants would be conclusive.

The word "resident," used for over a century in these taxing Acts, was introduced long before limited liability was freely recognized by the law, but in and before 1853 all incorporations were brought under charge. None existed with the precise forms of incorporation and obligation enacted for companies with limited liability since 1862. The words "a person resident" were, of course, used of incorporated persons without any reference to the provisions subsequently enacted.

My Lords, I think it follows that the first question here is the interpretation of the Companies (Consolidation) Act, 1908, and not that of the Income Tax Acts. Only if its provisions make an English limited liability company resident in England does any further question arise. Now the Companies (Consolidation) Act, 1908, says nothing about the "residence" of the companies incorporated under it and as regards income-tax it was passed *alio intuitu*. The question is not "Where does such a company reside, if it must reside somewhere?" but "Has the Act of 1908 constituted for companies any residence at all?"—a thing not in any case analogous to the residence of an individual. Residence is not inherent in a company in the nature of things and residence for the purpose of taxation is matter for express legislation.

Furthermore, down even to 1853 most taxpayers were natural persons. As to number it is so still, though whether they now pay more than do companies I do not know. Throughout the Income Tax Acts "resident," with its various qualifications "actually," "ordinarily," "occasionally," "temporarily" and so forth, is used in a sense in every way appropriate to natural persons, but only artificially applicable to incorporated persons and never really appropriate. Indeed, I think that "a person ordinarily resident in the United Kingdom" as used in the Income Tax Acts, is so inappropriate a term for a person, albeit an artificial one, who is always and by law immovably resident in the United Kingdom, that it cannot be sustained ; and so the Legislature itself seems to have thought, for I find in section 39 of the Finance (No. 2) Act, 1915 (a cog-

nate enactment to the Income Tax Act), the provision that "the . . . businesses, to which this Part of this Act applies, are all . . . businesses . . . carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom," which is the formula thought necessary to include the English businesses of companies and to bring them under excess profits duty.

At first, perhaps, the Courts might have said that, as a corporation could not "reside" anywhere in any true sense, they must leave it to the Legislature to enact residence in an artificial sense, but they felt bound to make the Acts work as they found them and arrived at a compromise, under which certain propositions, I think, are now well settled. The word "resident," it is laid down, has to be applied to artificial persons by analogy from natural persons. With these residence depends on personal facts. Place of birth, nationality and allegiance are not the tests, nor is domicile, except in a sense that makes it barely distinguishable from residence. Voluntary choice and habitual and repeated action are mainly material, such as making a home, keeping an establishment, pursuing a settled object in or at a particular place. A man can change his residence at will, except that a certain duration of time or fixity of decision is requisite, and, but for the peculiar cases of a convict in gaol or a lunatic lawfully detained in a madhouse, I do not think that residence is ever determined for a natural person simply by the law. Accordingly, under the decisions as well as in principle "resident" is a term exceedingly unsuited to describe a statutory person, which can never be non-resident because, by the law of its being, it is a fixture. The analogy that is really possible between a natural person and a company is that of carrying on business at a place, great or small, and in my opinion for the purpose of income-tax, both on the words of the Acts and on the cases, the residence of a foreign company is preponderantly, if not exclusively, determined by this kind of fact.

Turning now to the Companies (Consolidation) Act, 1908, a form of incorporation is indeed prescribed, but how does that affect the matter any more than the sealing of a Royal charter or the Royal assent to a private Bill? This at most does no more than bring the embryo company to the birth, which in a natural person is not the test. The first effect of the incorporation is to make the new company amenable to English law and English law Courts and to give it the status of an English company, but these things only place it in the same position as a British subject born or domiciled here, or as a natural person, who, "resident" or not, is within reach of English legal process. Then the company is to be wound up or to get leave to alter its memorandum or to reduce its capital in an English Court of law. The domiciled Englishman is similarly under this personal law as to marriage and divorce, intestate administration and bankruptcy. An English company must, under English law, pay its debts and may be fined, but so may anyone else who can be duly served with process for acts justiciable in this country. There is no analogy to "residence" here in the sense settled by the decisions for natural persons. These matters depend on the duty of obedience to English law.

What does the Companies (Consolidation) Act, 1908, say more? A company must have a registered office in the United Kingdom, though it can move it about. Then it must keep certain lists and registers and allow inquirers to inspect them, and, although failure in any of these respects does not *ipso facto* work its dissolution nor is performance of these essential and important obligations a condition concurrent to its continuing to be incorporated, heavy fines may be inflicted for non-performance and, if not paid, may, I assume, lead to winding-up. My Lords, between these requirements and the case of a natural person there is no analogy at all, for the natural person is not subject to them. How then do they constitute a residence such as is shared by a natural person and is analogous to his? It is said that the company is always really present at its registered office and, if you seek it, there you will find it. I can make little of this. The Income Tax Acts themselves distinguish between being "in" this country and being "resident" here (No. 2 of the Miscellaneous Rules applicable to schedule D), and Mr. Cadwalader in *Cooper v. Cadwalader* (5 Tax Cas., 101) and Miss Reid in *Reid v. Inland Revenue Commissioners* ([1926] S.C., 589) are examples of persons who had a "residence" here, though they were themselves nearly always elsewhere. At night and on Sundays and holidays you will not find the company at its head office, except in a mystical sense, but I would point out that a truer analogy and a more satisfying residence is to be found in "keeping house and doing business" there than in a continuous statutory presence, even during the hours of darkness and of Divine worship. I respectfully find this argument too transcendental for acceptance. Furthermore, all these requirements are enacted for other purposes than those of taxing profits and gains. As far as the Companies (Consolidation) Act, 1908, goes no business need be done at this office and no profits or losses made there. Nobody in authority need be present, perhaps nobody at all. The inspection of these registers and so on is the price paid for limitation of liability. It is directed for the assistance of creditors or intending creditors. It is not devised in order to attract tax. That is the business of a special taxing Act.

It is, I think, a legitimate test to see what is the minimum action by the company which will satisfy the Act, for, if the argument for the Crown is right, even that minimum must inevitably result in "residence" here. The head office need not be in any frequented or convenient place. It may be shared with any number of other persons, natural or incorporated. Whatever has to be done may be left, as it was here, to an independent contractor. No officer of the company nor even any servant need attend. The provisions of the Income Tax Act, 1918, which regulate the place at which a taxpayer is to be assessed, ignore altogether the head office of a company which does not carry on its business there. (See Rule 4 (1) of the Miscellaneous Rules applicable to Schedule D.) Either the place of trade or the place of manufacture or the "ordinary residence" is to be the place. If the appellant company has no place of trade here and does nothing at its head office but the minimum and occasional formalities required by the Act it is surely an impossible straining of plain words to call that its "ordinary residence." I cannot find anything to forbid the discharge of these obligations by purely mechanical means. A name on a doorpost; a letter-box in a door accessible to the public; a glass-fronted case under a lamp containing the lists required so placed that they may always be read from outside, with an occasional visit of a clerk to alter the lists and take away the letters, would seem to satisfy the Act —though, of course, I express no decided opinion about it. In so far as service may be by post or

delivery at the office the letter-box suffices. If it has to be personal the Act merely authorizes someone whom the company arranges to have there—an office-keeper or a typist—to accept service, a thing which the company might have done for itself. Notices and returns could be sent to the Registrar from abroad. Though the spirit of the company may be imagined to brood over these arrangements, I do not see how the company itself is there at all. The office is its English address, but its business may be elsewhere. If this is "residence" I think it is "residence" not by analogy to that of a natural person but by an independent metaphor. At any rate, if it is to be called "residence" only the Legislature can do it. In doing so a Court of construction would not be interpreting the Act but amending it. Either the Companies (Consolidation) Act, 1908, should say "a company registered under this Act is always resident at its registered office for all purposes," though "residence" is a matter quite outside the scope of an Act which deals only with a company's constitution, obligations and rights, or the Income Tax Act should say "a company registered under the Companies Acts shall be deemed to be at all times a person resident in the United Kingdom for income-tax purposes," which would raise a crop of difficulties for the Inland Revenue in other directions to be dealt with when the time comes.

As to the authorities, this point exactly in its present form appears not to have been actually decided before this case, but in my opinion the *Swedish Central Railway* case (41 *The Times* L.R., 385; [1925] A.C., 495) does not at all conclude it, and, on the other hand, the whole current of authority since the *Cesena Sulphur Company's* case (1 Ex.D., 428) has been such as to make the point one which should be decided against the Revenue and should not be reopened.

All that was decided in the *Swedish Central Railway* case (*supra*) was that the company could have two residences, one in England as well as one in Sweden. Your Lordships were not asked to decide more. It is true that by admission the controlling power over the business was in Sweden, but other business was done in London, the character and importance of which, though set out in the case, was not discussed at the Bar. It was a matter of degree on the facts, and your Lordships cannot be deemed to have come to some unexpressed conclusion on that ground merely because you did not for yourselves declare either that there was no evidence of business carried on in England or that there was no need to discuss the carrying on of business, because the effect of registration was conclusive. Nor is it decisive of the point to say now that the business done in England was only administrative. It was in fact a good deal more, and in the static condition of the company's affairs it was not much less important than the Swedish part. If new questions arose the Swedish directors could settle them, but as things were little had to be done anywhere except "administration," as is often the case with companies, and that was fairly divided between the two countries. I would particularly draw attention to the powerful judgments of my noble and learned friend Lord Atkinson and of Lord Justice Atkin as showing how strong are the grounds for saying that since the *De Beers* case (22 *The Times* L.R., 756; [1906] A.C., 455) the test of taxable residence for any company has been settled to be the carrying on of business here and not the bare operation of the Companies (Consolidation) Act, 1908.

In the Court of Appeal the majority in the *Swedish Central Railway* case (*supra*) held not only that a company could have more residences than one but that the English registration, together with the English statutory requirements, would suffice to constitute such residence, even though the central control of the business carried on was abroad. This was the argument for the Crown, advanced then, so far as I know, for the first time in any case, by Sir Patrick Hastings. Before your Lordships Sir Douglas Hogg presented the case in a rather different form ([1925] A.C., at pp. 498-499): "Unless it is established that central control is the sole and conclusive test of residence . . . the finding of the Commissioners disposes of the case. . . . If necessary, it is submitted that a company has a residence where its registered office is, though it may also have a residence where its central control abides." It is, I think, plain that your Lordships' House affirmed the judgment of the Court of Appeal on the first of these two grounds only, for the Lord Chancellor says at page 501: "An individual may clearly have more than one residence . . . and on principle there appears to be no reason why a company should not be in the same position. The central management and control of a company may be divided and it may 'keep house and do business' in more than one place; and, if so, it may have more than one residence." This was said with reference to the fact that there was evidence, on which the Special Commissioners could act, of business done in England sufficient in importance and in amount to give a residence on that ground. The Lord Chancellor then, at page 505, expressly reserved the point now in debate. No other noble Lord went beyond his above-quoted words and Lord Buckmaster, at page 519, after referring to *New Zealand Shipping Company, Limited v. Thew* (8 Tax Cas., 208) says, "For purposes of our income-tax the real and not a merely nominal residence was here, and if there were also residence elsewhere that did not displace it. The reference to the registered office is important; it is, to my mind, one of the critical facts in determination of residence in this country, but not necessarily the sole and exclusive fact." This was in accordance with the whole current of authority down to that time, and I would observe that the importance of the fact was for the Special Commissioners.

My Lords, as I venture to think that the law has been already decided against the respondent's proposition or, if not formally decided, has so long been taken at the Bar and on the Bench to be settled, I must, I fear, defend this position even at the cost of treading again the weary road of the tax cases. This question was a live question over fifty years ago. It was formally contended in *Attorney-General v. Alexander* (L.R., 10 Ex. 20, at p. 28) that a corporation's "seat and residence can only be in the country where it is constituted," a labour-saving proposition that must have commended itself very strongly and would hardly be rejected, if it could reasonably have been entertained. The case was decided on the ground that, apart from questions of residence in the country of incorporation, the claim for tax failed because the bank did not carry on business here, as the Attorney-General claimed that it did. I will, however, quote his argument. At page 26 he says:—"Such a body has no locality except by its acts and must be said to reside where its substantial business is carried on," and at page 30, Chief Baron Kelly says, "If . . . this corporation can be said to be resident anywhere . . . it must be resident in Constantinople, where alone it has its 'seat,'" not, that is, its place of incorporation but its chief place of business, while Baron Amphlett, at

page 37, makes his opinion plain that the locality of this seat alone and not the place of incorporation determines the question of residence. In the *Cesena Sulphur and Calcutta Jute Companies'* cases (1 Ex.D., 428), the Attorney-General again contended, alternatively to the carrying on of business here, that the "seat and residence can only be in the country where it is created and constituted." For this sundry United States cases were referred to, which were not much in point, but the challenge was boldly taken up by counsel for the Calcutta Jute Company, who says at page 442, "the test of residence, at least for fiscal purposes, is not where the company is incorporated, but where is the real trading carried on."

How, then, do the learned Barons deal with the point thus clearly raised before them? At page 445, Chief Baron Kelly answers the question, "what is the meaning of the word 'residing' as applied to a joint stock company?" thus: "Whether there may or may not be more than one place at which the same joint stock company can reside, I express no opinion at present—a joint stock company resides where its place of incorporation is, where the meetings of the whole company . . . are held and where its governing body meets in bodily presence . . . and exercises the powers conferred upon it . . . ." Baron Huddleston, at page 452, says, "I adopt Mr. Matthews's suggestion that 16 and 17 Vict., c. 34, when it speaks of 'residing,' does not mean an artificial residence. It means an actual residence." Then he shows at page 453 how and in what sense actual residence is used, when, negativing the Crown's contention that "if a company was registered in England it must be held to reside in England," he says, "Registration like the birth of an individual is a fact which must be taken into consideration . . . but it is only a circumstance," and he goes on to review as other circumstances all the direction and control and administration which take place in England, leading to the conclusion that when those circumstances show the main place of business to be here, then and thereby the company resides here.

Your Lordships will observe that so much of the respondent's present contention as rests on an English company's "residence" in the country of its incorporation was raised in the *Cesena* case (*supra*) by Sir John Holker (Attorney-General), and was negatived by both the learned Judges of the Court of Exchequer. So much was an express decision and is now in point, and the *Cesena* case (*supra*) has not only never been overruled but it has far too long been cited with respect to be overruled now, nor were your Lordships asked to do so. How are we to decline to follow it? No doubt the case could have been decided, as it was decided, without dealing with this point, but are we to say that the Court's rejection of it, which was explicit, was therefore a mere *obiter dictum* now, or that the point remains open because the Attorney-General argued it without mentioning the statutory obligations which the Companies Acts imposed? All that remains is an argument, which Sir John Holker (not ignorant of the Companies Acts, I am sure) elected to pass by, namely, the statutory obligations of such a company. Surely this does not reopen the decision.

Before passing from the *Cesena* case (*supra*) the case of *Imperial Continental Gas Association v. Nicholson* (37 L.T., 717), also decided by Chief Baron Kelly and Baron Huddleston shortly afterwards, ought to be mentioned. In it the same differences in language between the two judgments is to be noticed. Both agreed that, as regards the question of Schedule D, the two cases are on all fours. Chief Baron Kelly (p. 721) says "this being a foreign undertaking . . . belonging to a joint stock company, established, incorporated, and resident in England . . . the whole of the profits . . . are assessable to income-tax in this country," while Baron Huddleston says (p. 722), "here . . . according to the decision of the Court in the *Calcutta Jute Mills case* (*supra*), the business is carried on at the place whence the orders emanate. That is the central point where the business is carried on . . . and where the whole transactions occur and . . . it would be assessed here."

So matters stood for over thirty years. Importance chiefly attached to the place where control of the business was exercised (see *San Paulo (Brazilian) Railway Company, Limited v. Carter*; 12 *The Times* L.R., 107; [1896] A.C., 31), the place of incorporation being a subordinate matter and the subsequent statutory requirements attracting no attention at all. Then in 1906 the *De Beers* case (*supra*), albeit that of a foreign company, was decided in terms which in my opinion render it conclusive of the present issue.

It was at one time thought that the authority of the *Cesena Company's* case (*supra*) had been shaken (see *per* Mr. Justice Charles in *London Bank of Mexico and South America v. Apthorpe*; [1891] 1 Q.B., at p. 388), and in 1904, in *Goerz and Co. v. Bell* (20 *The Times* L.R., 348; [1904] 2 K.B., 136), "residence" again came up for discussion before Mr. Justice Channell. Though registered abroad, the Goerz Company had its head office in London, where the directing and controlling power was exercised, and the case directly raised the question, whether a company, registered abroad and not in the United Kingdom, can reside here for income-tax purposes. *Wingate's* case (24 R., 939), which was cited in *Goerz and Co.'s* case (*supra*), was one in which a foreign company, though taxed because it carried on the whole of its business here, was yet held to have been "resident" abroad. In *Goerz and Co.'s* case (*supra*) the Attorney-General contended, and so Mr. Justice Channell held, that registration was only one point to be considered and that the carrying on of the business of the company was the substantial test. After suggesting that a company may possibly have two residences, he asks whether the registration and incorporation abroad prevented residence in the United Kingdom, and replies that the English Companies Acts provide in the registered office of a company the place where anyone who wants to find the company officially must go to find it, and adds that the company in question merely provided by its articles that all summonses and notices should be served at its head office, in effect saying that "so far as the company has a local habitation it is at the head office," but, as the control and direction were exercised from London, which was the true head office, he finally held that, notwithstanding the South African registration and incorporation, the company was resident in London and was chargeable accordingly. "If it were necessary to decide between Johannesburg and London," he says, "I think that the considerations which go to make up the local habitation of such a body rather show that this company is to be found in London and not in Johannesburg." This sentence supports the finding of the General Commissioners in the present case, but how the previous observations can assist the Inland Revenue I am at a loss to imagine, while the statement positively made in *Egyptian Hotels, Limited v. Mitchell* (30 *The Times* L.R., 457; [1914] 3 K.B., 118, at p. 132) without discussion, that residence follows from incorporation here, must be read in its

context, namely, a business carried on here by a person who is charged as a "resident" here.

It was in this state of the authorities that the *De Beers* case (*supra*) was decided in the House of Lords in 1906. The appellants argued that "a company resides where it is registered and nowhere else," a proposition which, even in a case relating to a foreign company, almost necessarily involved some consideration of the effect of the Companies Acts in this connexion, whether it was discussed or not. This perfectly general proposition, which had been advanced by former Crown counsel almost in the same terms in the *Cesena* case (*supra*), was now met by a total denial. Sir Robert Finlay (Attorney-General) was not heard in the House of Lords, it is true, but in the Court below he is reported as saying "the question where a company resides is mainly a question of fact. The place of its incorporation or registration is one circumstance, but only a circumstance, to be taken into account," accepting and citing the *Cesena Sulphur Company's* case (*supra*) as authority, equally in the case of a foreign as in that of an English company. In an often-quoted passage Lord Loreburn rejected the appellants' contention. The process of deciding the residence of a company, he said, was one of seeing where it really keeps house and does business, not of considering the place or the form of its incorporation or the statutory obligations imposed by the *lex loci*. He then said that the *Cesena* case (*supra*) and the *Calcutta Jute* case (*supra*), in the former of which he had himself appeared as counsel, had been acted on for thirty years and involved the principle that a company resides for purposes of income-tax where its real business is carried on, and "the real business is carried on where the central management and control actually abides." "I regard that," he said, "as the true rule," and Lords Macnaghten and Robertson concurred without more, while Lord James of Hereford added a remark, which shows how prominently the question of the place of registration was before the mind of the House.

So far, my Lords, it does not seem to have occurred to any Judge that there might be two kinds of residence or two tests of its acquisition, one for the purpose of entangling foreign companies in British taxation, and another for that of tying British companies down, so that they cannot wholly escape it. I submit that such a doctrine is illogical in form and in substance unjust. Residence may no doubt be constituted by various kinds of acts, but how it can be constituted in one place by doing something there and, at the same time, in another place by doing nothing I cannot understand.

In considering the true effect of the decision in the *De Beers* case (*supra*) the following matters have to be borne in mind. (1) At that time and for twenty years afterwards it was assumed that a limited liability company could not have two residences for income-tax purposes; either it resided abroad or it did not. (2) The *Cesena Sulphur Company's* case (*supra*) was open to review both in the Court of Appeal and in the House of Lords and, although it had stood for thirty years, it had been criticized in the meantime, and what appeared to be its principal ruling was expressly challenged. (3) It was, therefore, natural and proper to consider not only the fact that the De Beers Company was registered abroad but the circumstances of that registration. To this I wish to direct attention. The De Beers Company was incorporated, as the report of the case before Mr. Justice Phillimore states, under section 3 of the Act 13 of 1888 of the Cape of Good Hope, which enabled a company, registered with limited liability under the Cape Colony Act No. 4 of 1861, to become a body corporate on satisfying certain formalities. The material provisions of the Act of 1861 were that it applied to partnerships of more than twenty-five members, and to partnerships whereof the capital was divided into shares transferable without the express consent of all the members. Such partnerships could obtain from the Colonial Registrar of Deeds a certificate of registration with limited liability. They had to lodge with him their deed of settlement, executed by not less than twenty-five shareholders holding not less than three-fourths of the nominal capital and endorsed with a certificate that not less than 10 per cent. had been paid up by them, and the Registrar was to receive and to keep a copy of such deed with a list of the shareholders and of the number of their shares. Thereafter the joint stock company had to expose its name on the outside of every office where its business was carried on. No increase could be made in its capital until it had been registered with the Registrar, with proof of payment of 10 per cent. on the increased capital, and, in case of the execution of new or supplementary deeds of settlement, copies had to be lodged with him. Twice a year the directors had to make a return to the Registrar of every transfer made in the company's share register and of the changes in the names of the existing shareholders by marriage or otherwise. The returns, deeds, and registers thus kept by the Registrar were open to public inspection on payment of a fee, not exceeding one shilling, and copies might be taken and were to be receivable in evidence. The performance of these obligations was enforced by liability to fines, and the certificate of registration conferred on members the benefit of limited liability.

My Lords, I think it is evident that in choosing between registration and carrying on business as the proper test for the single residence of the De Beers Company it was proper to inquire into the circumstances of its registration and not merely to act upon the fact and the place, and, as it was proper and natural to do so, I presume that it was done. The report does not mention any argument of counsel or judicial observation upon the Act above cited, but, even if counsel can be supposed to have overlooked it, one must presume that the Lords Justices and the noble and learned Lords did not neglect to consider all relevant materials. This Act is, I think, sufficiently *in pari materia*, both in its scheme and in its details, with the Companies (Consolidation) Act, 1908, to have brought before the minds of both tribunals all the considerations on which the counsel for the Crown have relied in the present case. Accordingly it seems to me that the decision against the South African registration as the determining factor of the company's residence was really in the circumstances a judicial negation of the Attorney-General's argument and is more than a mere adoption of the previous decision, that registration alone, apart from consequent statutory obligation, will not establish residence. Having adopted that view, the further adoption of control and carrying on of business as the test alike for the De Beers Company and for the Cesena Sulphur Company followed in logical course. I submit that, even technically, the *De Beers* case (*supra*) is a binding authority to-day. Even if it be otherwise and there be no technical decision of the issue, whether a British company may not acquire a taxable residence here both by carrying on business here and by being incorporated here under the limited liability Acts, still, that a House so composed should, after consideration, have adopted a canon, so ex-

pressed as to lay down one rule supported by one train of reasoning, without meaning that "the rule" applied equally to companies of both kinds exclusively of any other rule or reasoning, is, I confess, more than I can credit.

I will refer to two later cases in your Lordships' House (fully recognizing that in neither case was the issue of a British company's residence directly raised), for the purpose of citing language so used as to suggest that there is no vital distinction between the tests applicable to a foreign and those applicable to a British company alleged to reside here. In *American Thread Company v. Joyce* (29 *The Times* L.R., 266 ; 6 Tax Cas., 163, at p. 165) Lord Halsbury, referring, I think, to the *San Paulo (Brazilian) Railway* case (*supra*) says, "I myself have taken the same view of this, I think, some years before the *De Beers* case (*supra*), and that view has been since, I think, adopted in this House more than once, that the real test, which, after all, is only a question of analogy—you cannot talk about a company residing anywhere—and that which has been accepted as a test, is where what we should call the head office in popular language is, and where the business of the company is really directed and carried on in that sense." This expression of opinion can only mean that for both British and foreign companies alike the test is where on the facts (including among all the others the fact of incorporation here or there) the company's business is really directed and carried on.

In *Mitchell v. Egyptian Hotels, Limited* (31 *The Times* L.R., 546 ; [1915] A.C., 1022) the argument of Sir John Simon (Attorney-General) (pp. 1034, 1035) is, "In *De Beers Consolidated Mines, Limited v. Howe* (*supra*) Lord Loreburn lays down the principle as the result of the cases as follows: 'The real business is carried on where the central management and control actually abides,' and the Commissioners find substantially in the terms of that judgment. Lord Loreburn also states his opinion, following *Cesena Sulphur Company v. Nicholson* (*supra*), that a company resides for purposes of income-tax where its real business is carried on . . . That statement involves that a trading company carries on some part at least of its business at the place where it resides, and this company admittedly resides in this country." The admission here mentioned of course was as to the transaction of a part of the business here and did not refer to the English incorporation, on which, as on the Companies (Consolidation) Act, 1908, no stress was laid. There is a further case, *John Hood and Co., Limited v. Magee* (7 Tax Cas., 321), in which a United Kingdom company was again held to be chargeable under Case I of Schedule D, because in fact an important, and indeed the chief, part of its business was carried on at Belfast, and the *De Beers* case (*supra*) was discussed without any suggestion that the test mentioned in it was not as universal as its language would imply. Finally I would call attention to *Bradbury v. English Sewing Cotton Company, Limited* (39 *The Times* L.R., 590 ; [1923] A.C., 744), in which the references made to the rule laid down in the *De Beers* case (*supra*) both in argument for the successful parties (p. 747) and in the opinions delivered (pp. 753, 755 and 765) by the Lord Chancellor and Lords Shaw and Wrenbury, respectively, are all made in terms that mention no second sense of residence and suggest no alternative to Lord Loreburn's rule, whether the company in question be foreign, as it was there, or British, as in the present case.

I wish, however, to refer specially to *New Zealand Shipping Company v. Thew* (*supra*), though again this is the case of a company incorporated abroad. Lord Sterndale and Lord Justice Warrington in the Court of Appeal and Lord Buckmaster in your Lordships' House (see especially p. 229), in whose opinion all the other noble and learned Lords present concurred, all speak of the rule laid down in the *De Beers* case (*supra*) as if no other mode of determining any company's residence was known to them or could be put forward. Lord Sterndale quotes at p. 223 Lord Loreburn's rule and adds, "I think that that is just as accurate a statement of law now as it was at the time it was pronounced." Accurate it may have been, but, if the present argument for the respondent is to be sustained, it was sadly lacking in precision, for it bears all the appearance of a universal test. Lord Sterndale proceeds to say that these principles cannot possibly be affected by the statutory obligation of a company registered abroad to file its articles at Somerset House on beginning business here, and Lord Justice Warrington, as he then was, says of this (p. 228), as I think may truly be said of the statutory requirements imposed on English companies, "It is merely one of the conditions which must be fulfilled before they can lawfully do so. When that condition is fulfilled, then they can lawfully carry on the business ; and if the circumstances are such as to bring them within the principle to which I have referred, they are just as much carrying on the business in this country as if they had not been compelled to file and had not filed their articles." I would also like to quote in this connexion the observation of Lord Warrington in *Lysaght's* case (44 *The Times* L.R., 374 ; [1928] A.C., 234) (which, it is true, is not a case of a company), "I have reluctantly come to the conclusion that it is now settled by authority that the question of residence or ordinary residence is one of degree, that there is no technical or special meaning attached to either expression for the purposes of the Income Tax Act."

My Lords, in support of my view that this rule of income-tax law has long been deemed to be settled by common consent I would refer to the opinion of the legal profession as it may be gathered from books of admitted authority. Dowell's work first appeared in 1874 and contained no note on the residence of a British company. His second edition, 1885, after citing the *Cesena* case (*supra*) said (p. 208) : "The residence of a joint stock company incorporated and registered in England is in the United Kingdom and therefore the company is chargeable on profits from business carried on abroad as well as from business carried on in the United Kingdom" ; and this was repeated in the 3rd edition in 1890 (p. 221). In 1895 the 4th edition (pp. 244 and 245) modified this as follows : "In order to give effect to the Act as applied to joint stock companies we must suppose that a company has a residence. . . . In determining the question of residence, registration must be taken into consideration. It is a strong circumstance, but only a circumstance ; it is a fact to be considered with all the others ; but where a company" (does acts as in the *Cesena Company's* case, *supra*) "it is a company residing in the United Kingdom." For this the *Cesena* case (*supra*), the *Calcutta Jute* case (*supra*), and the *Imperial Continental Gas* case (*supra*) are cited. The 6th edition, 1908, adds that the principle of the decision in the *Cesena* case (*supra*) was approved in the *Goerz Company's* case (*supra*) and in the *De Beers Company's* case (*supra*), and the 7th edition, 1913, contents itself with a summary of all decided cases to date. Conversely I have endeavoured to find in the great authorities on the Companies Acts,

Lindley and Buckley, using the editions for which those celebrated authors were personally responsible, any warrant for the view of those Acts in their relation to income-tax for which the respondent contends. They cite the case that has so often been referred to, but the proposition that an English limited liability company is by law always a resident in the United Kingdom is conspicuously absent. Thus I find in Lindley on Companies, 5th ed., 1889, the last revision by the learned author himself, the statement that "a registered company does not necessarily dwell where its registered office is situate," citing the *Cesena* case (*supra*) and *Keynsham Blue Lias Lime Co., Limited v. Baker* (2 H. and C., 729), and my noble and learned friend Lord Wrenbury, in his last revision, 9th ed., 1909, says, p. 154, "For the purposes of the Income Tax Acts the place of registration of a company is not, any more than the birthplace of an individual, conclusive as to its residence. A company registered here, with a registered office here and governed by a board, which meets here, is no doubt resident here (*Cesena* case, *supra*), but also a company registered abroad, whose head office and directors' meetings are here, is resident here (*Goerz* case, *supra*). The test of residence is not registration but where the company does its real business, where the central management and control abide (*De Beers* case, *supra*)." Similarly Professor Dicey, in the first and second editions of his Conflict of Laws, which were wholly his own, dwells in his Rule 19 on the principal place of business as being the domicile of a trading company and then describes the same test as determining its residence, and, in his Appendix on income-tax law, his note on the *De Beers* case (*supra*) is "what should be noted is the close connexion between residence in the United Kingdom and the carrying on business there. In the case of a trading corporation or company the two things can hardly be separated, for the simple reason that such a company has not, in fact, any residence but resides, from a legal point of view, in the country where the central control and management of its affairs is to be found," a proposition only slightly modified on p. 777 of the 2nd ed. No one of these great authorities doubts, any more than Lord Lorcburn doubted, that the test is the same for English companies as for foreign ones, or entertains any idea that for income-tax purposes performance of the statutory obligations of a registered company has any different significance from that of mere registration. Similarly I have looked into the cases relating to the jurisdiction of County Courts over companies. I do not say that they afford much assistance, but they show that the combination of the place where the business is carried on has long been an integral fact along with that of the registered head office in deciding where a company "dwells" within the County Courts Act 9 and 10 Vict., c. 95, s. 128 (*Taylor v. Crowland Gas and Coke Co.*, 11 Ex., 1) and in *Keynsham Blue Lias Lime Co., Limited v. Baker* (*supra*), where the two were not the same ; it was the place of manufacture, where the contract sued on was made, and not the London head office, where the directors met, that satisfied the word "dwells." In neither case were the statutory requirements of the Acts, under which the respective companies were incorporated, treated as having any importance.

I venture to submit that a long current of judicial expressions, whether technically *obiter* or not, the general agreement of the most valuable textbooks and the course taken in argument by so many Law Officers of the Crown afford sufficient warrant for saying that the rule is settled and ought not to be disturbed. Sir Richard Baggallay and Sir John Holker advanced the present contention, though not on all the present grounds, but it was not accepted. Thenceforward one Law Officer after another until very recently has treated the rule as having been concluded, under circumstances that implied that the rule was an exhaustive one. Did they all miss the point or did they dismiss it as untenable ?

In my opinion these eminent men did not miss the point, but, apart from the unsuitability of the word "resident" to the technicalities of the Companies Acts, they saw that the interests of the Revenue demanded a different construction. With Victorian rates of income-tax it was long before it became worth while for English companies, which exploited foreign trades or properties, to incur the trouble and expense of removing the management from England. They were content to rely on the foreign locality of their enterprise. The crude attempt to rely on the place of incorporation, which was made in reply by the Crown, failed at once and was advisedly dropped for, had it succeeded, the Revenue could not have charged foreign companies trading here. It had not yet been foreseen that the doctrine of double residence could be applied to companies, still less that, if it could, double tests of residence could be tolerated, namely, incorporation for English companies and actual trading for foreign ones, a right about face attitude condemned in *Bradbury's* case by Lord Cave, L.C. ([1923] A.C., at pp. 753, 754) as intolerable.

My Lords, on reference to the Income Tax Act, 1918, I think it must appear that the Legislature itself has by that Act recognized the principle, which I submit was established by the previous current of authority, that for income-tax purposes the residence of an English limited liability company depends not on its English registration and statutory obligations but on the facts as to the mode and place in which it controls and directs its affairs. The initial words of No. 7 of the General Rules applicable to all schedules "where a non-resident person, not being a British subject, or a British, Indian, Dominion, or Colonial firm or company, or branch thereof, carries on business with a resident person . . . &c.," appear to me in plain English to assume that a "person," being a British company, may be a "non-resident person," and this without any qualification dependent on the manner of its incorporation. If so, the fundamental proposition, on which the argument for the respondent has been rested, is conclusively negatived.

It is, however, contended that the rule, properly construed, refers only to such persons, including companies, as are non-resident, and therefore cannot relate or refer to any companies, which by law must be always resident. There are British companies which can be non-resident, such, for example, as have been incorporated by some statute or Royal Charter, not containing provisions equivalent in effect to those pointed out in the Companies (Consolidation) Act, 1908, and to these, but to these only, the rule applies.

My Lords, I have not been able to adopt this view. It begs the whole question. It has been admitted that all the other "persons" mentioned after the words "not being" are used unrestrictedly and in this respect the drafting was said to have been "loose," but surely, unless express words to the contrary are to be found, words of exception like these are simply used in order to take the things enumerated out of the prior general words, because they would otherwise be included in them. In effect, I think this rule, had it been drafted in paragraphs, one dealing with British

subjects, the next with British companies, the next with British firms, and so on, would have meant and rightly should have read "Any non-resident British company, which carries on business with a resident person . . . ." The matter is not to be brushed aside as the result of unskilful drafting or of hasty discussion in Committee. It was argued that a rule framed *alio intuitu* should not be read as unsettling the settled law as to the residence of English limited liability companies, but the truth is that it was framed for the purpose of applying to a new case the income-tax law as it then stood and was understood to have been interpreted by the Courts, and to use it for the purpose of declaring by a tacit assumption a novel interpretation of the Companies (Consolidation) Act, 1908, in the teeth of the decisions of the Court, would have been contrary to all the principles on which taxing legislation is framed. It is not thus that draftsmen perform their difficult task. Of course, in later stages changes occur which, being the work of many minds and different processes of thought, may mar the symmetrical draft, which was the work of one. For this no apology is ever made, though we are often asked to show it suitable judicial indulgence, but I think this contention fails, as soon as the origin of Rule 7 is historically considered.

It was first enacted as section 31 (3) of the Finance (No. 2) Act of 1915, a section which added to the previous rules on the subject of non-residence and extended them, till the Consolidation Act of 1918 converted them into a code dealing with the whole topic. Section 31 of the Act of 1915 begins : "(1) Section 41 of the Income Tax Act, 1842 . . . shall, so far as it relates to the taxation of non-residents, be extended" in two particular respects. "(2) A non-resident person shall be chargeable . . . in the name of the branch, factor, agent, receiver, or manager" through whom the profits chargeable arose. Then follows in subsection (3) the provision which is now General Rule No. 7. Section 41 of the Act of 1842 provided a method of vicariously charging certain incapacitated natural persons and was not framed for the purpose of charging incorporated persons ; nor had it anything to do with the system of incorporating companies with limited liability. Where then there was added to that section a provision relating to a wholly different category of chargeable persons, namely, companies, one would expect that the new provision would deal with companies generally, except in so far as express limiting words were employed, but one would not expect that a provision, dealing with the chargeability of non-resident companies, would leave the chargeability of the most important class of such companies to be inferred only from an assumed construction of a non-taxing Act, which had not till that time been laid down by a uniform current of decisions. I am clearly of opinion that this General Rule adopts and, in effect, declares the view of the law as to the residence of companies generally, which had previously been assumed and acted on in the decisions for a generation or more, and gives statutory recognition to them, and, if so, the respondent's argument cannot be accepted.

The matter is one of very general importance. Many companies have, at the cost of some trouble and expense, transferred their control and management abroad on the faith of decisions, or if you will *dicta*, to the effect that by so doing they could legitimately reduce the burden of their taxation. Are they now to reconsider their position and, if so, in what direction ? The present contention shuts out English companies from the advantages with regard to income from Colonial and other securities, which the Act secures to such natural persons as change their residence in terms of the Rules, for companies cannot so change it. Such a discrimination must affect the question of the future incorporation of new concerns in England and the further question must arise whether British status and British protection are in business worth the price. It is a pity that among the above-mentioned advantages were those offered generally to investors by the Treasury on the issue of certain War Loans, for English companies, though they may hold the stocks, cannot have the benefit of exemption from tax, since they cannot be persons "not ordinarily resident in the United Kingdom," section 46 (1). Most of all is it to be regretted, if this grave change is to be brought about, because the Crown adopts a line of argument which appears to be the contrary of that long put forward on its behalf and thus obtains, as a matter of construction, something, as it seems to me, which the Legislature alone can make law.

In my opinion the decision of the General Commissioners was right and the appeal should be allowed.

LORD ATKINSON.—My Lords, I have had the privilege and advantage of reading more than once and have carefully studied the judgment which my noble and learned friend on the Woolsack has just delivered. I think the conclusions at which he has arrived are sound and are borne out by the facts to which he has referred. In my view his judgment is sound in every particular.

LORD BUCKMASTER (read by LORD ATKINSON).—My Lords, by Schedule D of the Income Tax Act, 1918, tax is charged in respect of profits or gains arising or accruing "to any person residing in the United Kingdom" from the property there specified. By Rule 1 of the General Rules every body of persons is chargeable like a person, and by section 237 "body of persons" means among other things "any company."

The appellants are a company incorporated in England under the Companies Acts, and the only question raised on this appeal is whether, by reason solely of the fact that its registered office must be here, such a company is a person "residing" in the United Kingdom within the meaning of Schedule D.

The difficulty which this question presents is due to the fact that residence is essentially a condition applicable to men and the tests for its determination, such as living and sleeping, can have no proper counterpart in an abstract entity such as an incorporated company, which can neither live nor sleep. It must, however, be assumed that a company *has* a residence, and if the question is looked at entirely apart from authority, I should have thought that the place of the registered office was also the place where the abstraction known as "a company" resided. It is the place where all notices must be served. It constitutes its address for purposes of receipt of all notices of legal process ; the books which the company is compelled by law to keep must be there kept and held ready for inspection ; and it seems to me a fair inference that this is consequently a place where it resides.

The matter cannot, however, be considered in this separate and detached way. In the first place, the decision in *Cesena Sulphur Company* and *Calcutta Jute Mills v. Nicholson* (1 Ex.D., 428), if not in express terms, yet by necessary inferential implication, decided that a company registered in this country did not have a residence here by reason

of that fact alone; subsequent authorities have accepted this conclusion and companies have arranged their business upon the hypothesis that it was exact. The most definite statement to this effect is to be found in the words of Lord Loreburn in *De Beers Consolidated Mines, Limited v. Howe* (22 *The Times* L.R., 756; [1906] A.C., 455) where he says, "The decision, . . . now 30 years ago, involved the principle that a company resides for purposes of income-tax where its real business is carried on. Those decisions have been acted upon ever since."

In order to see exactly what was the effect of this decision the cases need further examination. They were decided together. The Cesena Sulphur Company was a company which was registered both here and in Italy, and the Calcutta Jute Mills Company was registered only here. It is plain that had the Court regarded the fact that incorporation here, with its necessary consequences of having a registered office and other associated obligations, was sufficient to establish residence the cases might have been decided upon that ground, but they clearly were not, and, though there are passages in the judgment of Chief Baron Kelly at p. 444 which suggest that the registered office might be regarded as a residence, the subsequent statements show that he turned once more to the consideration of where the control of the business was and held that that decided the residence in England. Baron Huddleston spoke more definitely on the matter at p. 453. The argument that registration was conclusive of residence was advanced by the Attorney-General, but this argument the learned Judge rejected in these words:—

"Registration, like the birth of an individual, is a fact which must be taken into consideration in determining the question of residence. It may be a strong circumstance, but it is only a circumstance. It would be idle to say that in the case of an individual the birth was conclusive of the residence. . . . In the case of a corporation the place of its registration is the place of its birth and is a fact to be considered with all the others."

The decision, therefore, did clearly declare that the real place of business was a test of residence, and until the decision of this House in the case of *Swedish Central Railway Company, Limited v. Thompson* (41 *The Times* L.R., 385; [1925] A.C., 495) no one seems to have suggested that residence need not be unique.

It was subsequent to and probably consequent upon that decision that this dispute arose, and pursuant to its authority the Court of Appeal have held that as a residence may be dual the existence of a registered office here is one of its decisive tests.

In forming this opinion, however, a matter which does not appear to have been fully argued has been overlooked. In 1915 a new rule was added to the General Rules of the Income Tax Acts, incorporated in the Act of 1918 as Rule 7, which begins in these terms:—

"Where a non-resident person, not being a British subject or a British, Indian, Dominion, or Colonial firm or company . . . carries on business with a resident person. . . ."

This rule clearly is based on the hypothesis that a British company need not reside here since it may be "non-resident."

If, therefore, the phrase "British company" includes a company incorporated under the Companies Acts it is obvious that the place where its registered office may be is not the critical consideration for determining residence, since such a company must have its registered office here and could not, therefore, be non-resident.

The only road of escape from this difficulty is the one pointed out by the Attorney-General, which lies in saying that the words "British company" have a limited meaning and only deal with such companies as need not have a registered office and can, therefore, be non-resident, as, for example, companies incorporated by Royal Charter.

This argument results in cutting down the phrase "British company" to a relatively insignificant number of companies and depriving it of its most obvious meaning, and that without any reason capable of being extracted from the rule. Had that been the real purpose of the statute it should have been, as it easily could, more simply and directly expressed.

In my opinion, however, such was not its meaning or its purpose. In 1915 the *Cesena* case (*supra*) had been decided for nearly 50 years, the test it laid down had again and again been applied, and the statement of Baron Huddleston had not been contradicted in any considered judgment, the statement of Lord Wrenbury in *Egyptian Hotels, Limited v. Mitchell* (30 *The Times* L.R., 457; [1914] 3 K.B., 118, at p. 132) being really nothing but an interjection. The result was that in 1915 residence for a company was sought for by examining its seat of business, and registration as a sole test was overlooked. It was in these circumstances that the Act of 1915 was passed, and its effect was to give legislative sanction to the view that registration alone was not decisive of residence.

It is for this reason that in my opinion the appeal succeeds and should be allowed with costs.

LORD WARRINGTON OF CLYFFE.—My Lords, the question in this case is whether or not the appellant company was in the years of assessment a person residing in the United Kingdom within the meaning of Schedule D of the Income Tax Act, 1918, construed, of course, with due regard to other relevant provisions of the Act.

The company was incorporated on April 20, 1904, under the Companies Acts, 1862-1900, as a company limited by shares. By the memorandum of association it was stated in accordance with the statute that the registered office of the company is situate in England.

The actual registered office is at Gresham House, Old Broad-street, in the City of London. This is, in fact, the office of Mr. F. J. Horne, who carries on there the business of secretary of public companies and performs there on behalf of the company and certain other companies the functions necessary to be performed by them in order to comply with the requirements of the Companies Acts. The names of the companies for whom he acts are on the door of the office.

The business of the company is carried on in Egypt and its affairs are controlled and managed there.

The case thus raises the question whether a company incorporated under the Companies Acts, and therefore having a registered office in the United Kingdom, at which under the statutes certain duties have to be and are in fact performed on its behalf, and notices and other documents affecting the company are to be served, is as a legal consequence of these facts a person residing in the United Kingdom within the meaning of the Income Tax Act, 1918.

Assessments to income-tax for the years 1919-20 to 1924-25 under Schedule D, cases IV. and V., having been made upon the company by the Commissioners of Inland Revenue, the company appealed to the General Commissioners of Income Tax for the City

of London. The General Commissioners found that the company was not resident in this country. At the request of the present respondent they stated a case for the opinion of the Court. The case came before Mr. Justice Rowlatt in the King's Bench Division on November 23, 1926, and he allowed the respondent's appeal from the decision of the General Commissioners. His judgment was on February 18, 1927, affirmed by the Court of Appeal. Hence the present appeal to this House.

The statutory provisions relating to this and all other companies incorporated under the Companies Acts are now contained in the Companies (Consolidation) Act, 1908.

Under that Act every company is to have a registered office to which all communications and notices may be addressed. Every company is to keep a register of its members containing certain particulars enumerated in the statute (section 25). An annual list of members, with a summary specifying a large number of particulars relating to its capital and its liabilities and assets, is to be prepared and is to be contained in a separate part of the register of members (section 26 (3)). A copy of every instrument creating any mortgage or charge requiring registration under the Act is to be kept at the registered office and such copies are to be open to inspection by any creditor or member of the company. The register of members, and therefore, of course, the annual list and summary which are part of it, are to be kept at the registered office, and under certain conditions are to be open to inspection by members and other persons, and any member or other person may require a copy of the register, or of the list or summary or of any part thereof respectively, on payment of the prescribed sum. Every company is to keep at its registered office a register containing the names, addresses, and occupations of its directors or managers. A document may be served on a company by leaving it at or sending it by post to the registered office. This provision extends to service of a writ and of a petition for winding up and such service is equivalent to personal service. Service may be thus effected at any time of the day or night.

By No. 1 of the General Rules applicable to all Schedules of the Income Tax Act, 1918, it is provided that every body of persons is to be chargeable to tax in like manner as any person is chargeable under the provisions of the Act.

Inasmuch, therefore, as tax is imposed upon a person residing in the United Kingdom it is clear that the artificial person, a company under the Companies Acts, amongst other bodies of persons is regarded as capable of residing in the United Kingdom, although of course, inasmuch as it neither eats nor sleeps nor performs any of the physical or social functions of a natural person, the fact of residence depends upon considerations other than those which determine the residence of an individual.

Independently of authority, and in the absence of any relevant provisions of the Income Tax Act, 1918, throwing light on the meaning attributed by the Legislature to the words "residing" and "resident" as used in the Act, I should probably have been of opinion that the provisions of the Companies (Consolidation) Act, 1908, to which I have referred lead to the conclusion that, whatever other residence the company may have, the Legislature has provided that the registered office shall be a residence.

Certain corporate functions imposed upon it by the Act are to be performed at that place. Service of the most important documents, which in the case of individual persons must be served personally, may be effected by their being left at or sent by post to the registered office without restriction as to time.

The cumulative effect of these provisions apparently creates for the company a statutory home where it is to perform the corporate functions above mentioned, and where it is regarded as at all times present and ready to receive such documents and communications as are left or sent there.

This state of things would go some way to establish that in the case of a registered company there are present those conditions which, in the case of an artificial person, may constitute a residence in that part of the United Kingdom in which by the terms of its memorandum of association the registered office is situate.

But I have to consider the authorities and such relevant provisions as may be found in the Act of 1918 and to determine whether the opinion which I have above expressed can be maintained in view particularly of the provisions of the Act.

At the date of the passing of the Act of 1918 the authorities were in this position:—

In *Cesena Company, Limited v. Nicholson* and *Calcutta Jute Company, Limited v. Nicholson* (1 Ex.D., 428) Baron Huddleston expressed himself as follows (p. 453): "In the present argument the Attorney-General advanced a proposition to which I cannot assent. He suggested that the registration of a company was conclusive of its residence, that if a company was registered in England it must be held to reside in England. I think the answer which was given during the argument is a good one. It is this: registration, like the birth of an individual, is a fact which must be taken into consideration in determining the question of residence. It may be a strong circumstance, but it is only a circumstance. It would be idle to say that in the case of an individual the birth was conclusive of the residence. So drawing an analogy between an actual and an artificial person you may say that in the case of a corporation the place of its registration is the place of its birth and is a fact to be considered with all the others. If you find that a company which is registered in a particular country, acts in that country, has its office and receives dividends in that country, you may say that those facts, coupled with the registration, lead you to the conclusion that its residence is in that country." The decision, however, was given on the ground that in both cases the company in question carried on substantial business in this country.

In *De Beers Consolidated Mines, Limited v. Howe* (22 *The Times* L.R., 756; [1906] A.C., 455) it was decided in this House that in the case of a company registered abroad the test of residence is where it really keeps house and does its real business and the real business is carried on where the central management and control actually abide.

In 1918 it was, I think, assumed that the general current of authority, and in particular the *Cesena* case (*supra*), the *De Beers* case (*supra*) and certain other cases as to foreign companies had settled the question as to British companies, viz., that the mere fact of incorporation in this country, though an important circumstance, would not involve residence here, though the provisions of the Companies (Consolidation) Act, 1908, as to the registered office referred to above were not considered in those cases. In this assumed state of the law the Act of 1918 was passed, and there is in that Act one provision which to my mind shows conclusively that the Legislature accepted and acted on that view of the law. It is found in No. 7 of the rules applicable to all

Schedules. The material part of the rule is as follows:—

"Where a non-resident person, not being a British subject or a British, Indian, Dominion, or Colonial firm or company or branch thereof carries on business with a resident person," and certain facts and circumstances appear to the Commissioners, then "the non-resident person shall be assessable and chargeable to tax in the name of the resident person as if the resident person were an agent of the non-resident person."

This rule appears to me clearly to assume that a British company, equally with an individual British subject, might for the purposes of the Act be a non-resident person. I can see no legitimate reason for excluding from the expression "British company" a company registered under the Companies Acts; in fact, the rule as a whole indicates to my mind that such companies were those principally referred to. The result is that, as every British company is under a statutory obligation to have a registered office to which there are attached by statute the incidents and characteristics above referred to, every such company, notwithstanding the provisions as to the registered office, may for the purposes of the Act be a non-resident company.

If this be the true construction of the Act it cannot be maintained that as a matter of law the General Commissioners were bound to decide that the appellant company was resident in this country. The question before them was thus one of fact; there was ample evidence on which they could find as they did and it was not competent to Mr. Justice Rowlatt and the Court of Appeal to reverse their decision. The appeal ought to be allowed with costs here and below.

It is right to add that though the point was raised in the Court of Appeal it appears not to have been pressed and there is no reference to it in any of the judgments. It was not mentioned by counsel at your Lordships' Bar, but was raised by one of your Lordships after the original argument and the case was restored that it might be dealt with.

The case of the *Swedish Central Railway Company v. Thompson* (41 *The Times* L.R., 385; [1925] A.C., 495) was decided subsequently to the Act of 1918. The point on which as I think this case turns was not raised. There are, however, dicta in my judgment in that case in the Court of Appeal ([1924] 2 K.B., 255) which cannot be supported in view of the present decision.

[Solicitors—Messrs. Herbert Smith and Co.; the Solicitor of Inland Revenue.]

Court of Appeal: (Scrutton, Lawrence, and Greer, L.JJ.) 1928. July 17.

G. AND T. EARLE, LIMITED v. HEMSWORTH R.D.C.*

Contract—Building contract—Retention fund—Specific fund — Assignment — Debentures—Floating charge—Appointment of receiver—Priorities.

By a lump sum building contract entered into in 1922 between S. and Co., Limited ("the contractors") and the defendants, provision was made for interim payments on the architect's certificates, to be given monthly at the rate of 90 per cent. of the value of all work executed. The remaining 10 per cent. ("the retention fund") was to be retained and deposited in a bank until the final adjustment of accounts. The contract was varied by consent, and in the events that happened the retention fund amounted to £1,000 at the beginning of 1924; this was never deposited in a bank and remained a merely notional fund, but both parties treated it as a separate sum capable of being earmarked. It was included, without distinction, in the architect's final certificate for £1,848 10s. 2d., on January 28, 1927. Meanwhile, the plaintiffs, who were supplying cement to the contractors, found that the latter were getting into arrears with their payments, and to obtain further credit the contractors, being then indebted to the plaintiffs in the sum of £671 on April 7, 1924, assigned to them the retention fund by a document in these terms: "In reduction of the amount now or to be owing from us to you for goods supplied by you, we hereby assign to you all moneys now or hereafter to become due to us from the Hemsworth R.D.C. for retention moneys in respect of the G. Housing Scheme, and for which your receipt shall be a sufficient discharge. . . ." Due notice of that assignment was given to the defendants next day.

The contractors had at various dates between 1900 and February 2, 1924, issued to the Manchester and County Bank, Limited, a number of debentures charging the undertaking of the contractors and all their property, both present and future, the charge being a specific charge on the contractors' freehold and leasehold property, machinery, goodwill, and uncalled capital, and a floating charge on all the company's other assets, subject to a proviso that the contractors were not to be at liberty to create any mortgage or charge on any of their assets in priority to the debentures. On October 13, 1924, a receiver for the debenture-holders was appointed, who duly entered into possession. On October 20, 1924, a resolution was passed for the voluntary winding up of the company. The receiver refused to recognize the right of the plaintiffs to payment under their assignment in priority to the debenture-holders, and on the architect's final certificate being given in January, 1927, the defendants declined to interplead and paid the retention moneys to the receiver for the debenture-holders, and the plaintiffs thereupon brought their action on their assignment. The Judge gave judgment for the plaintiffs, and the defendants appealed, not raising any question as to priorities, but contending that the assignors ought to have been joined as parties.

Held, that the retention money, although not becoming payable until a later date than the assignment, constituted a debt or legal thing in action which could be assigned, and could be sued for in an action without joining

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

the assignors as parties ; and that the assignment was a good assignment, and the plaintiffs were entitled to recover on it.

Decision of Wright, J. (44 *The Times* L.R., 605), affirmed.

This was an appeal by the defendants from a judgment of Mr. Justice Wright (44 *The Times* L.R., 605) in an action in which the plaintiffs claimed to recover £1,000, being retention money due from the defendants to certain contractors under a building contract. The plaintiffs claimed under an assignment of the retention fund to them dated April 7, 1924. The facts are stated in the head-note and in the judgment.

Mr. W. Norman Raeburn, K.C., and Mr. N. L. Macaskie appeared for the appellants ; and Mr. Alexander Neilson, K.C., and Mr. W. H. Owen for the respondents.

Lord Justice Scrutton.—I begin my judgment in this case by saying that I entirely agree with the judgment of Mr. Justice Wright, but out of deference to the argument that Mr. Raeburn has presented with his usual fairness and clearness I will say a few words.

The Rural District Council who are appealing have put themselves in the unfortunate position of paying a sum of money to one person and finding themselves sued for the same sum of money by a second person, and unfortunately they have only themselves to thank for it. They might very well have interpleaded and left the two contending parties to fight for the sum themselves, but they have chosen to pay one of the contending parties and now find themselves liable to pay the other contending party.

The question arises in this way. A company for which Messrs. Wagstaff and Sons were architects were executing a building scheme for the Council, or rather two schemes. The particular scheme in question relates to what is called the Grimethorpe contract, and the Grimethorpe contract, which is based upon a specification and priced bill of quantities was for the sum of £49,459 8s. 3d., referred to as the contract price. On the question how the contract price was to be paid one refers to clause 29: "(1) Interim payments. No money shall become due to the contractor unless and until the architect shall certify in writing the amount thereof and that the contractor is entitled thereto. (2) When work to the value of £1,000 has been executed and thereafter at monthly intervals the architect shall certify in writing to the contractor and the employers the amount from time to time payable to the contractor under this contract and shall issue such monthly certificate not later than the 15th day of each month following that in which the first certificate is given and the employers shall within fourteen days of the date of issue of the certificate pay to the contractor the sum so certified. (3) The amount to be certified by the architect on his first and monthly certificates as due to the contractor shall be at the rate of 90 per cent. of the value of all work." That means of course that the architect will value the work according to the bill of quantities and specification ; he will find so much, say £1,000, done by value and he will issue a certificate that 90 per cent. of it, £900, is payable to the contractor. "The balance of 10 per cent. of the value of the work shall be retained until the sum so retained (hereinafter called 'the retention fund') amounts to £2,472 after which the contractor shall be entitled to be paid monthly to the full value of all work executed and material supplied." The certificates proceeded so far that £2,472 was being retained by the Council, and being retained because the contractor had done work of that value for which he would be entitled to be paid though the sum was not yet payable. If the contract had been carried out, instead of being varied, the proceedings would have gone on in this way. "One half of the retention fund shall be paid (subject to the conditions set out herein) to the contractor at the completion or occupation of the works and the other half together with any further sum found due to the contractor at the final adjustment of the accounts by the quantity surveyor shall be paid six months after completion or occupation of the works provided that all defects for which the contractor is liable are made good and that he has otherwise discharged his liabilities under the contract. (4) The sums forming the retention fund shall be deposited by the employers as they accrue in a bank to be agreed." It is curious that the contract uses that word "accrue" because the word "accrue" after being used by Lord Esher in *Brice v. Bannister* (3 Q.B.D., 569) is used again by the Divisional Court in *Walker v. Bradford Old Bank, Limited* (12 Q.B.D., 511) as describing a debt that can be assigned—"If an accruing debt arising out of contract be assigned," and the words here used about the retention fund are "as they accrue." The terms of the contract were not carried out, but what happened was that in the case of the Grimethorpe contract first of all £972 was paid to the contractor reducing the retention money to £1,500, and then on the completion of half the number of the houses the £1,500 was further reduced by £500, leaving therefore a retention fund of £1,000 on the Grimethorpe contract, the remaining £1,000 to be retained until the final certificate. A final certificate was given ultimately which showed that £1,800 was due to the contractors. In the meantime the contractors, wanting cement to complete their houses and having got a certain amount from the plaintiffs for which they had not paid, desired to have still more cement, and in order to obtain more cement they on April 7, 1924, made an assignment to the plaintiffs in the following terms : "In part reduction of the amount now or to be owing from us to you for goods supplied by you, we hereby assign to you all moneys now or hereafter to become due to us from the Hemsworth Rural District Council for retention moneys." At that time all the retention fund had accrued ; it had not been put in the bank as originally proposed but it had all been deducted and it had been reduced to £1,000, labelled retention moneys, by these two payments in variation of the contract, but there was a fund of £1,000 retention moneys earmarked because it represented the value of work already done under the contract.

The question is whether that assignment is a good assignment. The person to whom the Rural District Council in fact paid the money is the receiver for the contractors' debenture-holders who had a floating charge on all assets of the contractors which crystallized, to use a phrase used in the cases, some time after the date of this assignment when a receiver was appointed in consequence of a default under the terms of the debentures. The question then is, as raised by Mr. Raeburn, whether this is such an assignment, to use the language of the Law of Property Act, 1925, section 136, of a debt or other legal thing in action that the assignee can sue without joining

the assignor as a party. As I understood Mr. Raeburn's argument that is the sole question. He has not gone into the extremely interesting and intricate question of equitable priorities, and I take his objection to be: This is not an assignment of a debt or other legal thing in action and, not being such an assignment, it cannot be sued for in any proceeding unless the assignor is joined as a party. In the view which I take of the cases which have been cited it has been effectively determined by a series of cases binding upon us that where the thing assigned arises out of an existing contract, although it may not become payable until a later date than the assignment, it is a debt or other legal thing in action which can be assigned and sued for without joining the assignor as a party. Two of the three cases which Mr. Raeburn cited to us on the question of these assignments, first of all the case of *Ex parte Moss—In re Toward* (14 Q.B.D., 310), which was a ship case in which Mr. Justice Mathew treated the assignment of a retention fund under a building contract as being clearly within the language of the Supreme Court of Judicature Act, 1873, and secondly the decision in *Drew v. Josolyne* (4 *The Times* L.R., 717) where under the building contract itself the retention fund was treated as a matter that might be assigned under the language of that Act, and the language of the Divisional Court in *Walker v. Bradford Old Bank, Limited* (*supra*), "If an accruing debt arising out of contract be assigned," and the very wide definition by Mr. Justice Channell in *Torkington v. Magee* (18 *The Times* L.R., 703; [1902] 2 K.B., 427; 19 *The Times* L.R., 331; [1903] 1 K.B., 644) appear to me to show that the Judge below has taken the right view when he decided that this particular retention fund assignment is a matter which comes within the language of the Supreme Court of Judicature Act, 1873, or the Law of Property Act, 1925, and indeed to my own knowledge this view has been constantly acted on by builders and their assignees and persons concerned with them in building contracts for a very considerable time.

I therefore come to the conclusion that this appeal must be dismissed, with costs.

LORD JUSTICE LAWRENCE and LORD JUSTICE GREER concurred.

[Solicitors—Messrs. Emmett and Co., for Mr. C. E. Scholefield, Hemsworth; Messrs. Gregory, Rowcliffe and Co., for Messrs. Holden, Scott and Co., Hull.]

Chan. Div. (Romer, J.) } 1928. July 31.

IN RE GROVE-GRADY—PLOWDEN v. LAWRENCE.*

Will—Bequest—Validity—Charitable bequest—Animals' benevolent society.

The Court upheld the validity of a bequest for the maintenance of an animals' benevolent society, on the ground that a gift to prevent cruelty to the lower animals was a good charitable gift even though it included animals harmful to the human race.

This was a summons taken out by the trustees of the will of Mrs. Sarah Martha Grove-Grady, who died in 1925, for the determination by the Court of the question, *inter alia*, whether a bequest of her residuary estate for the establishment, on certain conditions, of an institution to be called "The Beaumont Animals' Benevolent Society" was a valid charitable bequest.

Mr. Grant, K.C., and Mr. Byrne appeared for the applicants; Mr. Wilfrid Greene, K.C., and Mr. Daynes for the next-of-kin of the testatrix; the Solicitor-General (Sir Boyd Merriman, K.C.) and Mr. Stafford Crossman for the Attorney-General; and Mr. W. P. Donald and Mr. J. Single for other parties interested under the will; and Mr. Alfred Adams held a watching brief for the National Anti-Vivisection Society.

Mr. GRANT, in opening, said that the testatrix was a devoted lover of animals and a determined anti-vivisectionist.

One of the questions in respect of which the decision of the Court was sought arose under a clause in the will by which the testatrix devised and bequeathed her residuary estate to her trustees upon trust, to form a trust fund for the founding, establishing, and maintaining of a charitable institution to be called "The Beaumont Animals' Benevolent Society":—

"Under such rules and regulations and under such Committee of Management not exceeding ten members and otherwise in all respects as my trustees shall in their absolute discretion think fit, and having regard to my wish that the expense of management shall be kept as low as possible Provided that all members of the Committee and of the Governing Body and all officials of the said Society shall be and always have been declared Anti-vivisectionists and opponents of all sport involving the pursuit or death of any stag deer fox hare rabbit bird fish or any other animal and to have for its objects [(1) the provision of refuges for the preservation of 'all animals birds or other creatures not human'; (2) the distribution of any part of the yearly income of the trust fund amongst such Societies or Homes for the benefit of animals generally or for the benefit of individual cases British or Foreign as the Committee of 'The Beaumont Animals' Benevolent Society' might think fit]; (3) the founding establishing endowing supporting maintaining or providing of hospitals or homes for animals in Great Britain having no declared vivisectionist upon the Governing Body or bodies thereof or in any way connected with the management thereof."

Mr. GREENE said that the gift was bad and was not a charitable gift. To form a society of the kind referred to, it was necessary to find people who had always been declared opponents of all sport. The condition was too loosely and too vaguely expressed. A trust for the preservation of animals was not necessarily a charity. The question was whether the trust was beneficial to the community. A trust involving the preservation of pests, such as rabbits or mosquitoes, was not charitable.

A gift in favour of animals could only be a good charitable gift if it were for the benefit of the community. Such a gift could only be for the benefit of the community if it conduced to its moral, physical, or intellectual well-being. It followed that a gift for the benefit of animals, as such, was not necessarily charitable, since its object was the mere preservation of animals without any necessary element of benefit to the community. In the present case that necessary element of benefit was not to be found in the gift, since it contemplated equally the preservation of useless, or even harmful, animals. Whether anything was prejudicial or beneficial to the

* Reported by J. L. DENISON, Esq., Barrister-at-Law.

community was a question of fact for the Court and did not depend on the views of a testator. If a trust embraced both charitable and non-charitable objects the whole gift was bad. Even if the gift were charitable, the directions as to the constitution of the society were so essential a part of the gift as to make the intention particular and not general, with the result that if these directions could not be complied with the gift failed. In his submission the directions were so vague and uncertain that they could not be complied with.

The SOLICITOR-GENERAL said that the question was whether this was a charitable gift at all. The bearing of the anti-vivisection point was very indirect. The testatrix wished her directions to be carried out by a body of persons with an anti-vivisectionist mentality. The case was amply covered by authority (*In re Wedgwood—Allen v. Wedgwood*, 31 *The Times* L.R., 43 ; [1915] 1 Ch., 113), and there was nothing in the present trust for animals *per se* which prevented the direction from being a perfectly good charitable purpose. The testatrix, in her reference in the clause to opponents of all sport, was not thinking of fantastic questions, such as relating to the pursuit of butterflies, but meant persons opposed to the pursuit of killing animals for purposes of sport.

Mr. JUSTICE ROMER, in his considered judgment, said that there were several indications to be found in the clause that the dominating intention in the mind of the testatrix was the protection of the lower animals from cruelty and suffering. It had been established by authority which was binding on him, and it was conceded by the heir-at-law and next-of-kin, that a gift the object of which was to prevent suffering and cruelty to the lower animals was charitable (*In re Wedgwood*, 31 *The Times* L.R., 43 ; [1915] 1 Ch., 113).

The question which he had to put to himself was : Did a trust for the benefit of the lower animals tend to promote public morality ? In his opinion that question must be answered in the affirmative. Its tendency was to stimulate humane and generous sentiments in man towards these animals and by these feelings to promote feelings of humanity and morality generally and to repress brutality and thus elevate the human race. It was, however, urged in opposition to that conclusion that, whatever might be said in favour of a trust for animals beneficial to mankind, it ought not to prevail in the case of a trust which included within its scope animals which were positively harmful to the human race ; and this, it was said, was a trust of that kind. But the same objection was unsuccessfully put forward in *In re Wedgwood* (*supra*).

The next objection on the part of the heir-at-law and next-of-kin to the validity of the trust was that it included a trust for the benefit of individual animals (*Cooper-Dean v. Stevens*, 5 *The Times* L.R., 404 ; 41 Ch.D., 552).

In his opinion, the phrase "individual cases" in the will referred to particular species of animals and not to any individual animal. For the objects of the gift were societies and homes, and it would be fantastic to suppose that the testatrix had in mind or contemplated the possibility of a society or home for the benefit of one or more individual animals. She was thinking of such societies or homes as existed for the benefit of, say, dogs or horses generally. Such societies or homes were, without question, charitable. For these reasons he was of opinion that the trusts declared of the residuary estate were charitable.

It remained, however, to consider the effect of the condition imposed by the testatrix as to the constitution of the committee and governing body of the "Beaumont Animals' Benevolent Society."

The contention had been advanced that the condition was so essential a part of the gift as to make the intention of the testatrix with regard to her residuary estate a particular and not a general charitable intention ; that the condition could not be complied with; and that the gift of residue accordingly failed. Even if it were considered that the condition was of the character alleged, why could it not be complied with? It was said that no one could truthfully assert that he had always been a declared anti-vivisectionist and an opponent of all sport involving the pursuit or death of any animal. That was true, without any question, if the investigation into the views of the candidates for service on the committee, governing body, and staff was to be carried back to the cradle. But the condition must be interpreted reasonably, and, if so interpreted, need not go back beyond the time when the candidate attained to years of discretion. If the investigation were confined in that way he could not think that there would be any difficulty at all in complying with the condition. In his opinion the trusts declared of the residuary estate were valid.

[Solicitors—Messrs. Pennington and Son ; Messrs. Andrew, Wood, Purves, and Sutton, for Mr. J. Halmshaw, Barnsley ; the Treasury Solicitor ; Messrs. Iliffe, Sweet, and Co., for Messrs. Laycock, Dyson, and Laycock, Huddersfield ; Messrs. Shield and Mackarness.]

Court of Appeal. (Scrutton, Greer, and Sankey, L.JJ.) 1928. July 17.

LLOYD v. COOK.
GOUDGE v. BROUGHTON.
SIMSON v. MIATT.
BARTRAM v. BROWN AND OTHERS.
BARKER v. HUTSON.*

Landlord and Tenant—Restrictions—Dwelling-house — Decontrol — Possession by "landlord"—Subsequent letting of part—Whether part so let controlled—Grant of lease to tenant — Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 12 (2), (7)—Rent and Mortgage Interest Restrictions Act, 1923 (13 and 14 Geo. V., c. 32), s. 2 (1), (2).

The term "landlord," in section 2 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, is not to be construed as requiring a contract of tenancy ; it must be construed in the looser sense of "owner," or in the sense of a person who, at a later stage, is going to appear in legal proceedings as landlord contesting with the tenant the terms of his tenancy.

Cohen v. Gold (43 *The Times* L.R., 376 ; [1927] 1 K.B., 865) overruled.

Where a dwelling-house has been decontrolled under section 2 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, every part of the dwelling-house is decontrolled—*i.e.*, the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, ceases to apply to the

* Reported by T. W. MORGAN and E. J. M. CHAPLIN, Esqrs., Barristers-at-Law.

whole dwelling-house, so that a subsequent letting of the dwelling-house, or any part of it, does not revive control.

Decision of the Divisional Court in *Lloyd v. Cook* (44 *The Times* L.R., 455) on this point reversed.

Ratkinsky v. Jacobs (44 *The Times* L.R., 548) approved.

The words "the tenant" in section 2 (2) of the Rent and Mortgage Interest Restrictions Act, 1923, refer to the sitting tenant—*i.e.*, to the particular person who is the tenant when the lease referred to in the subsection is granted, and to no other person.

Decision of the Divisional Court in *Bartram v. Brown and Others* (44 *The Times* L.R., 572) affirmed.

LLOYD v. COOK.

This was an appeal by the landlord from a decision (44 *The Times* L.R., 455) of a Divisonal Court—Mr. Justice Salter and Mr. Justice Charles—who had allowed an appeal by the tenant from a decision of his Honour Judge Hill Kelly, given at Bloomsbury County Court, which raised the question whether a fresh letting of part of premises which had been decontrolled was outside the protection of the Rent Restriction Acts.

The appellant, Mrs. Kate Cook, was the holder of a 99 years' lease of premises known as 14, Eversholt-street, Camden Town, N.W.1. Three rooms on the third floor of that house had been let to a Mr. Churchman, who vacated possession on August 12, 1926. Mrs. Cook thereupon prepared one of these rooms for the use of her son, who came in and occupied it as soon as it was ready. She had the other two whitewashed and prepared with a view to another letting.

On August 28, 1926, she let these two rooms on a weekly tenancy at a rent of 14s. a week to the respondent, Mr. Frederick Charles Lloyd. Mr. Lloyd applied to the Registrar to have the standard rent of his rooms fixed by an apportionment of the rent of the whole house, on the ground that his rooms constituted a "dwelling-house" protected by the Rent Restriction Acts. The Registrar granted the application, and fixed the standard rent at 5s. 8d. a week, but the County Court Judge reversed that decision on appeal, and held that Mr. Lloyd's rooms were no longer protected by the Acts, having become decontrolled by virtue of section 2 (1) of the Rent and Mortgage Interest Restrictions Act, 1923.

From that decision the tenant, Mr. Lloyd, appealed to a Divisional Court.

The Divisional Court held that, notwithstanding the decontrol of the three rooms, the subsequent letting of two of these rooms to Mr. Lloyd as a separate dwelling-house on a fresh tenancy was not outside the protection of the Rent Restriction Acts, and that the tenant was entitled to an apportionment.

The landlord appealed.

Mr. Montgomery, K.C., Mr. J. C. Lockwood, and Mr. Gordon Clark appeared for the appellant; and Mr. John Duncan for the respondent.

Mr. MONTGOMERY, in opening the appeal, said that the landlord, Mrs. Cook, had obtained possession of the dwelling-house consisting of the three rooms at some time subsequent to July 31, 1923, and the whole house consisting of the three rooms had been decontrolled under section 2 of the Rent and Mortgage Interest Restrictions Act, 1923. Either the two rooms which were subsequently let to Mr. Lloyd were to be regarded as part of the dwelling-house consisting of three rooms—in which case they were decontrolled by section 2 of the Act of 1923, because the whole of the three rooms were decontrolled—or the two rooms were to be treated as a new dwelling-house, let for the first time on August 28, 1926, when they were let to Mr. Lloyd—in which case the Act did not apply.

It could not be said that Mrs. Cook had not come into possession of the two rooms in question, because the two rooms were not a separate dwelling-house when she came into possession of the three rooms.

Mr. JOHN DUNCAN, for the respondent, contended that the two rooms let to Mr. Lloyd constituted a new and separate dwelling-house. It was a separate entity from the dwelling-house consisting of the three rooms. The whole did not, in law, include the part in this case. There were here two separate dwelling-houses and two separate lettings, and the new letting to the respondent, Mr. Lloyd, was subject to the protection of the Rent Restriction Acts, and Mr. Lloyd was entitled to an apportionment of his rent. Moreover, the appellant was not the landlord who had been in possession of the premises for the purposes of section 2 of the Act of 1923. The respondent ought to succeed.

GOUDGE v. BROUGHTON.

This was an appeal by the plaintiff, Mr. James Alfred Goudge, the owner of premises known as Under Beeches Stables, at Redhill, from a judgment of a Divisional Court—Mr. Justice Salter and Mr. Justice Talbot—allowing an appeal by the defendant, Mrs. Mary Broughton, from a judgment of the Deputy County Court Judge at Redhill County Court ordering the defendant to give up possession of the premises.

The plaintiff bought the premises from the former owner in October, 1925. The former owner's gardener was then in possession. The gardener remained in possession as caretaker, paying no rent. In December, 1926, the plaintiff let the premises to the defendant. The gardener remained on for some time, and ultimately went out of his own accord. The defendant then remained in sole occupation of the premises until she received the plaintiff's notice to quit. The tenancy was a monthly one at a rent which was within the limits of the Rent Restriction Acts, and proper notice to quit was given.

The question was whether the plaintiff had brought himself within section 2 of the Rent and Mortgage Interest Restrictions Act, 1923, and was entitled to possession. The section provides:—

"(1) Where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house at the passing of this Act [*i.e.*, July 31, 1923] or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house. . . ."

By subsection (3):—

"For the purposes of this section the expression 'possession' shall be construed as meaning 'actual possession,' and a landlord shall not be deemed to have come into possession by reason only of a change of tenancy made with his consent."

The Deputy County Court Judge came to the conclusion that the premises were decontrolled and that *Cohen v. Gold* (43 *The Times* L.R., 376; [1927] 1 K.B., 865) did not apply.

The Divisional Court came to the conclusion that they were bound by *Cohen v. Gold* (*supra*) and that the present case was not distinguishable from that case. They accordingly reversed the decision of the Deputy County Court Judge.

The plaintiff appealed.

Mr. Croom-Johnson, K.C., and Mr. Horace Douglas appeared for the appellant ; and Mr. W. N. Stable for the respondent.

Mr. Croom-Johnson, in opening the appeal, referred to the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, sections 1, 4, 5, 8, 12, and 15 ; and to the Rent and Mortgage Interest Restrictions Act, 1923, section 2 (being the section which the Court had to construe in this case). He said that the question was what was the meaning of the expression "the landlord" in that section. He submitted that the true view was that "the landlord" in that section meant the person who was the landlord at the relevant time—namely, at the time when the matter came before the Court. The same meaning should be given to the expression "the landlord" as that given to it in section 12 (1) (*g*) of the Act of 1920. He referred to *Cohen v. Gold* (*supra*) ; *Ratkinsky v. Jacobs* (44 *The Times* L.R., 548) ; *Prout v. Hunter* (40 *The Times* L.R., 868 ; [1924] 2 K.B., 736) ; *Finey v. Gougoltz* (42 *The Times* L.R., 501 ; [1926] 2 K.B., 322) ; *Oakley v. Wilson* (43 *The Times* L.R., 521 ; [1927] 2 K.B., 279).

The gardener who occupied the premises when the plaintiff purchased them was not a tenant under the Rent Restriction Acts so as to be entitled to the protection of these Acts. He was not there *qua* tenant. He was there either as licensee or as caretaker or agent for the plaintiff, and his occupation of the premises was the occupation of the plaintiff. See also *Remon v. City of London Real Property Company* (36 *The Times* L.R., 869 ; [1921] 1 K.B., 49) and *Bracey v. Pales* (43 *The Times* L.R., 69 ; [1927] 1 K.B., 818).

The premises were at one time a dwelling-house to which the Rent Restriction Acts applied. The plaintiff was the landlord of the premises and was in actual possession at some date subsequent to July 31, 1923, and the premises thereby became decontrolled. On the question of the meaning of "actual possession," and whether that was a question of fact or law, counsel referred to *Hall v. Rogers* (41 *The Times* L.R., 341) and *Jewish Maternity Society's Trustees v. Garfinkle* (42 *The Times* L.R., 589).

Counsel submitted that there was evidence on which the Deputy County Court Judge was entitled to draw the inference that the plaintiff was in actual possession of the premises within the meaning of the section. The present case was not determined by *Cohen v. Gold* (*supra*), but, if it were, that case was wrongly decided. The judgment of the Divisional Court was wrong, and the judgment of the Deputy County Court Judge ought to be restored.

Mr. W. N. Stable, for the respondent, contended that the decision of the Divisional Court was right. The defendant was entitled to retain possession under section 5 of the Act of 1920. To succeed, the plaintiff must satisfy the Court that he was in actual possession of the premises within the meaning of section 2 of the Act of 1923.

In the Judge's note there was no evidence that the gardener who occupied the premises when the plaintiff purchased them was employed by the plaintiff in any capacity whatever, or that he was in any sense the plaintiff's agent ; and when the plaintiff let the premises to the defendant the gardener was still there and remained in occupation as well as the defendant for some time afterwards. So little was the gardener the plaintiff's servant that the plaintiff was unable to give the defendant sole possession. There was no evidence on which the Court could find that the plaintiff or his predecessor in title ever had actual possession of the premises on or after July 31, 1923, within the meaning of section 2 of the Rent and Mortgage Interest Restrictions Act, 1923.

Counsel referred to *Hall v. Rogers* (*supra*), where Lord Justice Scrutton contrasted actual possession with the idea of a mere legal right to possession. See also *Hughes v. Chatham Overseers* (5 Man. and Gr., 54), *per* Chief Justice Tindal, at page 78, as showing that there was no inconsistency between the relation of master and servant and that of landlord and tenant. The situation of a person who was both servant and tenant was clearly within the contemplation of the draftsman of the Rent Restriction Acts. See section 4 (1) of the Act of 1923.

Cohen v. Gold (*supra*), whether rightly or wrongly decided, was clearly binding on the Divisional Court. According to *Cohen v. Gold* (*supra*) there never was a landlord who could have been in possession of the premises on July 31, 1923, or who could have come into possession of them afterwards. Where there had never been a letting of the premises to which the Rent Acts applied, section 2 of the Act of 1923 could not apply. The "landlord" meant some one who, in relation to the premises, at some time or other had a tenant. Having regard to the definition of "landlord" in section 12 (1) (*g*) of the Act of 1920, the draftsman never contemplated a case where there had never been a letting at all.

In the present case the appellant had entirely failed to discharge the burden of proof which lay on him of showing that he was at any material time in actual possession of the premises. Further, there never was a landlord of the premises in question who, within the meaning of section 2 of the Act of 1923, was in actual possession of the premises.

SIMSON v. MIATT.

This was an appeal by the landlord from a decision of the Divisional Court—Mr. Justice Salter and Mr. Justice Talbot—which raised the question whether a purchaser from a landlord of a dwelling-house to which the Rent Restriction Acts applied, and who had possession of the dwelling-house, could claim that the provisions of the Acts had ceased to apply to it.

In 1910 Mr. F. R. Miller was the owner and occupier of 106, Queen's-road, Finsbury Park, which he held under a lease from the Ecclesiastical Commissioners at a ground-rent of £10 10s. a year. In 1919 the appellant, Mr. Simson, became Mr. Miller's tenant of the whole of the premises at a rent of £60 a year. The appellant thereupon sublet part of the premises to a Mr. Mitchell, who gave up possession in 1922. In December, 1925, the appellant purchased from Mr. Miller the lease of the premises, which had 49 years to run. The appellant continued to occupy the whole house until April, 1926, when he let three rooms to the respondent, Mr. Miatt, at 25s. a week.

On September 24, 1927, the respondent withheld the rent which was due that day, and the appellant served him with notice to quit on September 27. On October 7 the respondent issued a summons for apportionment of rent, and on October 24 the apellant brought an action against the respondent for possession, rent, and mesne profits.

The County Court judge gave judgment for the respondent, Mr. Miatt, and that judgment was affirmed by the Divisional Court.

Mr. Hanbury Aggs and Mr. T. M. O'Callaghan appeared for the appellant; Mr. John Duncan for the respondent.

Mr. Hanbury Aggs, in opening the appeal, referred to the first proviso to section 2 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, which stated:—

"Provided that where part of a dwelling-house to which the principal Act [the Act of 1920] applies is lawfully sublet, and the part so sublet is also a dwelling-house to which the principal Act applies, the principal Act shall not cease to apply to the part so sublet by reason of the tenant being in or coming into possession of that part, and if the landlord is in or comes into possession of any part not so sublet, the principal Act shall cease to apply to that part notwithstanding that a subtenant continues in, or retains, possession of any other part by virtue of the principal Act."

Counsel said that the proviso could be considered only at the time of decontrol. There could be no decontrol until some person had been found who could be described as the landlord. The ground landlord was not in possession. He submitted that when once a house had become decontrolled in whole or in part it could not come under control again, and that the whole of the premises had become decontrolled when they came into the possession of the appellant after Mr. Mitchell had given up possession. The decision of the Court of Appeal in *Brooks and Others v. Liffen* (44 *The Times* L.R., 350) applied to the present case. In his submission, *Cohen v. Gold* (43 *The Times* L.R., 376; [1927] 1 K.B., 865) and *Lloyd v. Cook* (44 *The Times* L.R., 455) were wrongly decided.

Mr. J. Duncan submitted that the appellant was on the premises as a tenant only and not as landlord for the purposes of the Acts, with the result that he had no rights of decontrol. Further, even if the whole house were decontrolled, that did not prevent the creation of a new tenancy—in this case the letting of the three rooms to the respondent. That created a dwelling-house which remained within the protection of the Rent Restriction Acts.

BARTRAM v. BROWN AND ANOTHER.

This was an appeal by the defendants from a decision of the Divisional Court—Mr. Justice Acton and Mr. Justice Finlay (44 *The Times* L.R., 572). The case involved the interpretation of section 2 (2) of the Rent and Mortgage Interest Restrictions Act, 1923, which provides:—

"Where, at any time after the passing of this Act, the landlord of a dwelling-house to which the principal Act applies grants to the tenant a valid lease of the dwelling-house for a term ending at some date after the 24th day of June, 1926, being a term of not less than two years, or enters into a valid agreement with the tenant for a tenancy for such a term, the principal Act shall, as from the commencement of the term, cease to apply to the dwelling-house. . . ."

In March, 1922, the defendant, Mr. Cecil Brown (now deceased), took over the residue of a long lease of premises known as 32, Stroud Green-road, Finsbury Park, N. In May, 1923, Mr. Brown sublet the whole premises to a Mr. Griss for a period of 22 years from March 25, 1923, on terms by which Mr. Griss was prohibited from subletting without his lessor's consent. Without obtaining that consent, Mr. Griss, in May, 1923, sublet two rooms on the top floor to a Mrs. Simpson. Mr. Griss never paid any rent, and, shortly after subletting, disappeared from the premises, Mrs. Simpson remaining in possession of her two rooms.

In September, 1923, Mr. Brown sublet the whole of the premises to a Mr. Redman for a period of 21¼ years at a rent rising from £150 to £160 per annum. Mr. Redman took over Mrs. Simpson as his sub-tenant.

Early in 1926 Mr. Redman vacated possession, and on June 14, 1926, Mr. Brown sublet the whole premises to the plaintiff, Mr. Frank Bartram, on a yearly tenancy at a rent of £160 a year. Mr. Bartram subsequently got into arrear with his rent, and on August 16, 1927, Mr. Brown caused distress to be levied on the premises. Mr. Bartram entered into an agreement with the sheriff's officers, who withdrew, but he was unable to abide by the terms of that agreement, and the distress was renewed on September 7. No leave had been obtained from the Court for the levying of that distress, and Mr. Bartram subsequently brought an action against Mr. Brown and Messrs. Odell, Hibbard, and Co. (the sheriff's officers) for damages for illegal distress.

In the County Court the plaintiff contended that the distress was illegal in that the premises were protected by the Rent Restriction Acts, and that no leave for the levying had been obtained from the Court, as required by section 6 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

The defendants contended, *inter alia*, that the premises had been decontrolled under section 2 (2) of the Rent and Mortgage Interest Restrictions Act, 1923, by virtue of the long lease granted by Mr. Brown to Mr. Redman in September, 1923.

The County Court Judge held that the words "grants to the tenant a valid lease," in section 2 (2), must be construed as "grants to the sitting tenant a valid lease," that a lease to a person who was not already tenant of the premises could not effect decontrol, and that therefore the premises continued to be protected under the Acts. He gave judgment for the plaintiff for £35, the agreed amount of the damages.

The Divisional Court held that the words "the tenant," in section 2 (2) of the Rent and Mortgage Interest Restrictions Act, 1923, referred to the particular person who was the tenant at the time when the lease referred to in the subsection was granted, and to no other person, and they affirmed the judgment of the County Court Judge.

The defendants appealed.

Mr. Croom-Johnson, K.C., and Mr. J. H. Critchley appeared for the appellants; Mr. Phineas Quass for the respondent.

Mr. Croom-Johnson contended that the mere return of the lease by Mr. Griss did not operate as a surrender of the lease. Mr. Brown had come into "actual possession" of the premises within the meaning of section 2 of the Act of 1923 before the subletting to Mr. Redman, and the premises had thereby become decontrolled. Further, Mrs. Simpson was at that time not a lawful sub-tenant at all; she did not become so until her rent had been accepted by Mr. Brown.

Counsel further submitted that "the tenant," in section 2 (2), must refer to the time when the matter was being litigated in the County Court, and was not to be limited to the sitting tenant.

Mr. Quass said that before 1923 the premises were within the Act, and there had been one letting of the dwelling-house. After July, 1923, Mr. Brown never came into possession of the whole of the premises, inasmuch as there were two rooms of which Mrs. Simpson was lawfully in possession. As to section 2 (2), he submitted that it had relation to

the case where the landlord was not in possession for the reason that there was a tenant who was in possession. It must refer to the sitting tenant.

BARKER v. HUTSON.

This was the plaintiff's appeal from a decision of a Divisional Court affirming a decision of the County Court Judge at Brentford in favour of the defendant in an action brought by the plaintiff for the possession of two rooms at 3, Oxford-road, Ealing, Middlesex.

The plaintiff was the tenant of the whole house under a two years' lease granted to him by the freeholders as from December 26, 1926. There was also a cross-summons by the defendant for apportionment of rent. The County Court Judge dismissed the claim for possession and granted an order for apportionment.

A Mrs. Eldridge had been in possession of the premises as statutory tenant and had given up possession in 1925 to the freeholders. They were in possession when the two years' lease was granted to the plaintiff in December, 1926. In May, 1927, the plaintiff sublet two rooms to the defendant at the weekly rent of 17s. 6d., to include electric light and gas.

The County Court Judge held that the dwelling-house the subject of the proceedings—namely, the two rooms sublet to the defendant—had never been previously let; that they first became a separate dwelling-house on such letting to the defendant; that no one *qua* landlord had since had or received possession of such dwelling-house; that the case of *Cohen v. Gold* (43 *The Times* L.R., 376; [1927] 1 K.B., 865) applied; and that the dwelling-house constituted by these two rooms had never been decontrolled and was, therefore, the subject of apportionment.

The Divisional Court, following *Lloyd v. Cook* (44 *The Times* L.R., 455), affirmed the judgment of the County Court Judge.

The plaintiff appealed.

Mr. Humphrey Edmunds appeared for the appellant; Mr. John Duncan for the respondent.

Mr. EDMUNDS contended that the whole of the dwelling-house was decontrolled before the letting to the defendant by reason of the actual possession of the freeholders. If *Lloyd v. Cook* (*supra*) was rightly decided, this appeal must fail, but if *Ratkinsky v. Jacobs* (44 *The Times* L.R., 548) was a correct decision, then the appeal should succeed. The premises, having been decontrolled by the actual possession of the freeholders, could never become recontrolled by the subsequent letting of part. The Rent Restriction Acts applied *in rem*. They applied to the dwelling-house and not to the tenant. He submitted that *Lloyd v. Cook* (*supra*) was wrongly decided.

Mr. DUNCAN contended that the judgment appealed from was right. The word "landlord" could not apply to an owner or a freeholder who had never previously let the premises. Even assuming that the whole house was decontrolled, the change of status was sufficient to recontrol the two rooms in question in this case.

Mr. EDMUNDS replied.

The following considered judgments in the five cases were delivered.

LORD JUSTICE SCRUTTON.—This group of appeals was heard together on account of difficulties which had arisen from contradictory decisions of the Divisional Courts with regard to the true meaning of the decontrolling section, section 2 of the Rent and Mortgage Interest Restrictions Act of 1923. The material words of that section are as follows:—

"(1) Where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house. . . ."

The chief conflict as to the meaning of these words, giving rise to these appeals, is between the decisions of *Cohen v. Gold* (43 *The Times* L.R., 376; [1927] 1 K.B., 865) and *Lloyd v. Cook* (44 *The Times* L.R., 455) on the one hand, and *Ratkinsky v. Jacobs* (44 *The Times* L.R., 548) on the other.

In *Cohen v. Gold* (*supra*) the plaintiff when the 1923 Act was passed was in possession of the whole of a house, which he had never let. In 1925 he let three rooms on the ground floor to Gold. He alleged in the action that his actual possession from the passing of the Act of 1923 to the letting in 1925 had caused the Rent Restriction Acts to cease to apply to the three rooms or the whole house, and therefore that he could eject Gold. The Divisional Court (Mr. Justice Acton and Mr. Justice Talbot) decided against the plaintiff, affirming the County Court Judge. I understand that the decision proceeded on two grounds—(1) that "the landlord" could not be in possession or come into possession of premises which had never been let; when there was no tenancy, there was no "landlord." (2) That being in possession of the whole house did not involve being in possession of a part of the house, subsequently let as a dwelling-house. The point that the occupier, being in fact the assignee of a lease with 26 years to run, was a tenant, and not the owner, and could not be within the meaning of the section "the landlord," does not appear to have been taken in the County Court, or to form the ground of the decision.

In *Lloyd v. Cook* (*supra*), which is one of the present group of appeals, the claim was by the sub-tenant Lloyd to apportion the standard rent of the whole house so as to determine the proper rent to be paid by him to his landlord, Cook, for two rooms which he occupied. Cook replied that the two rooms and the whole house had been decontrolled. Cook was the holder of a 99 years' lease and occupier of the whole house. She had let three rooms to one Churchman. On August 12, 1926, Churchman vacated possession. Cook went in, prepared one room for the reception of her son, who at once occupied it, and on August 28, 1926, let the two remaining rooms to Lloyd. Cook contended that she had come into actual possession of the two rooms, which were therefore decontrolled. The Divisional Court (Mr. Justice Salter and Mr. Justice Charles) decided against the contention, reversing the County Court Judge, who had held that the rooms were decontrolled. The points that the rooms were not decontrolled by reason of the proviso to section 2 (1) of the Act of 1923, and as to the effect of section 12, subsection 7, of the Act of 1920 in enabling the Court to disregard long leases at a ground rent, were not taken in the County Court, and could not be taken against the County Court decision in the High Court. The Divisional Court took the view that though the dwelling-house composed of three rooms had been decontrolled, Cook having come into possession of it after it had been let, the dwelling-house of two rooms, which as such had never been previously let, had never been or

come into Cook's possession as landlord, following *Cohen v. Gold* (*supra*). The points that Cook being tenant was not landlord within the meaning of the section, and as to the effect of section 12, subsection 7, of the Act of 1920, were never taken or decided.

On the other hand, in *Ratkinsky v. Jacobs* (*supra*), Barnet Ratkinsky, the father, had bought a house in 1917, and had let four rooms to a Mr. Cohen, who vacated possession in February, 1926. Barnet, being then in possession of the whole house, let four rooms, three of Cohen's letting, and one other to Jacobs. In February, 1927, Barnet sold the whole house to his son Morris, who in November, 1927, gave notice to Jacobs to quit and claimed possession. Jacobs replied he was protected by the Rent Restriction Acts, and his counsel relied on *Cohen v. Gold* (*supra*) and *Lloyd v. Cook* (*supra*). The Court, composed of Mr. Justice Branson and Mr. Justice MacKinnon, declined to follow the cases cited. They held that "landlord" meant "owner"; that an owner might be in actual possession though he had never previously let; and that, as the owner had been in possession of the four rooms let to Jacobs after the passing of the Act of 1923, they were decontrolled. In this case it will be noted that the Ratkinskys were owners, not themselves tenants.

These two lines of decisions cannot stand together; one side or the other must be wrong. I look at the object and words of section 2 of the Act of 1923 to ascertain its true construction.

I take its object to be at a time when rent restriction was supposed to be drawing to an end, owing to increased provision of houses, gradually to decontrol in cases where existing vested interests had come to an end by the owner's or landlord's having or obtaining vacant possession on or after July 31, 1923, but not to allow a tenant to obtain freedom to profiteer, by subletting, while his landlord was bound to him by the Acts. By reason of the first proviso to section 2, it could not be argued that the tenant by coming into possession of the part which he had sublet obtained freedom from control, while his landlord was controlled; the landlord could get freedom from control of the part of which he came into actual possession, though he was controlled as to the part in possession of the sub-tenant. This was carrying out the policy of section 5, subsection 5, and section 15, subsection 3, of the Act of 1920.

Turning to the actual words, the substantive part of section 2, subsection 1, of the Act of 1923, uses the word "landlord"; it does not speak of tenant, or sub-tenant. It speaks of a "whole dwelling-house" and frees the whole dwelling-house under certain conditions from the application of the principal Act. The first of these conditions is if the "landlord" is at the passing of the Act in actual possession of the whole dwelling-house. He cannot be, if at that date he has a tenant. If he has then no tenant, he is not *stricto sensu* a "landlord." This seems to me conclusive to show that the term "landlord" cannot be used as requiring a contract of tenancy. To hold otherwise would be to prevent any person from being in actual possession at the passing of the Act, so as to decontrol the house, for if he were then a "landlord" in the strict sense, his tenant would be in possession. The word "landlord" must be used either in the looser meaning of "owner," or in the still looser meaning of a person who at a later stage is going to appear as a landlord contesting with a tenant the terms of his tenancy. Indeed, that "landlord" means "owner" is the view of Mr. Justice Salter in *Brooks and Others v. Liffen* (44 *The Times* L.R., 94; [1928] 1 K.B., 441), adopted by Lord Justice Sankey in the same case in this Court (44 *The Times* L.R., 350). But if "landlord" means "owner," it seems to me impossible to support the view that the section cannot apply unless the house is or has been previously let, which is the fundamental ground for the decisions in *Cohen v. Gold* (*supra*) and *Lloyd v. Cook* (*supra*). If the owner on or after July 31, 1923, has or comes into actual possession of the whole house, there are no vested interests to prevent decontrol; similarly, if he comes into actual possession of a dwelling-house which is part of another dwelling-house, the first and smaller dwelling-house may be decontrolled.

It is further to be noted that the effect of the "landlord's" coming into possession of the whole dwelling-house is that "the principal Act shall cease to apply to the dwelling-house." Now, apart from the effect of subsection 7 of section 12 of the Act of 1920, which must be considered separately, this renders it very difficult to contend that a tenant can be a landlord or owner. Suppose the tenant sublets his whole tenement and then comes into actual possession of it again, if as between himself and any sub-tenant the house is decontrolled, is the house decontrolled as between the tenant and his landlord, so that the landlord can distrain without leave of the Court, or get possession at the end of the tenant's contractual tenancy? It is difficult to see why it should follow from the tenant's getting actual possession against his sub-tenant that he should lose the protection of the Acts against his landlord. But if he does not, then the Acts have not "ceased to apply to the dwelling-house." In the case of the tenant's subletting part, the first proviso to section 2 (1) of the 1923 Act makes it clear that Parliament did not intend that the tenant recovering actual possession should free himself and the part of the house from the Acts. It may be said that the insertion of the proviso involves that but for the proviso the tenant would be a landlord within the first part of the section. But it is not uncommon to insert a proviso to prevent the main enactment from being construed as having a meaning which it does not bear. It will be noted that in the proviso "landlord" certainly means "owner" or "freeholder" as distinguished from "tenant"; it would be curious if in the first part of the section it has a different meaning and includes "tenant." I have come to the conclusion, after careful consideration of the object and language of the section, that "landlord" means owner or freeholder, and subject to consideration of the Act of 1920, section 12, subsection 7, does not include a tenant from a freeholder. I test the question in this way. Suppose that, the day after the passing of the Act of 1923, two persons came before a Judge to ascertain their respective positions in regard to houses which were by rateable value within the Rent Restriction Acts. The first was a freeholder, who said: "I have always been in actual possession of this house, which has never been let. Is it now decontrolled?" The answer would, I think, be, "Yes; it is true you are not strictly a landlord, as there is no tenant, but if this is the meaning of 'landlord' no 'landlord' would ever be in actual possession at the passing of the Act; possession would always be in the tenant. Landlord must mean owner who can let." The second applicant said: "I have a three years' lease from the freeholder, and am in actual possession. I can sublet the whole of the premises. Am I a 'landlord' in actual possession so that the premises are decontrolled?" The answer should, in my opinion, be "No; you are in actual possession, but as a tenant, not as a landlord; so long as you are

a tenant you cannot get decontrol." I do not find that the definition of "landlord" in the 1920 Act, section 12, presents any difficulty. Subsection (1) (*g*) expressly excludes the tenant from those persons who may be "landlords" because they are entitled to possession, and would include an owner who has not let, but is in possession. When subsection (1) (*f*) makes "landlord" include a person deriving title under the original landlord, I do not think it can contemplate there being at the same time two landlords—one the landlord, the other the tenant. The person who derives title under the original landlord takes his place; the "original landlord" ceases to be the landlord. I am the more persuaded that the term "landlord" must be restricted to "owner" because I do not see how else the Acts can "cease to apply to the dwelling-house." If they still apply as between owner and tenant they do not "cease to apply." When Parliament wanted the Acts not to apply to a particular rent or tenancy, they knew how to say so (section 12, subsection 7, of the 1920 Act). Under that subsection the Acts continue to apply to the whole dwelling-house. It is also to be noted that to construe "landlord" as "a tenant who has or may let" would in some cases have no effect, in other cases an effect contrary to the policy of the Act. If the tenant, whether statutory or contractual, sublets part of his tenement, by the operation of the proviso the part is not decontrolled by the landlord-tenant coming into actual possession of the part so let. If the statutory tenant assigns or sublets the whole of his tenement, the landlord, under section 5, subsection 1 (*h*), of the Act of 1920, as amended by s. 4 of the Act of 1923, can turn him out, and there will be no question of actual possession reverting to the tenant. If a contractual tenant or a statutory tenant, with consent, lawfully sublets the whole, and if he is a "landlord" within section 2 of the 1923 Act, this consequence follows. Before he sublets he is in actual possession, and if he is a "landlord" the premises are decontrolled, and he loses his protection against his landlord, which I cannot believe to be the intention of Parliament.

There remains the question of the meaning of the subsection just cited. As I have stated in *Brooks and Others v. Liffen* (*supra*), I have no doubt of the original object of this subsection. It was (1) to prevent a long lease at a small ground rent from hampering the landlord in charging a proper rent, or perhaps from evicting the tenant at the end of the lease. (2) To prevent compassionate tenancies granted at a low rent during the War from having a lasting effect against the charitable landlord. But the suggestion was made that the effect of the Courts' having to treat such tenancies as non-existing was to prevent them from saying that there was an owner other than the tenant, and to compel them always to treat the tenant as owner. In *Brooks and Others v. Liffen* (*supra*) this argument was carried to an ingenious extreme. Brooks was the freeholder; Liffen, his tenant, had, in 1904, 20 years to run of a long lease at a low ground rent. This lease terminated in June, 1924, and Liffen was immediately granted a quarterly tenancy at a rack rent. In November, 1926, Brooks gave the tenant notice to quit, alleging that, as the Courts could not treat the long lease as existing, Liffen had been in actual possession after 1923, and therefore the Acts ceased to apply to his dwelling-house. The County Court Judge, the Divisional Court, and the Court of Appeal declined to accept this argument. The Court was not bound to shut its eyes to the fact that at the time when there was a quarterly tenancy by a freeholder to a tenant there was then an owner of the house, and Liffen, though a "person entitled to possession" under section 12, subsection 1 (*g*), was not "a person other than the tenant." Further, the subsection expressly said that the Acts were to continue to apply to the house; the owner could not, therefore, say that they did not apply. Another way of stating the point decided was that, if the Court was unable to look at the facts while the long lease was in existence, when at the end of that lease they could look at the facts they found Liffen a quarterly tenant and Brooks a landlord who had never been in actual possession. The Act of 1923, therefore, gave Brooks nothing, while the Act of 1920 said that the Acts were to continue to apply to the house.

Some trouble is caused by the cases of *Finey v. Gougoltz* (42 *The Times* L.R., 501; [1926] 2 K.B., 322) and *Jenkinson v. Wright* (40 *The Times* L.R., 858; [1924] 2 K.B., 645). In the latter case Jenkinson, in 1920, acquired an unexpired term of 31 years of a 99 years' lease. In 1921 she mortgaged her leasehold interest by subdemise to the mortgagee at a nominal rent of a peppercorn. She lived in the house, and let part of it after 1923. She gave her sub-tenant notice to quit, alleging that she had had actual possession after 1923, and he replied that the tenancy under the mortgage could not be looked at under subsection 7 of s. 12 of the Act of 1920, and that the proviso to section 2 (1) of the Act of 1923 protected him. The County Court Judge held that the plaintiff was tenant, and therefore that the proviso applied, and the house was still subject to the Acts. The Judges in the Divisional Court allowed the appeal, but on different grounds. Mr. Justice Darling held that a tenant with a substantial part of a lease unexpired was a "landlord" for the purposes of section 2 (1) of the Act of 1923, apparently quite independently of the question of the relation of rent to rateable value under subsection 7 of section 12 of the Act of 1920. This seems to me, with respect, to be legislation, not construction. Long leases at a rack rent do not take a house out of the Act. He further held that though the mortgage made the "landlord" a tenant, it might be disregarded under subsection 7, and the "landlord-tenant" was therefore in actual possession, and the Acts did not apply. This, although subsection 7 said that the Acts should apply, and only the tenancy be disregarded. Mr. Justice Rowlatt did not express any opinion on the first point; he agreed that subsection 7 struck out the mortgage tenancy, but pointed out that the point with regard to the proviso to section 2 (1) of the Act of 1923 was not taken in the County Court, and therefore could not be considered.

So far as it rested on the view of Mr. Justice Darling, that any tenant under a long lease, whether within s. 12, subsection 7, of the Act of 1920 or not, was a landlord, in my view this case was wrongly decided. If the other points had been taken in the County Court, it appears to me, for the reasons stated hereafter, that Jenkinson was, by the operation of subsection 7, a landlord in actual possession of a tenement decontrolled by section 2 (1) of the Act of 1923, and therefore the subsequent letting did not make the proviso applicable.

In *Finey v. Gougoltz* (*supra*) Gougoltz was the lessee of a 99 years' lease at a rent of £10; and in January, 1925, was in possession of the whole of the house. In February, 1925, she let a room to Finey. As he did not pay his rent she distrained on him, without leave, and he brought an action for wrongful distress, and claimed apportionment. The County Court Judge held that Gougoltz was not landlord, but tenant, and that the premises were not decontrolled.

The Divisional Court reversed this decision, holding that subsection 7 required them to treat the tenant as landlord, and section 2 decontrolled the house, there not being three persons, landlord, tenant, and sub-tenant, under the proviso. They thus not only ignored the rent and tenancy, but ignored the real owner, and ignored the concluding words of subsection 7, that the Act should apply to the dwelling-house. For the reasons given below I think this case was rightly decided.

I do not pretend that it is easy to construe subsection 7 of section 12 of the Act of 1920, and section 2 of the Act of 1923; and I doubt whether the draftsmen or legislature bestowed any thought on their meaning. I have come to the conclusion that the true construction of subsection 7 of section 12 of the Act of 1920 and section 2 of the Act of 1923 is as follows:—

1. Where a long lease coming within the terms of subsection 7 expires after July, 1923, and the landlord goes into actual possession, before he grants a new tenancy, there seems to be no difficulty: the house becomes decontrolled under section 2.

2. Where, when such a long lease expires, the landlord has arranged for a tenancy to follow immediately, *Brooks and Others v. Liffen* (*supra*), by which we are bound, decides that the landlord, not being in actual possession, section 2 does not apply, and the house is not decontrolled.

3. Where such a long lease has not expired, subsection 7 of section 12 of the Act of 1920, with section 2 of the Act of 1923, requires the Court to ignore the fact that there is an owner, not the tenant, and an owner who is not in actual possession. The subsection says that the Act is to apply in respect of the house, but section 2 of the Act of 1923 enables the Court to overlook the owner and turn the tenant into a landlord-owner, thus depriving the tenant of any protection or restriction he would get from the Acts. I doubt whether Parliament ever gave the relation between the two sections a thought, but in my opinion the above is the result of their labours.

I have had great doubt what is the position when the long lease under subsection 7 of section 12 of the Act of 1920 has not expired at the time, either at the passing of the Act of 1923 or after it, when the tenant is in actual possession of the demised tenement. But I appreciate that to hold that the freeholder at such a time is to be considered by the Court as owner and landlord will be to prevent a very large number of dwelling-houses in London, where there are many long leases at ground rents, from being decontrolled. And, though with considerable hesitation, I have come to the conclusion that the Court, which is to disregard the rent and tenancy may, under section 2 of the Act of 1923, treat the tenant under such a lease as the landlord; and if he is, or has been, at or since the passing of the Act of 1923, in actual possession, may treat the premises as decontrolled. In other words, in such a case the part of subsection 7 of section 12 of the Act of 1920 which provides that the Act is to continue to apply to the dwelling-house is to be treated as repealed by section 2 of the Act of 1923.

If the tenant under a lease within subsection 7 of section 12 of the Act of 1920 is in actual possession of the whole house at the passing of the Act of 1923, or comes into possession of the whole house, he can be treated as landlord, and the premises can be decontrolled under section 2, subsection 1, of the Act of 1923. It is immaterial if, after that, he lets part, and resumes actual possession of this part. The proviso does not apply, for the premises are already decontrolled. If at the time of the passing of the Act he has sublet part of the premises and comes into actual possession of that part, the part is decontrolled, for as landlord he has resumed possession of part, and decontrol follows from the last words of the proviso.

I have come to the conclusions:—

1. In so far as they rest on the view that there cannot be a landlord under section 2 of the Act of 1923, unless the exact dwelling-house, the subject of the dispute, has been previously let, and that it is immaterial that a large dwelling-house containing the dwelling-house in question has been previously let or has returned to the actual possession of the owner, *Cohen v. Gold* (43 *The Times* L.R., 376; [1927] 1 K.B., 865) and *Lloyd v. Cook* (44 *The Times* L.R., 455) are wrongly decided, and *Ratkinsky v. Jacobs* (44 *The Times* L.R., 548) is rightly decided.

2. "Landlord" in section 2 of the Act of 1923 means owner or freeholder, and, apart from subsection 7 of section 12 of the Act of 1920, actual possession by a tenant either of the whole or part of a dwelling-house cannot decontrol the house, either under the principal clause or the proviso. It is possession by a tenant, not by a landlord.

3. The general operation of subsection 7 of section 12 of the Act of 1920 and section 2 of the Act of 1923 may during the currency of a lease within subsection 7 of section 12 of the Act of 1920 under section 2 of the Act of 1923 turn a tenant into an owner, so as to decontrol a house under section 2 of the Act of 1923 to which subsection 7 of section 12 of the Act of 1920 had said the Act was to apply. I have above stated the detailed application of subsection and section.

4. As to other cases, this Court is of course bound by *Prout v. Hunter* (40 *The Times* L.R., 868; [1924] 2 K.B., 736) and *Brooks and Others v. Liffen* (44 *The Times* L.R., 350). The following cases were correctly decided: *Dunbar v. Smith* (42 *The Times* L.R., 196; [1926] 1 K.B., 360), *Catto v. Curry* (42 *The Times* L.R., 243; [1926] 1 K.B., 461), *Joy v. Eppner* (41 *The Times* L.R., 136; [1925] 1 K.B., 362), and *Doulin v. Purcell* (43 *The Times* L.R., 140).

The following cases were wrongly decided: *Jenkinson v. Wright* (40 *The Times* L.R., 858; [1924] 2 K.B., 645), so far as it rests on the view of Mr. Justice Darling that the tenant under any long lease is an owner, and in so far as it ignores the effect of the proviso to section 2; *Oakley v. Wilson* (43 *The Times* L.R., 521; [1927] 2 K.B., 279).

LLOYD v. COOK.

This is one of the two cases the conflict of which with *Ratkinsky v. Jacobs* (44 *The Times* L.R., 548) resulted in the hearing of this group of cases.

Mrs. Cook in 1913 purchased as tenant the remaining period of a long lease of 99 years. She let three rooms, part of the demised premises, to Churchman, who gave up possession on August 14, 1926. She then came into actual possession of these three rooms, and at once prepared one for her son, who came in and occupied, paying rent. On August 28 she let the other two rooms to Lloyd, who presently applied for apportionment, and to this Mrs. Cook replied that the rooms were decontrolled.

The County Court Judge held in Mrs. Cook's favour that the two rooms were decontrolled, Mrs. Cook having been in actual possession between August 14 and August 28. That is his contemporary note. In signing a note on March 8, 1928, he added that Mrs. Cook was the landlord of the three rooms let to Churchman. The Divisional Court reversed this decision on the ground that the two rooms had never been let before as a separate dwelling, and therefore

when first let were controlled by the Acts, supporting this decision by that in *Cohen v. Gold* (*supra*). Oddly enough, Mr. Justice Salter agrees that the three rooms were decontrolled as a separate dwelling, but holds that the two rooms, part of the three, were not. It must be noted that there is no trace in the notes or judgment that any point was taken as to the effect of the long lease under section 12, subsection 7, of the 1920 Act, or as to the effect of the proviso to the 1923 Act, section 2, or I think as to the contention that though Cook might be the landlord of Churchman or Lloyd, she was not the landlord of the whole dwelling-house within the meaning of section 2 of the Act of 1923. The decision in *Smith v. Baker* (7 *The Times* L.R., 679; [1891] A.C., 325) prevents our giving effect to our view on these points. Apart from these points, I think the decision of the County Court Judge was right and the decision of the Divisional Court erroneous. I do not think it was necessary that there should be a previous letting of these two rooms as a dwelling-house before a "landlord" could obtain actual control of them, and that it is immaterial whether they had never been let at all, or only as part of a larger dwelling-house. If they had never been let at all, the actual possession was the more complete. On the points which alone we can consider the appeal must be allowed and the judgment of the County Court Judge restored, with costs here and below.

But I think it right to add that in our view of the construction of the statutes, if the points had been taken:—

1. Apart from the question of the long lease, the freeholder would be owner; the proviso to section 2 of the Act of 1923 would therefore apply, and neither the three nor the two rooms would be decontrolled.

2. If the long lease is considered, as I have already stated, in my opinion it prevents the Court from taking notice that there is an owner who was not in actual possession, and allows the Court to treat the tenant as landlord and ignore the owner.

If subsequent cases raise similar facts to *Lloyd v. Cook* (*supra*) and the first point above is taken, and there is no long lease, the rooms would not be decontrolled, though not for the reasons given by the Divisional Court, which were in my opinion erroneous.

GOUDGE v. BROUGHTON.

In this case Goudge, the plaintiff, bought a cottage called "Under Beeches Stables" in October, 1925. It had never previously been let. When he bought it he found in it the gardener of the previous owner. This gardener is stated to have paid no rent. The gardener stayed in the cottage, paying no rent, till December, 1926, when the plaintiff let the cottage to the defendant Broughton and "got rid of the gardener." Goudge gave Broughton notice to quit and brought an action for possession, and Broughton pleaded the Rent Acts. The County Court Judge made an order for possession. To do so he must have found that Goudge before he let to Broughton was in actual possession, through or in spite of the gardener, who was a licensee, tenant at will, or trespasser, and who anyhow was not there on the terms of paying rent; and that the cottage was therefore decontrolled. The Divisional Court reversed this, on the ground taken in *Cohen v. Gold* (*supra*) that the plaintiff could not be a "landlord" who had obtained actual possession, for if he did so obtain possession it was when the cottage had never been let, and therefore he could not be a "landlord." Holding this, the Court did not decide the point about the gardener, though I think Mr. Justice Salter's judgment shows that he would either have held Goudge to have possession through the gardener or the finding of the County Court Judge to be one of fact with which he could not interfere.

I take the same view of this point. I think there was evidence on which the Judge could find that the owner was in actual possession through the tenant at will or licensee. In *Remon v. City of London Real Property Company* (36 *The Times* L.R., 869; [1921] 1 K.B., 49) I said, and I think it has been accepted, that the decision with regard to statutory tenants only applies to cases where there was a previous legal letting and legal tenancy, and does not extend to caretakers, occupiers by service, and mere trespassers.

I should have made the same finding as the Judge. That being so, Goudge was in actual possession after the passing of the Act of 1923, and the premises became decontrolled, for in my view it was not necessary that they should have been previously let to make the plaintiff a "landlord" within the meaning of the Act, which is the decision in *Cohen v. Gold* (*supra*) on which the Divisional Court proceeded. I think that decision and the decision in the present case cannot stand. The appeal must be allowed and the judgment of the County Court restored, with costs here and below.

SIMSON v. MIATT.

In this case one Miller was a tenant of a dwelling-house under a long lease at £10 a year, and he let the house to Simson at £60 a year. During this time Simson let four rooms on the top floor and a room on the ground floor to Mitchell. In 1922 Mitchell went out and Simson, as tenant to Miller, was in possession of the whole house. In December, 1925, Simson purchased from Miller the unexpired portion of the lease, being then in possession of the whole house as tenant under the long lease. In April, 1926, Simson let to Miatt three out of the four rooms on the top floor. Miatt did not pay his rent. Simson therefore took out a summons for possession. Miatt replied with a summons for apportionment. The County Court Judge, in a careful judgment, held that Simson was always a tenant and never a "landlord," and that the premises were not, therefore, decontrolled. It is, I think, clear that the point under the Act of 1920, section 12, subsection 7, was taken before him, for he speaks of Miller as a lessee at a ground rent having no landlord, and Simson having no landlord after the assignment in 1925. But it follows in my view that Simson was then a landlord in actual possession by virtue of subsection 7, and that the house was, therefore, decontrolled. The Divisional Court, without expressing any opinion on this point, held, following *Lloyd v. Cook* (*supra*), that as the three rooms let to Miatt had never been let before, Simson did not come into possession of them as landlord. I have already held that *Lloyd v. Cook* (*supra*) was wrongly decided. It follows that the reason of the Divisional Court for supporting the judgment was erroneous. But in my opinion the County Court Judge did not give the proper effect to the fact that Simson was tenant under a long lease at a ground rent. He should have treated Simson after 1925 as a landlord in actual possession. Section 2 of the Act of 1923 then decontrolled the premises, and Miatt had no right to a summons for apportionment. The premises were decontrolled before he omitted to pay his rent, for the actual

possession obtained by Simson was not for non-payment of rent. The judgment of the County Court was therefore erroneous, and the judgment of the Divisional Court supporting it was also based on erroneous reasons. The appeal must, therefore, be allowed, and judgment given for possession, and the summons for apportionment dismissed.

BARTRAM v. BROWN AND OTHERS.

The facts in this case were very complicated. Brown, the landlord, was sued for levying a distress without the leave of the Court, and replied that the premises had become decontrolled (1) by his being in actual possession after 1923, (2) by his having granted two long leases, (1) to one Griss, and (2) to one Redman, thus decontrolling the premises under subsection 2 of section 2 of the Act of 1923.

The County Court Judge held: (1) That the landlord had never obtained actual possession, (2) that under subsection 2 the lease must be granted to the "sitting tenant," a tenant then in actual possession, and not to a fresh tenant.

The Divisional Court affirmed him on both points. I have come to the same conclusion. With regard to the point of actual possession, without going into the complicated facts, I cannot find a time after July, 1923, when the Browns were in actual possession. A certain Mrs. Simpson remained in possession of some rooms during the whole period, paying rent to various people, including the Browns. The Browns themselves had carried on a butcher's business there and withdrawn from it, and never seem to have come near the place, except for a casual inspection. They granted long leases to Griss and Redman, both of whom disappeared. Mrs. Simpson remained a tenant through all the changes in the history of the house. On the second point, I think the object of the subsection was to allow the change, from a tenant under the Acts to a tenant under contract who had as much contractual protection as he would get under the Acts, to decontrol the house. If a long lease was being granted to a new tenant, decontrol could be effected under section 2, subsection 1, of the Act of 1923, by the landlord's entering into actual possession before he granted the new lease, without any need for subsection 2. If there were a sitting tenant, "the tenant," he could not be dealt with in this way, and subsection 2 was necessary. The whole aim of section 2 of the Act of 1923 in my opinion was to accelerate decontrol, if vested interests were extinguished as provided for. The appeal must be dismissed with costs.

BARKER v. HUTSON.

The facts of this case are simple. In 1926 the owners were in actual possession of a dwelling-house, 3, Oxford-road, Ealing, and on December 25, 1926, they let it to Barker, the present plaintiff and appellant. In May, 1927, Barker sublet two rooms to Hutson, the present defendant and respondent. Barker gave Hutson notice to quit. Hutson replied that the rooms were under the Rent Restriction Acts, and asked for apportionment. The County Court Judge, following *Cohen v. Gold* (*supra*), and finding that the two rooms had never been let as a separate dwelling-house before, decided in favour of the tenant. The Divisional Court, hearing the case after *Lloyd v. Cook* (*supra*) had been decided, followed the two previous cases and dismissed the appeal. In my view, when the freeholders were in actual possession after July, 1923, the whole house became decontrolled. Control did not revive on the letting of the whole house to Barker, or the two rooms to Hutson. The appeal must be allowed, the judgment of the County Court Judge set aside, and an order made for possession and mesne profits at 17s. 6d. a week from November 21, 1927. The plaintiff must have the costs here and below. The order of the Judge for apportionment cannot stand.

LORD JUSTICE GREER.—It will be seen when I read my judgment that, although I agree in the result in all these five cases, I do not agree with my Lord with regard to the grounds on which the decision is put, and, unfortunately, the grounds for the decision seem to me to be more important than the decision in each of these cases. Therefore I think it necessary to read a separate judgment.

In order to deal with the questions arising in these cases, it is necessary to consider two questions arising on the construction of section 2 of the Rent and Mortgage Interest Restrictions Act, 1923.

The first question is whether, when the Act has ceased to apply to the whole of a dwelling-house, it becomes reapplied to parts of the dwelling-house subsequently let, which have never been the subject-matter of a separate letting before.

The second question is whether a house can become decontrolled if the landlord of the tenant who is the occupying tenant at the time when the question arises is able to prove that he was in possession of the whole of the dwelling-house at the time of the passing of the Act of 1923 (31st July, 1923).

The first question involves a decision as to whether *Cohen v. Gold* (43 *The Times* L.R., 376; [1927] 1 K.B., 865), followed by *Lloyd v. Cook* (44 *The Times* L.R., 455), on the one hand, or *Ratkinsky v. Jacobs* (44 *The Times* L.R., 548), on the other hand, was rightly decided. On this question I have come to the conclusion that when the whole of a dwelling-house, to which the Act applies, has become decontrolled, the decontrol affects every part of the dwelling-house, whether such part has or has not been previously let. It has been decided by this Court that where the whole of a dwelling-house is let on August 3, 1914, that is a letting of every part of the dwelling-house, and a subsequent letting of part of the dwelling-house is not, within the Act, the first letting of such part (*Sutton v. Begley* ([1923] 2 K.B., 694)). For the purpose of deciding when the separate part was first let, the rule that the whole includes the part has thus been applied by the Court. I think that the same rule should equally apply when the question is whether the decontrol of the whole is a decontrol of all the parts. Since the decision in *Barrett v. Hardy Bros. (Alnwick), Limited* (41 *The Times* L.R., 426; [1925] 2 K.B., 220), it has always been considered that the Rent Restriction Acts operate *in rem*, by attaching to a dwelling-house a standard rent which applies to the whole house, and, where necessary, also applies by apportionment to every part. In my judgment, when, by reason of section 2 of the Act of 1923, the standard rent no longer applies to the whole house, an apportioned part of it also ceases to apply to each and every part whether such part has ever been separately let or not. I think the decisions in *Cohen v. Gold* (*supra*) and *Lloyd v. Cook* (*supra*) were not right, and that *Ratkinsky v. Jacobs* (*supra*) was correctly decided.

The other question with regard to the meaning of "landlord," in section 2 of the Act of 1923, is one of great difficulty. It seems quite clear that neither in the Act of 1920 nor in that of 1923 is the word used in the technical sense of a person between whom and the tenant a contractual relationship of land-

lord and tenant exists. An occupying tenant only requires the protection of section 5 of the Act of 1920 when his position as tenant under his contract is determined, and it is impossible to read that section without seeing that the landlord referred to in many of the subsections is the immediate landlord of the occupying tenant. For example, the landlord referred to in subsection (1) (*c*) is the landlord who has received a notice to quit from his tenant. This clearly means the immediate landlord of the occupying tenant, he being the only person to whom such notice could be given. It also seems clear that, if such an immediate landlord required the dwelling-house for occupation as a residence for himself within subsection (1) (*d*), he would be the landlord for the purposes of that subsection. It has been held, and I think rightly held, in Scotland, that "landlord" in subsection (1) (*f*) includes a tenant who has sublet. It seems clear also that under subsection (1) (*i*), as inserted by section 4 of the Act of 1923, "landlord" must include a landlord who is himself a tenant, if he is the employer in whose employment the tenant therein referred to was. In my judgment, the effect of section 2 of the Act of 1923 is to add to the various circumstances which, under section 5 of the Act of 1920, permit an order for possession to be made, and that "landlord" in that section includes any person who, but for the provisions of the Act of 1920, would be entitled to say to the occupying tenant: "Your tenancy has come to an end. Hand over the premises to me." In my opinion, section 2 of the Act of 1923 provides that where a person claiming that the contract of tenancy between him and the occupying tenant has come to an end can prove to the Court that he was in possession of the whole of the dwelling-house on the 31st July, 1923, or, subsequently to that date, came into possession thereof, he establishes the decontrol of the house, and he is entitled to succeed in his claim for possession against the occupying tenant; when this state of things is proved, the Act is repealed so far as that house is concerned. I read the proviso as creating an exception in a case where the dwelling-house which is the subject-matter of the dispute is part of a larger dwelling-house, enacting that in such a case the smaller dwelling-house shall not be decontrolled. I take the same view of the second subsection of section 2, and indeed, with reference to this subsection, the case seems even clearer than with reference to subsection (1), because, as has been decided, and I think rightly, the tenant therein referred to is the sitting tenant, and the only person who could, in ordinary circumstances, grant to the sitting tenant a further lease for two years is his immediate landlord. In most cases the freeholder with a tenant whose lease is still in operation would have no say on the question whether or not a two years' lease should be granted to the sitting tenant; the latter's tenancy is a tenancy between him and his immediate landlord. I think the construction of the Act of 1923 that has commended itself to me is one which carries out the probable intention of the Acts of Parliament gradually to bring about the decontrol of property which was controlled for reasons which no longer apply.

It seems quite clear that the word "landlord" in section 5 of the Act of 1920 cannot mean landlord in the ordinarily accepted meaning of the word. The section is dealing with cases in which the tenancy at common law has come to an end. There are no longer a contractual landlord and a contractual tenant. The person claiming possession from the occupying tenant is his ex-landlord. The word "landlord" is used in the sense of the person, be he himself a freeholder or a leaseholder, who is the ex-landlord of the occupying tenant.

Section 5 gives to the tenant the absolute right to remain in possession notwithstanding the expiry of his tenancy, unless his ex-landlord can bring the case within one or other of the sub-clauses of the section. If he cannot do so, the ex-landlord is turned into a statutory landlord; if he does so, the Court may make an order for possession. The matter will be made clearer by considering a concrete case. "A" is the freeholder. He has let the whole of a dwelling house at a rack rent for 21 years to "B." "B," after occupying for seven years, has lawfully sublet on an annual tenancy to "C," and has duly given him notice to quit, and after the notice has expired brings an action for possession in the County Court. He proves that he let the house to "C" as part of the terms of his employment of "C," and claims the benefit of subsection (1) (*i*). The Court has a discretion to make an order for possession under that subsection. The leaseholder has himself duly performed all the terms of his subsisting lease from the freeholder. The freeholder is therefore out of the picture so far as the facts are concerned which the County Court Judge has to consider. It seems impossible to hold that the long leaseholder is not the landlord of the occupying tenant within the purview of section 5, subsection (1) (*i*). So, if "B," instead of being the original lessee of "A," had bought the lease, and in other respects complied with subsection (1) (*f*), it would be difficult to hold that he was not the landlord within the meaning of subsection (1) (*f*). Similar considerations lead to a similar conclusion in any case where the immediate landlord of the occupying tenant can bring his case for possession within subsection (1) (*g*).

In considering the construction of section 2 of the Act of 1923, it seems necessary to consider the effect of subsection (7) of section 12 of the Act of 1920. It has been suggested that, but for this subsection, the term "landlord" would in all cases mean the freeholder. In my judgment, the subsection has no such effect. I think it was inserted to prevent an occupying tenant, under a lease from the ground landlord, or any other landlord who had let the premises to him for any reason at a rent less than two-thirds of the rateable value, from saying after the expiration of the lease that he was entitled to retain possession so long as he paid that rent, and not for the purpose of preventing him from being considered the landlord in a case where his lessee had let the house at a rack rent to the occupying tenant. I think the landlord, under section 5, is in every case the ex-landlord of the occupying tenant who is seeking an order for possession.

The considerations I have been dealing with affecting the meaning of the word "landlord" in section 5 of the Act of 1920 seem to me equally to apply to the question arising in one of these cases with regard to the meaning of "landlord" in section 2 of the Act of 1923, which by section 20 has to be construed as one with the Act of 1920—that is, as if it were contained in a section of that Act.

In my judgment the word "landlord" in section 2 of the Act of 1923 means the same person as it means in section 5 of the Act of 1920—that is to say, the person who, being an ex-landlord of the occupying tenant, is asking for possession of the tenement on the determination of the contractual tenancy. Where such an ex-landlord can prove either that he was in possession of the whole of the dwelling-house at the date of the passing of the Act of 1923 (31st July, 1923), or since that date, the 1920 Act ceases

to apply to that dwelling-house and to every part of it, and the Court is bound to consider such a person's claim for possession or increased rent, independently of the Act of 1920. When these facts are proved, the whole of the dwelling-house passes for ever out of the purview of the Act. It is "decontrolled" (to use a convenient word), not merely as between that landlord and that tenant, but for all purposes. If there be an outstanding tenancy between the freeholder and the occupying tenant's landlord, the rights of the parties to that tenancy agreement are put outside the Act, and they are for the future to be regulated by the subsisting agreement. The mesne landlord who has himself been freed from the restrictions of the Act is himself disentitled to claim its protection when his own landlord becomes by contract or at common law entitled to possession. I cannot myself see that this result is unreasonable or unfair. A mesne landlord who has himself obtained release from the shackles of the Act has no grievance if the facts which entitle him to such release operate in favour of his superior landlord or landlords. I read the proviso not as an explanation of the meaning of the substantive parts of section 2, but as an exception to it. I think if it had not been there a mesne landlord who had let part of a house as a separate dwelling-house, and could prove that he was in possession of that part on the 31st July, 1923, would have been entitled to say that the part of the dwelling-house was decontrolled. The proviso was put in to prevent the tenant of a whole dwelling-house which had not been decontrolled from profiteering with regard to part of the dwelling-house, while his immediate landlord remained subject to control; and the latter part of the proviso was inserted to enable his immediate landlord, if he got into possession of the rest of the house, to say that at any rate that part was decontrolled. I am confirmed in my view of the meaning of "landlord" in the first subsection of section 2 by considering the provisions of the second subsection. It seems to me impossible to apply this section if "landlord" means the freeholder, where such freeholder is not the immediate landlord of the occupying or "sitting" tenant as he has been conveniently called. So long as the mesne landlord has committed no breach of the head lease entitling the freeholder to possession as against him, the only person who could grant a two years' lease to the sitting tenant is his immediate landlord, and if the term "landlord" in this subsection means the ex-landlord of the sitting tenant, I think that in the first subsection it must also mean the ex-landlord of the sitting tenant, even where he is himself a lessee of a superior landlord. In my opinion, there are no decisions of this Court that bind me to come to a different conclusion from that which I have expressed above.

In *Glossop v. Ashley* (37 *The Times* L.R., 827; [1922] 1 K.B., 1) it was held by Lord Justice Scrutton that there can be only one standard rent of a house to which the Act applies, and by the whole Court that the rent to be considered as the standard rent of the material dwelling-house is the rent at which it was let by a lessee to an occupying tenant on the 3rd August, 1914, and not the rent at which it was let by the freeholder to the leaseholder. This decision, though not directly in point, seems to me to support my view with regard to the meaning of the Acts of 1920 and 1923.

As I have already pointed out, it has always been considered, and I think rightly considered, that the Rent Restriction Acts operate *in rem*, and not *in personam*, and it follows that the *res* in question, the whole house, is let, not the tenancy agreement but the whole material thing—the house and every part of it.

The only case that has occasioned me some difficulty is *Brooks and Others v. Liffen* (44 *The Times* L.R., 94; [1928] 1 K.B., 441; affirmed in C.A., 44 *The Times* L.R., 350), but I do not think it really touches the point under consideration in these cases. The person in possession in that case at the material date was not a landlord and had never become a landlord when the question arose. He was never a person who had obtained freedom from the restrictions of the Act, and therefore his landlord could not say that he, the landlord, had also obtained such freedom. The position would have been different, in my judgment, if after obtaining possession the tenant sublet and was claiming possession from the sublessee. Then the house would have been decontrolled for all purposes. If this is regarded as an odd or anomalous result of the Rent Restriction Acts, it would certainly not be the only one, and I cannot see in it any good reason why I should reject a construction of the Act which, for the reasons I have stated, appeals to me as the right construction.

The only other part of the Act of 1923 to be considered is section 2 (3), which defines "possession" as meaning actual possession. The distinction between actual possession and the right to possess will be found to determine one of these appeals. My view of the meaning of subsection (1) of section 2 of the Act of 1923 is in accord with the opinion of Mr. Justice Talbot in *Brooks and Others v. Liffen* (*supra*) when before the Divisional Court, and the opinion of Mr. Justice MacKinnon in *Ratkinsky's* case (*supra*) in one part of his judgment. In the former case Mr. Justice Talbot said at page 444: "The object of the section is to confer certain rights on a man who is a landlord at the time when the question of his position as against a tenant arises, if he can show that he was in possession of, or took possession of, the dwelling-house at either of the times specified in the subsection."

In *Ratkinsky v. Jacobs* (*supra*, at page 550) Mr. Justice MacKinnon says: "It seems to me quite clear that where section 2, subsection (1), of the Act of 1923 speaks of 'landlord' and 'tenant,' it is referring to the two parties who will be protagonists before the Court in proceedings under section 5 of the Act of 1920." It follows that the judgment in *Jenkinson v. Wright* (40 *The Times* L.R., 858; [1924] 2 K.B., 645) was right, and that the judgment in *Finey v. Gougoltz* (42 *The Times* L.R., 501; [1926] 2 K.B., 322) was right.

I now proceed to apply the above construction of section 2 of the Act of 1923 to the five cases which we have to decide.

In *Lloyd v. Cook* (*supra*) a lessee for 99 years came into possession of the whole of a house, No. 14, Eversholt-street, Camden Town, on August 12, 1926. She subsequently let two of the rooms, which were part of three rooms that had, before she took possession, been separately let. There was no evidence that Mrs. Cook's rent under her lease was less than two-thirds of the rateable value. It was held by the Divisional Court that, though the whole house had been decontrolled, the dwelling-house comprised by the three rooms had not. In my judgment, this decision is wrong. The decontrol applies, in my view, to the whole house, and to every part of it. When there has been decontrol of the whole house, the Act is repealed with regard to it. This appeal should be allowed with costs.

In *Goudge v. Broughton* a freeholder by assignment obtained possession of a cottage and then let

it to a tenant. It had never been previously let. The County Court Judge held that the cottage had come into the actual possession of the freeholder after the Act of 1923 was passed. The cottage had never been previously let, but had been occupied by the licensee of the previous owner. The freeholder gave notice to quit in accordance with the terms of the defendant's oral tenancy agreement. The County Court Judge held that the cottage had been decontrolled, and made an order for possession. The Divisional Court reversed this finding. In my judgment, the County Court Judge was right, and ought not to have been reversed. The plaintiff was the landlord for the purposes of the Act. If the Act of 1923 had never been passed, he would have been a landlord seeking possession of his property, and liable to be defeated by section 5 of the Act of 1920. As I have indicated, I think he is the person referred to as "landlord" in section 2, subsection (1), of the Act of 1923, and, having been in actual possession of the cottage since the passing of the Act, he was entitled to say that the cottage had been decontrolled. This appeal should be allowed with costs here and below.

In *Simson v. Miatt* the facts have been conveniently summarized by Lord Justice Scrutton. Until the 6th December, 1925, the plaintiff occupied, as tenant to Miller, at £60 a year. On that date he bought Miller's long lease, and was then in possession under the long lease, a lease which came within subsection (7) of section 12 of the Act of 1920, and could therefore be ignored. On the 17th April, 1926, he became the landlord of three rooms, which he let to Miatt. If I am right with regard to the meaning of "landlord" in section 2 of the Act of 1923, he was a landlord who, having been in possession of the whole house since July, 1923, would be entitled to say that the house was outside the Act, and he was therefore entitled to recover possession. I think this appeal should also be allowed.

In *Barker v. Hutson* the freeholder was in possession of No. 3, Oxford-road, Ealing, a previous statutory tenant having given up possession. The freeholder let the whole house to the plaintiff, who then sublet two rooms to the defendant. He gave the defendant due notice to quit. The defendant refused to quit, and claimed apportionment. The Judge, following *Cohen v. Gold* (*supra*) held that the dwelling-house consisting of the two rooms never having been previously let, they were not decontrolled, and the Act still applied to them. His judgment was affirmed. As already indicated, my view is that the whole house was decontrolled by the possession obtained by the defendant's landlord, the plaintiff, and the judgment of the Divisional Court should be reversed, with costs here and below.

Bartram v. Brown and Others (44 *The Times* L.R., 572) was an action for damages for illegal distress. The distress was made without the leave of the Court required by section 6 of the Act of 1920. The question was whether, on the proved facts, the Act of 1920 had ceased to apply. The County Court Judge found that the defendant had never been in actual possession of the house, or any part of it that was let to the plaintiff, therefore it could not be said that the house was decontrolled, and gave judgment for damages, agreed at £35, against the defendant. This judgment was affirmed, and I agree that this appeal should be dismissed with costs.

Lord Justice Sankey.—As in every case I have reached the same result as my Lord and Lord Justice Greer, I propose, without recapitulating the facts at length, to state as briefly as possible the reasons which have led me to my conclusions. My reasons are the same as those which have commended themselves to Lord Justice Greer. I should like to express a hope that these matters will be taken to the House of Lords in order that the supreme tribunal may give a final authoritative opinion to assist the learned Judges of County Courts, who have my sympathy in their difficult daily task of administering these difficult and embarrassing Acts.

These cases in a variety of ways involve the proper construction of the decontrolling section—viz., section 2 of the Rent and Mortgage Interest Restrictions Act, 1923. To refer to them for the moment very briefly, in *Goudge v. Broughton* the plaintiff brought his action for possession of the premises. The County Court Judge decided in his favour, but the Divisional Court reversed that decision upon the ground that the house was still controlled and the plaintiff was not entitled to possession. In *Lloyd v. Cook* (44 *The Times* L.R., 455) the plaintiff applied for apportionment of the standard rent of the dwelling-house. The County Court Judge decided in favour of the defendant upon the ground that the house had become decontrolled, but the Divisional Court reversed that decision.

In *Simson v. Miatt* a tenant issued a summons for apportionment of the standard rent, whereupon the plaintiff brought an action for possession. The summons for apportionment was adjourned and the County Court Judge gave judgment for the defendant upon the ground that the house was still controlled, and the Divisional Court upheld the judgment.

In *Bartram v. Brown and Others* (44 *The Times* L.R., 572) the plaintiff brought an action for an illegal distress, on the ground that the defendant was his landlord, that the premises were still controlled and that therefore the distress was illegal, as the leave of the Court had not been obtained for it. The County Court Judge decided in favour of the plaintiff tenant—viz., that the house had not become decontrolled—and the Divisional Court affirmed his judgment.

In *Barker v. Hutson* the plaintiff brought an action for possession of a dwelling-house. There was a cross claim for apportionment of the standard rent. The County Court Judge decided in favour of the defendant upon the ground that the premises were still controlled, and the Divisional Court upheld him.

There have been numerous decisions upon the meaning of this puzzling section, some of which are in direct conflict with others. In all these cases, however, it is important to ascertain the facts carefully before endeavouring to apply the law to them. In some of the cases the question was one of fact for the County Court Judge; in others again it may be possible to support the decision upon different grounds; in yet others the appellant may not have taken the proper point in the Court below, but as the construction of the section is one of general application, an endeavour must be made to state its real meaning, and then to consider each of the cases upon its particular facts.

The effect of the decontrolling section is to exclude certain dwelling-houses from the application of the principal Act of 1920 in certain events—in other words, to set them free from control.

The legislature might have done nothing upon the question of decontrol. It might have repealed the Act and removed the control altogether, but it appears to have taken a middle course, possibly with the object of effecting decontrol gradually, possibly with the object of protecting the sitting tenant, and pos-

sibly too with the object of decontrolling where the landlord, who for the moment may be called the occupying landlord, has got into actual possession, subject to the proviso contained in section 2 (1) that, where a tenant has sublet a part of his dwelling-house but has got into possession of that part, that part does not thereby become decontrolled, the desire being to prevent a tenant from profiteering by a sub-tenancy at a time when his own landlord is prevented by the Act from doing so.

It is to be observed that section 12, subsection 2, of the principal Act—viz., the Act of 1920—applies to a house or part of a house let as a separate dwelling. Section 12, subsection 1 (*f*) and (*g*), define the expressions "landlord" and "tenant," although it must be noticed that, as the language there used is that the expression "landlord" includes the person there referred to, it is not an exclusive but an inclusive definition. Section 12, subsection 7, which creates the greatest difficulty, makes the Act apply to certain dwelling-houses as if a certain tenancy had never existed, and section 20 of the 1923 Act says that that Act is to be construed as one with the principal Act.

It must be taken now that the Act operates *in rem* and not *in personam*. See remarks of Mr. Justice Sargant, when sitting in the Court of Appeal, in *Prout v. Hunter* (40 *The Times* L.R., 868; [1924] 2 K.B., 736, at p. 744). The decontrolling section, section 2, effects its object, broadly speaking, by saying that where after the passing of the Act—that is to say, after the 31st July, 1923—the landlord gets into possession of the whole of the dwelling-house (subsection 1, subject to the proviso), or grants to the tenant a valid lease for a certain term (subsection 2), the house becomes decontrolled. Subsection 3 defines possession as meaning actual possession.

The way, however, in which the section is drafted, coupled with the very puzzling section 12, subsection 7, of the 1920 Act, makes a logical interpretation of the Act almost impossible, and it becomes necessary to see what is the real meaning of the word "landlord" as used in the section. I am forced to the conclusion that the meaning of the word must to some extent be governed by the context in which it is used and the circumstances under consideration. In my view, the draftsman was considering the position at the time at which, in the particular case, a question arose for determination, and what the parties to an action would have to prove to establish their rights.

The word "landlord" in section 2, subsection 1, must be loosely used because, strictly speaking, there cannot be a landlord without a tenant and a tenure, and the subsection deals with a case where there is neither tenant nor landlord. See *Brooks and Others v. Liffen* (44 *The Times* L.R., 94; [1928] 1 K.B., 441; 44 *The Times* L.R., 350). I cannot think that the word "landlord," when used in the section, always means the freeholder, or a person who has a tenant. I agree with the view expressed by Mr. Justice MacKinnon in *Ratkinsky v. Jacobs* (44 *The Times* L.R., 548), in the last paragraph but one of his judgment, at page 550: "I have no doubt, speaking for myself, that the view expressed in *Cohen v. Gold* (43 *The Times* L.R., 376; [1927] 1 K.B., 865) that 'landlord' in section 2, subsection (1), of the Act of 1923 has the highly technical meaning of a person who has a tenant, so that a relation of tenure exists between them, is not correct. I think that 'landlord' there means 'owner,' or one of the two parties to the litigation contemplated by section 5 of the Act of 1920, and that therefore in this case the landlord was in possession or had come into possession of the whole house." The word may include, in certain circumstances, the freeholder. It may include a person who is tenant to the freeholder, for such a person may be the landlord of some sub-tenant. You must look at the relationship which exists between the two parties to the action and see whether one stands in the relation of tenant to the other. For example, supposing A lets to B, and B sublets part to C. In an action between A and B, A is the landlord. In an action between B and C, B is the landlord. I am of opinion that "landlord" may be any person who, since August 31st, 1914, has let or has been entitled to let conditionally or unconditionally a dwelling-house to which the Act applies, or any part thereof. Discussing the cases under appeal, it is convenient to deal with several of those which have already been decided, and chiefly with the case of *Cohen v. Gold* (*supra*). In my view, that case was wrongly decided and should be overruled. Mr. Justice Acton, at page 866, is reported to have said, "How can you say that the plaintiff was 'landlord' of his dwelling-house at the passing of the Act of 1923, when there was no tenancy existing?" The decision proceeds upon that ground. In my opinion, the plaintiff in that case was the landlord of the dwelling-house—he did come into actual possession of it and the premises did become decontrolled and he was entitled to succeed.

I agree with the decision of Mr. Justice Branson and Mr. Justice MacKinnon in *Ratkinsky v. Jacobs* (*supra*), and I think that case was rightly decided and on proper reasoning. I think, too, that the judgment of Mr. Justice Darling in *Jenkinson v. Wright* (40 *The Times* L.R., 858; [1924] 2 K.B., 645) is correct.

I now propose to deal in detail with each of the cases under appeal. In *Goudge v. Broughton* the plaintiff brought his action for possession. The learned County Court Judge found as a fact that the plaintiff did get actual possession of the premises. There was evidence upon which he could so find. The Divisional Court reversed that decision, Mr. Justice Salter saying, "We must hold, on the authority of *Cohen v. Gold* (*supra*), that the plaintiff failed in showing that he was landlord of the premises."

Being of opinion that *Cohen v. Gold* (*supra*) is wrong, I come to the conclusion that the plaintiff did get actual possession, that he was the landlord, that the premises did become decontrolled, and that therefore the decision of the Divisional Court should be reversed.

With regard to *Lloyd v. Cook*, the learned Judge in the County Court held that the dwelling-house, consisting of two rooms let to Lloyd, had become decontrolled by reason of having been in the actual possession of Mrs. Cook between the time when Churchman vacated the rooms and Lloyd came in. The Divisional Court reversed this decision, relying on the authority of *Cohen v. Gold* (*supra*). I think in this case also the decision of the Divisional Court must be set aside. It must be remembered with regard to this case that the appellant cannot succeed upon a point not taken before the County Court Judge.

In *Simson v. Miatt* the facts were of a complicated character, and it is not easy to follow exactly what took place in the County Court, but in my view the County Court Judge omitted to consider the effect of subsection 7 of section 12 of the 1920 Act. The long lease to Miller must be disregarded; the plaintiff was a landlord within the meaning of section 2 of the 1923 Act and had been in actual possession of the

dwelling-house since the 31st of July, 1923. The house therefore was decontrolled, and the plaintiff was entitled to judgment. The appeal should be allowed.

In *Bartram v. Brown and Others* (*supra*) the facts again were complicated. I am of opinion that that case was rightly decided. The word "tenant" in section 2, subsection 2, of the Act of 1923 must in my view refer to the particular person who is the tenant at the time when the lease referred to in the subsection is granted, and to no other person. In this case again the question was one of fact for the County Court Judge, upon which I do not think he in any way misdirected himself. He was entitled to find and did find that Brown never came into actual possession of the whole of the dwelling-house, and therefore the premises did not become decontrolled. Mrs. Simpson was not there merely by leave and licence. There is evidence that she paid rent.

In *Barker v. Hutson* the plaintiff as landlord brought an action for possession. There was a cross summons for apportionment. The learned Judge, acting on the authority of *Cohen v. Gold* (*supra*), said: "The dwelling-house the subject of these proceedings, viz., the two rooms let to the defendant had never previously been separately let—that first became a separate dwelling on such letting to the defendant and no one *qua* landlord has since had or recovered possession of the premises. The case of *Cohen v. Gold* (*supra*) applies."

The following facts, however, were proved. The plaintiff took a tenancy of two years from December, 1926, from the freeholders of the premises who were at that time in possession of the house. Previously to that a Mrs. Eldridge had been in possession as statutory tenant and had given up possession to the landlord. The Judge's judgment is very brief, probably quite rightly, as he says that as far as he was concerned he was bound to say that the case was concluded by *Cohen v. Gold* (*supra*). The Divisional Court upheld the judgment upon the same ground, and for reasons already given the appeal must be allowed and judgment entered for the appellant.

[Solicitors—Mr. E. M. Tringham, Messrs. George Brown, Son, and Vardy, for Messrs. Bacon, Phillips, and Pringle, Redhill; Mr. William Bird; Messrs. Alfred Double and Sons; Messrs. Lambert and Hale, for Messrs. Lambert, Hale, and Procter, Ealing; Mr. A'Deane Gent Wood; Messrs. Westbury, Preston, and Stavridi, for Messrs. Grece and Patten, Redhill; Messrs. Henneker, Rance, and Co.]

House of Lords.
(Viscount Dunedin, Lord Shaw of Dunfermline, Lord Phillimore, Lord Carson, and Lord Blanesburgh.)

1928.
July 18.

REX (ON THE PROSECUTION OF PEGLER) v. COMMISSIONERS OF CUSTOMS AND EXCISE.*

Intoxicating Liquors—Tied house—Increase of duty—Apportionment by Commissioners of Customs and Excise—Tenancy entered into after the Act—Finance (1909-10) Act, 1910 (10 Edw. VII., c. 8), s. 46.

Held (Lord Blanesburgh dissenting), that section 46 of the Finance (1909-10) Act, 1910, which provides for the apportionment between landlords and tenants of "tied" houses of the increased licence duties imposed by that Act, does not apply to tenancies entered into after the Act came into force.

Decision of the Court of Appeal (43 *The Times* L.R., 772; [1928] 1 K.B., 523) affirmed.

This was an appeal from a decision of the Court of Appeal (43 *The Times* L.R., 772; [1928] 1 K.B., 523) affirming a decision of a Divisional Court (43 *The Times* L.R., 441), which discharged a rule *nisi* for a writ of *mandamus* directed to the Commissioners of Customs and Excise, commanding them to hear and determine an application by Mr. Pegler, a licensed victualler, in regard to the proportion of the increased duty which he was liable to pay under section 46 of the Finance (1909-10) Act, 1910, in respect of his licence.

By section 46 of the Finance (1909-10) Act, 1910:—

"Where the licence holder is bound by any covenant, agreement, or undertaking, or is otherwise under any direct or indirect obligation of any kind, to obtain a supply of intoxicating liquor from any person or persons, the licence holder shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from or deduct from any sum due to any such person so much of any increase of the duty payable in respect of his licence occasioned by this Act as may be agreed upon, or in default of agreement determined by the Commissioners to be proportionate to any increased rent of the licensed premises, or increased prices of intoxicating liquor supplied, or other benefit obtained by such person by reason of any such covenant, agreement, undertaking, or obligation as aforesaid."

The question to be determined on this appeal was whether this section applied to tenancies entered into after the coming into operation of the Act.

Mr. Pegler originally became tenant of the City Arms, Bell-lane, Gloucester, from Messrs. Arnold, Perrett and Co., Limited, under a lease dated August 31, 1911, containing a covenant by the tenant to pay

"All rates, tithes, taxes, charges, assessments, duties, and outgoings whatsoever, whether Parliamentary, parochial, local, or of any other description, which are now or may at any time hereafter be assessed, charged, or imposed upon the said demised premises or the owner or occupier in respect thereof, the landlords' property tax alone excepted."

The lease also contained a covenant to purchase all liquor from the landlords.

The lease was renewed to Mr. Pegler on April 15, 1912; to Mr. Pegler and his wife (owing to his War service) on November 4, 1916; and to Mr. Pegler on March 5, 1920, that being the subsisting lease and containing the same material covenants as the original lease.

The landlords' business was acquired in 1924 by the Cheltenham Original Brewery Company, Limited, who were now the landlords.

On April 28, 1926, Mr. Pegler, by his solicitors, applied to the Commissioners to determine the proportion of the increased duty payable by him under the Finance (1909-10) Act, 1910. The Commissioners declined to do so on the ground that the section only applied to agreements in existence at the date of the passing of the Act. Mr. Pegler having obtained a rule *nisi* for a writ of *mandamus*, a Divisional Court, by a majority (Mr. Justice Avory and Mr. Justice Talbot, Mr. Justice Swift dissenting), discharged the rule. The Court of Appeal, by a majority (the Master of the Rolls and Lord Justice Sargant, Lord Justice Scrutton dissenting), affirmed the decision of the Divisional Court.

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

Sir Henry Maddocks, K.C., and Mr. Roland Burrows appeared for Mr. Pegler; the Attorney-General (Sir Thomas Inskip, K.C.), the Solicitor-General (Sir Boyd Merriman, K.C.), and Mr. W. Bowstead for the Commissioners; and Sir Reginald Mitchell Banks, K.C., and Mr. Croom-Johnson, K.C., for the landlords.

VISCOUNT DUNEDIN.—My Lords: This is an application for a *mandamus* against the Commissioners of Customs and Excise at the instance of one Pegler who is the appellant before your Lordships' House, and arises in the following circumstances:—

Pegler is the tenant of a public-house, his landlords being the Cheltenham Original Brewery Company, who are associated with the Commissioners of Customs and Excise as respondents. His lease is a yearly lease and the date of the lease in question is March 5, 1920, and he is still holding under yearly prolongations thereof. His first connexion with the premises was under a lease entered into on August 31 and running from September 29, 1911, for a year. Since then he has had various leases, in some of which his wife was associated with him. The covenants in the earlier leases were the same as those which I will now mention in the present lease. The covenants on which the present question arises are two in number. The first is:—

"And also that the tenant will at his own expense apply for and use his best endeavours to obtain and maintain the necessary licences or renewal of licences for opening and keeping open the said premises during the said tenancy as a tavern or public-house or beer-house duly licensed for the sale and consumption therein of ale, beer, wine, and spirits by retail or such of them as his licences entitle him to sell and will pay the excise duties for the said licences."

The second is:—

"And also that the tenant will deal exclusively and directly with the landlords or their successors in business or nominees for any wines, spirits, cordials, liqueurs, ales, beers, porter, stout, and cider (whether in cask or bottle), cigars, cigarettes, and mineral or aerated waters, which he may require for sale under the licence or licences attached to or held in respect of the said demised premises or under any occasional licence granted to him for sale elsewhere than upon the demised premises, the purpose and intent being that draught ales, stout, and aerated waters sold by the tenant shall be such as are brewed or manufactured by the landlords and that the wines and spirits, cordials, liqueurs, and other goods shall be of such description and quality as is usually supplied by the landlords to their tied tenants and that in all cases the landlords shall be at liberty if they think fit to select the same."

Pegler held a justices' licence and duly applied for and got an excise licence for the premises which he occupied under the lease of 1920. Up to 1926, he had paid the entire licence duty without claiming any repayment from the landlords although he seems to have mooted the question. But in 1926 he started the present proceeding. What that proceeding exactly is will now be explained.

Under the law as it stood up to 1910 certain duties were leviable. They were calculated on a sliding scale depending on the value of the licensed premises. Under the law as it then stood the duty on the premises in question if occupied as a public-house would have been £25, but the Finance (1909-10) Act, 1910, imposed a new scale of duties and became the ruling Act for calculating the duty. Under this Act the duty for 1925-1926 was £35. The 46th section of the Act of 1910 is as follows:—

"Where the licence holder is bound by any covenant, agreement, or undertaking, or is otherwise under any direct or indirect obligation of any kind, to obtain a supply of intoxicating liquor from any person or persons, the licence holder shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from or deduct from any sum due to any such person so much of any increase of the duty payable in respect of his licence occasioned by this Act as may be agreed upon, or in default of agreement determined by the Commissioners to be proportionate to any increased rent of the licensed premises, or increased prices of intoxicating liquor supplied, or other benefit obtained by such person by reason of any such covenant, agreement, undertaking, or obligation as aforesaid."

Pegler, conceiving that he had a right under this section, applied to the Commissioners to apportion the £10 which he averred was the increase of duty on his licence occasioned by the Act of 1910. The Commissioners replied that the section only applied to agreements extant at the passing of the Act of 1910 and did not apply to an agreement contained in a lease of date 1925-26. Pegler then asked for a *mandamus* against the Commissioners. The case depended before a Divisional Court consisting of Mr. Justice Swift, Mr. Justice Talbot, and Mr. Justice Avory. These two latter held that the Commissioners were right and dismissed the application. Mr. Justice Swift dissented. Appeal was taken to the Court of Appeal when the Master of the Rolls and Lord Justice Sargant agreed with the majority of the Divisional Court, Lord Justice Scrutton dissenting. Appeal has now been taken to your Lordships' House.

There is thus disclosed a decided divergence of judicial opinion. Nor is the matter made easier for those who have to say which ought to prevail to find as one does that, if carefully analysed, neither do the opinions of the majority nor of the minority go on precisely the same grounds as between themselves. And before your Lordships the learned Attorney-General produced at least one argument which I do not think had seen the light of day in the Courts below. This being so I have come to the conclusion in the view I take of the case that instead of proceeding to analyse all that has been said in the Courts below, I had better go straight to the words which go to the root of the matter and decide the case as I think in favour of the respondents. Before, however, I do so, I should just like to say that this case is not ruled by authority. To do them justice none of the learned Judges who were of the opposing view held that it was so, but Lord Justice Scrutton has derived a little comfort from the fact that in the case of *Watney, Coombe, Reid, and Co., Limited v. Berners* (31 *The Times* L.R., 449; [1915] A.C., 885, at pp. 889, 890). Lord Haldane said that "Under section 46 of the Act of 1910, Saile, being bound by the tie to the appellants as to supply of liquor, could recover from them so much of the increase of his licence duty as was proportionate to the increased rent of the licensed premises, or the increased prices of intoxicating liquor supplied, or any other benefit obtained by them from the tie." The lease of Saile was of date January 1911; the dictum would, therefore, cover the point now involved, but the case had to do not with the Act of 1910 at all but with the effect of section 2 of the Act of 1912. Not only, therefore, is the dictum *obiter*, but there is no indication that the point to be taken as to section 46, as to whether it applied to the agreements after its date, was in the learned Lord's view at all. The whole sentence is

only an introduction to what follows as to section 2 of the Act of 1912. While, therefore, I do not wish to rob Lord Justice Scrutton of such comfort as he finds, I cannot say that I have been for a moment hampered by anything said in that case.

My view on the words of the section is of the shortest. What is it that the tied tenant is entitled to recover or deduct as the case may be? It is "so much of any increase of the duty payable in respect of *his* licence occasioned by this Act." (The italics are mine.) There is here a comparison between something paid before and something payable now. In the case of a person holding under an agreement current at the time of the Act the contrast is obvious. So much was payable in respect of his licence before the Act, so much more is payable now because of the Act. But in the case of a man who only comes in after the Act—it may be years after as in the case we are now dealing with, 1925-26—there is no increase payable in respect of the Act. There is no increase at all because he never had a licence that paid a less duty than the duty settled by the ruling Act of 1910.

There is much controversy of opposing views in the Courts below as to the word "is" in the opening words of the section "is bound by any covenant, agreement or undertaking, &c." And the minority argue that the view of the majority is only tenable if the words "at the time of the passing of the Act" are read into the section. My view escapes any such necessity. It is true that the agreement must be an agreement extant at the passing of the Act, but that is not because words are read in, but because the words as to the "increase of the duty payable in respect of his licence" do not fit any agreement except an agreement extant at the passing of the Act.

Section 2 of the Finance Act of 1912 was prayed in aid by both sides. It runs as follows:—

"Where the licensed premises are held under a lease or agreement for lease made before the passing of the Finance (1909-10) Act, 1910, which does not contain or import any covenant, agreement, or undertaking on the part of the lessee under such lease or agreement for lease to obtain a supply of intoxicating liquor from the grantor of the lease or agreement for lease, the lessee under such lease or agreement for lease shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from, or deduct from any sum due to, the grantor of such lease or agreement for lease so much of any increase of the duty payable in respect of the licence under the provisions of the Finance (1909-10) Act, 1910, as may be agreed upon as proportionate to any increased rent or premium payable in respect of the premises being let as licensed premises, and, in default of agreement, the amount proportionate to such increased rent or premium shall be determined in manner directed by rules of court by a county court in England or Ireland, and by a sheriff court in Scotland. . . ."

Those arguing for the appellant say that this shows that, when the Legislature, dealing with such a subject, wishes the enactment not to apply to agreements after the date of the Act, it says so in plain terms. Those arguing for the respondents say that, on their construction of section 46, it makes a consistent and equal provision applying to both tied and untied houses; while on the other construction in the future tied and untied houses will be in a different position. Now it is often argued when dealing with different sections of the same Act that, if so and so had been meant, the draftsman would have expressed himself in one section as he had in another. But a Parliamentary draftsman is not a being of immaterial conception, he is a mere mortal that varies from year to year, and to argue that because the draftsman of 1912 said so and so, the draftsman of 1910 would have said so and so, is, I think, to put too great a strain on the argument. The argument on the other side has a certain attraction, but on the whole I think the borrowed light of section 2 of the Act of 1912 is not bright enough to illuminate section 46 of the Act of 1910. I would only point out one little matter which I think escaped attention. The words in the Act of 1912 are *the* licence and not *his* licence. To prevent argument it was well indeed to put in the opening words.

My Lords, in the judgments in this case, and still more in those of *Watney's* case (*supra*), there were stern warnings to those who in order to read in words into a statute which are not there or to divert words used from their ordinary and natural meaning permitted themselves to speculate as to what the aim and attainment of the Act were likely to be. Your Lordships will have noticed that I have based my opinion on the words of the statute and on them alone, but with all deference to those opinions, with which indeed I cordially agree, I think it is quite legitimate when it comes to a question of construction without addition or diversion of words to see what the aim of the statute would turn out according to the one interpretation or the other.

Now in the view I have taken of the words the aim of the statute is simplicity itself. It finds a state of affairs where in tied houses the whole burden of the licence has been taken by the tenant or mortgagor as the case may be. It then suddenly increases the duty and it thinks it not unfair that the new and unforeseen additions should be borne partly by both parties. "In spite of any agreement to the contrary" is necessary to get over an explicit clause such as we have here putting the whole burden on the licensee. That situation never occurs when agreements extant at the date of the statute are spent. Now take the other view. The other view is based on the idea that the brewer, who is landlord or mortgagee, has the whip hand of the licence holder, and that this clause is a charter for him. How futile this is. In the present case, and in a few more like it, he would indeed get a temporary relief; but what is the situation when a new lease has to be arranged (and most of the leases are yearly leases), or when a new arrangement of the mortgage has to be fixed up, as a mortgage would ordinarily include a personal covenant to pay?

It was argued that all that the brewer had to do was to arrange for an illusory apportionment, and to that the learned Attorney-General added the new argument that that was actually done by the licensee having signed a lease in which he said he would pay all the licence duties. My Lords, I will assume, and the assumption costs me no pain, that the new argument of the learned Attorney-General is unsound, and I will assume that an arrangement for an illusory proportion would not stand if challenged. What remains? All that the brewer, who *ex hypothesi* has the whip hand of the situation, needs to do is to say: "Arrange what proportion of the duty you like that I have to pay. You will always have that deduction, but then I will secure my own position either by enhancing the rent or stiffening the terms of the mortgage."

The words of the very learned Judge, Baron Parke, in *In re Knight* (1 Ex., 802) were quoted by the Judges in the majority not so much as an authority that ruled this case, but rather as an illustration of

Parliament doing the same sort of thing, and as a comment on the obvious justice of their view being adopted. It may interest counsel to know that there is another analogous case on the construction of a contract. It is a case which they could not possibly be expected to know or to find. I refer to the case of *Scott v. Edmond* decided in 1850 (12 D., 1077). In that case a superior in a charter of date 1789 bound himself to relieve his vassal from all public burdens and parochial burdens whatever imposed or to be imposed on the said lands except poors' money. Public burdens greatly increased in 1850. It was held unanimously by a Bench of 13 Judges that the obligation imported relief only from burdens imposed or to be imposed on the lands in question by virtue of the laws then existing, and not by virtue of subsequent laws. That case was upheld and applied by this House in 1878 in the case of *Dunbar's Trustees v. British Fisheries Society* (3 App. Cas., 1298).

On the whole matter my opinion coincides with that of Lord Justice Sargant and I move that the appeal be dismissed with costs.

LORD SHAW OF DUNFERMLINE.—My Lords : This is a case upon which I have had serious doubt. But ultimately I have found myself in agreement with the majority of your Lordships in the construction of section 46 of the Finance (1909-10) Act, 1910. The section was in my view for the purpose of relieving tenants who found themselves by existing contracts under a burden which was not contemplated when they negotiated the terms of their tenancy. The language of the section shows very plainly the endeavour and the intention to prevent contracting out by the landlord-brewer from this liability in relief. This, however, is at once rendered really nugatory by the proviso that although contracting out of the whole provision of the section be forbidden, yet the parties may by agreement substantially destroy the prohibition by an arrangement which, while not formally getting rid of it entirely, would yet enable them to be rid of such a proportion of it as would only leave a fragmentary liability upon the brewer. Contracting out is thus shut out by the front door of prohibition, but immediately readmitted by the back door of the proviso.

What then is a Law Court to do ? It can no more delete the proviso than it can the prohibition. Some reconciliation must be found.

I therefore feel more inclined to view the provision of the section as a transitory provision covering a comparison between the taxation on the house prior to and that operative in the year of enactment. If there were, or be, any more extended policy meant to be effected, other language must be employed to express this meaning. But such matters are not for us but for the Legislature.

I agree fully with the judgment just pronounced by my noble and learned friend Lord Dunedin. But I refrain from expressing concurrence in regard to the Scottish case of *Scott v. Edmond* (12 D., 1077) cited by the learned Viscount. If the soundness of that case came directly in question it would have to be investigated on its merits ; in this case I think it unnecessary to express an opinion one way or another upon it.

LORD PHILLIMORE.—My Lords: In the month of April, 1910, there was an occupant of the City Arms in the City of Gloucester who held the usual full licence for the sale of spirituous and other liquors and had paid for it when he took up its licence some time in the year previous (1909) the duty then payable by the holder of a licence for a public-house of the quality of the City Arms, viz. £25. We may assume that he was a tenant from year to year and that he was what is called "tied," that is to say, bound by the covenants of his lease to take his liquors from his landlord on certain terms as to qualities and prices.

In April, 1910, the Finance (1909-10) Act, 1910, was passed, and by section 43 of that Act certain duties being heavier than the previous rate of duties were charged retrospectively as well as prospectively "on any licences which shall have been granted after the 1st day of July, 1909, or may hereafter be granted," with a rebate in the case of licences granted before September 30.

In the case of "tied" houses the brewer is a co-adventurer with the licensee, both standing to profit by the sale of drinks, and as there was to be an additional tax in respect of this profit, a tax which could not be escaped because the licence had already been taken out and which had not been foreseen when the landlord and tenant had entered into mutual relations by the lease, the Legislature proceeded to provide that the licensee, who had in the first instance to bear the burden, should have certain rights to claim a proportion of it from the landlord, and accordingly special provision was made for this by section 46.

We do not know what happened, but it may be presumed that the then licensee availed himself of this provision. The increase of duty in the case of the City Arms was at the moment from £25 to £32 10s. In the course of the year 1910 the tenancy and the licence were renewed for another year, and the licensee, whether he was the same person as in the previous year we do not know, but, whoever he was, he knew when he took up his licence that he would have to pay £32 10s. and must have paid that sum. What were the relations with regard to this increase between him and his landlord we do not know, nor is it material. But in the course of the following year, 1911, the appellant Pegler became tenant and licensee. Under the terms of his lease he became tied to his landlords and he covenanted in the usual way to keep the premises as a licensed house, to pay and discharge all taxes and duties and to endeavour to obtain and maintain the necessary licences or renewal of licences, and he paid, as he knew he would have to pay, the sum of £32 10s. for his annual licence. He remained licensee from that date till 1926, his lease and licence being annually renewed, and may, for all your Lordships know, still be the tenant and licensee. This statement is subject to a qualification which is not material but should be stated for the purpose of accuracy, that during the time when he was serving in the War his wife was named as joint tenant with him and was holder of the licence. During the time when he was so tenant the duty was varied, partly because of the change in the assessed value of the premises, and partly by the operation of amending Finance Acts, the highest being the sum of £35, and the lowest £7 10s.

In 1926 he took up the position that he was entitled to the benefit of section 46 and that the difference between £25 and the excess figure, when there was an excess, ought to be borne as to some proportion of it by his landlords, and as the landlords refused to allow any deduction from his rent in respect of increased licence duty he made application to the Commissioners of Customs and Excise to determine a proportionate sum under the provisions of section 46 of the Act of 1910 which has been

already cited. The Commissioners replied that in their view section 46 did not apply to cases in which an agreement had been entered into after the passing of the Act. Thereupon the appellant applied for a writ of *mandamus* directing the Commissioners to determine the proportion of increased duty payable in respect of his licence. He obtained a rule *nisi* which after argument was discharged, the opinion of the majority of the Judges in the King's Bench Division being adverse to him. He appealed to the Court of Appeal, where again there was a majority of two to one against him, and he is now before your Lordships' House.

My Lords, in my opinion the judgment appealed from is right and should stand. The Act of 1910 was, as its very title shows, an unusual Act. It imposed retrospective duties upon land values and it retrospectively increased duties upon property passing by death. It made retrospective increases of income-tax and supertax, and as already stated licences for public-houses ; and where as in the case of licences there would be one person to pay, and more than one who ought to share in bearing the increased tax, it was proper to provide a procedure by which the actual taxpayer could be relieved of a portion of his burden, and therefore it was enacted that notwithstanding any agreement to the contrary, that is, notwithstanding the usual agreement by which the licensee covenants to pay the licence duty, this unexpected increase should be shared. This in my judgment is the sole effect of this section, whether it be a case of landlord and tenant or of mortgagee and mortgagor. The latter relation having been referred to in the course of the argument, I would say that the same principle and the same provision apply.

A tenant comes and makes his bargain with a landlord. Part of that bargain is, that he who takes out the licence shall bear the duty. In ordinary cases it is known what the duty is. He has to pay it down when he takes up his licence, and the rent, or in the case of a mortgage the provision as to interest, is calculated accordingly. If the view of the appellant were to prevail, he might perchance snatch a year's proportion of duty from an unsuspecting landlord ; but the next year his rent would be increased in proportion. Possibly even if the law were as the appellant contends, provision might be made *quia timet*, as it were, in every lease by which the tenant would agree that he would not claim a proportion, or that his proportion should be some minute part, say one per cent. of the increase of duty.

No man is bound to take a lease of a public-house unless he likes, and no landlord of a public-house is bound to take a tenant unless he likes.

As far as I can gather, the reason which deterred Mr. Justice Swift and Lord Justice Scrutton from coming to what I must, with all respect, characterize as the commonsense and business conclusion of this matter, was that they felt it a duty to give a literal construction to the words of section 46, to shut their eyes to the general tenor of the statute, and to apply themselves to the words of the section only ; and in so doing they came to the conclusion that the contention of the Commissioners and of the landlords required the insertion of words which were not to be found in the Act, and which therefore ought not to be inserted.

My Lords, I think that one ought to look at the whole Act, and I am rather inclined to quote against the dissentient Judges the maxim *qui hæret in litera hæret in cortice*. But in truth I can take them upon their own ground, and I find in the section itself quite sufficient indication that it was only intended to provide for the case of holders of annual licences who had already paid for their licence, and whose term was still running.

The licence-holder, so the section says, may recover or deduct from any sum that he has to pay "so much of any increase of the duty payable in respect of his licence occasioned by this Act as . . . ." What is "his licence" ? It is not the licence of the City Arms. Such places, it is true, are called "licensed premises." But the landlord cannot have the premises licensed, nor can he claim as a right to put in whom he pleases, and thereby confer a licence on that man. The licence-holder is some person approved by the justices, though no doubt he is not licensed in the air but licensed to sell in the particular place which for that reason is called "licensed premises."

For a man in the possession of a licence in April, 1910, which had been already current perhaps for more than half a year there was an increase of duty payable in respect of his licence. But for a licensee after the date of the passing of the Act of 1910 there was no increase of duty in respect of his licence. It was no concern of the appellant Pegler what somebody had paid for a licence two years before. Indeed it might be said that it was only by accident or by inference that he knew or could tell what that predecessor had paid. There was no statutory method of discovery.

It was suggested in the course of the argument for the appellant that if a licensee, who held his licence in April, 1910, and was therefore entitled to the benefit of section 46 for that year, continued to be the licensee in following years he would continue to receive the benefit of a proportion of the duty ; and upon this suggestion an argument was based to the effect that the words "his licence" in the section must mean more than the current licence for the one year.

My Lords, if that case were to come before us, I should require to examine closely into the position of a licensee under the general licensing law. It might possibly be that the right of a man of good character residing in the approved house to a renewal of his annual licence is so strong that he ought to be treated as a continuous licensee, so that, if the landlord did not intend to contribute towards the duty in future, he would have to make some special bargain to protect himself. But *prima facie* I should be disposed to hold that "his licence" meant the actual existing authoritative document which enabled that man to carry on that public-house for that year, and that the words would have no application to a future document.

My Lords, other arguments of weight deduced from the language of the section were offered on behalf of the respondents ; but I think that I have said enough. In my opinion the appeal should be dismissed.

LORD CARSON (read by VISCOUNT DUNEDIN).—My Lords: In the present case we are not dealing with the case of a licensee who before or at the time of the passing of the Finance (1909-10) Act, 1910, had held a licence for the supply of alcoholic liquor at the City Arms Inn or of an assignee of such premises as licensed premises. In my opinion in such cases different questions might have to be considered having regard to the nature of a licence as property under the existing laws. It is admitted that before the year 1911 the appellant had not held any licence and that his title originally commenced under a demise of

premises for one year from the 29th September, 1911, and so on from year to year subject to determination by notice as therein provided. It is evident, therefore, that the appellant was in an entirely different position from licensees of tied houses who were in possession at the time of the passing of the said Act and who but for the relief granted by section 46 of the Act would have been liable to pay the whole of the extra duty imposed by the Act of 1910 in accordance with the covenants contained in the demise. There was in such cases an ample subject-matter to which the section could be applied to arrange the proportion of liability for new duties in circumstances which could not have been contemplated when the contract was entered into between the parties. The difficulty however is created by the opening words of section 46 which enacts that "where the licence holder is bound by any covenant, agreement, or undertaking, or is otherwise under any direct or indirect obligation of any kind, to obtain a supply of intoxicating liquor from any person or persons the licence holder shall be entitled, &c." Now it cannot be denied that the appellant comes within the words quoted, and I agree with a great deal that has been said by Lord Justice Scrutton as to the necessity of construing the words as passed by Parliament without guessing or trying to infer that something different was intended. But when I come to examine the position of a licence holder created after the passing of the Act and bound by covenants in a demise created after the Act the real difficulty arises from the words in the section defining the relief granted, for what I have to arrive at is "so much of any increase of the duty payable in respect of his licence occasioned by this Act as may be agreed upon, or in default of agreement determined by the Commissioners to be proportionate to any increased rent of the licensed premises, or increased prices of intoxicating liquor supplied, or other benefit obtained by such person by reason of any such covenant, agreement, undertaking, or obligation as aforesaid." Now in the first place I have to make a comparison of the increase of duty payable in respect of his licence with that previously paid before the passing of the Act and so far as I can see one of the elements of comparison is non-existent. I do not myself think the use of the words "his licence" instead of "the licence" would make any difference in such a case as we have to determine. But then, in the absence of agreement the Commissioners have to proceed to examine into increased rents and prices and other benefits coming out of the covenants or agreements. In my view such an inquiry is entirely inappropriate if not impracticable in regard to a demise of licensed premises made after the Act. The contracting parties are well aware not only of the increased duties imposed by the Act of 1909-10, but the other elements for consideration to which I refer must be materially affected and duly weighed having regard to the agreement of the tenant to pay such duties. I do not know, if such an inquiry as is asked for by the appellant was to take place, how far the Commissioners would be entitled to hear evidence from the landlords or the tenant respectively as to the various elements which were considered or entertained in fixing the rent or the prices of intoxicating liquor supplied or other benefits as mentioned in the section and how far such considerations would modify or annul the right of relief claimed by the appellant.

I am of opinion, therefore, that although the opening words of the section may be wide enough to cover the present case there is sufficient in the subsequent part of the section and in the working out of the relief under the terms of the section to indicate that the section has no application to tenancies created after the Act came into force. I agree with the noble and learned Viscount on the Woolsack that this appeal should be dismissed with costs.

LORD BLANESBURGH.—My Lords : The true place and purpose of section 46 in the scheme of Part II of the Finance (1909-10) Act, 1910, is the fundamental issue on this appeal. Is the section one of unappreciable or transitory significance confined to ties or to licence holders in being at the passing or commencement of the Act, and as has now been suggested possibly affecting them only till the end of the licensing year then current ? Or is the section one of fundamental significance, operative for the whole duration of the Act, to adjust compulsorily as between a licence holder and his brewer—if I may for brevity adopt this term to describe the person entitled to the benefit of the tie—the burden of an abnormal additional tax on licences imposed by the Act for the first time ? Mr. Justice Swift in the Divisional Court, and Lord Justice Scrutton in the Court of Appeal, take this latter view of the section and decide the case in the appellant's favour, and although I am very conscious of the weight of your Lordships' contrary opinion I remain constrained to say that I agree with them

The appellant certainly starts with certain initial advantages. This House in *Watney, Combe, Reid, and Co., Limited v. Berners* (31 *The Times* L.R., 449 ; [1915] A.C., 885, at p. 898) clearly, I think, acquiesced in Lord Haldane's statement there definitely made that a person in his position was under the section entitled to call upon his brewer for contribution to the increased duty. The case cannot, I know, be claimed as a binding authority to the full extent necessary now, because that question the House was not then called upon to decide ; but the interpretation of the section by their Lordships and in particular by Lord Wrenbury at page 898 in a sense entirely favourable to the appellant's present contention cannot I feel be lightly set aside.

Further, the Licensing Act, 1904—a statute for present purposes entirely in *pari materia*—supplies a statutory precedent for the appellant's view of the section. With that Act the well known compensation levy originated. The levy was called a charge, and in relation to it section 3 (3) provided that the deductions from rent there specified "may, notwithstanding any agreement to the contrary, be made by any licence holder who pays a charge under this section." On these words it was held in 1909 in *Wooler v. North Eastern Breweries* (26 *The Times* L.R., 129 ; [1910] 1 K.B., 247) that, as is now contended by the appellant on the present section, the words "notwithstanding any agreement to the contrary" included agreements made after as well as before the passing of the Act. Every contention against that construction which has been urged now was, and with certainly no less reason, put forward then ; but without success. In giving judgment Mr. Justice Phillimore, as he then was, used words which are very apposite on the present occasion.

"I agree," he said, "that the words of the section can be satisfied by making them apply only to contracts existing at the date of the Act, and if there were any reason *aliunde* for doing so I should be prepared so to apply them. That is practically what Baron Parke said in *In re Knight* (1 Ex., 802). But that means that I should be putting a restricted construction on the words because it was necessary to make them fit with other portions of the Act.

Prima facie the words refer to any agreement which is in existence at the time when the deduction is sought to be made, and, as I can find no other portion of the Act requiring a restricted construction, I must treat them as applying to agreements made after the passing of the Act as well as to agreements made before it."

And this judgment is the more unquestionable from the fact that it may be taken subsequently to have received legislative approval. For section 3 (3) of the Act of 1904 was repealed and without alteration re-enacted by section 21 (3) of the Licensing (Consolidation) Act, 1910.

To these two matters I must later return, and further considerations in support of the appellant's view of the section will emerge in the sequel.

The charging statute which in respect of licence duty the Act of 1910 displaced was the Inland Revenue Act, 1880. The maximum duty thereby charged in respect of any excise licence for the sale of liquor was no more than £60. Up to that limit the duty was charged with general reference to the annual value of the premises in respect of which the licence was granted, but, so far as concerned houses of value over £50, always in very much smaller proportions than that which became the fixed proportion under the Act of 1910. At an annual value of £700 the duty of £60 was reached. There it remained, a maximum, unaffected by higher values. By this 1910 Act the duty became half the annual value of the premises, whatever that value might be. The result, especially in the case of licences granted in respect of important premises, was, like other new imposts made by the same statute, to say the least, arresting. In the case of premises above £50, the new licence duties must always be in excess, in the case of premises reaching £600 they must always be as much as ten times in excess, and in the case of premises of still higher annual value they must be to an extent with no limit of amount in excess of the duties theretofore chargeable. The duty on a licence which under the Act of 1880 could never exceed £60 might, under the new Act, overtop that sum by many hundreds, even by thousands of pounds—by sums, indeed, out of all proportion and in quite another order to the displaced maximum. And so entire an entity is this increase of duty that by the Act it is treated as a thing apart from the original duty, a separate item to which separate incidents may be, as they are, attached. Under the Act the aggregate licence duty imposed is analysed as being made up (*a*) of the duty which would have been charged if the Act had not passed and (*b*) of the increase in that duty by the Act effected. That increase, it must never be forgotten, is not an increase upon some duty actually charged before the Act on a particular licence in respect of particular premises. It is an increase, not actual but hypothetical, upon the duty which upon the licence now granted in respect of any premises would under the old Act in the year of charge have been payable if the new Act had not been passed. Accordingly it is, as an "increase," as appropriate to the duty on a licence granted for the first time after the Act as to one which is merely a renewal of a licence that had long existed. The "increase" spoken of, being always hypothetical, is as definite a thing, as easily ascertainable, as completely appropriate to an entirely new licence as to any other. And in precise correspondence the duty under the old Act is the sum which "would have been payable if this Act had not passed," a hypothetical not an actual thing.

Now it is with the "increased" duty as so defined that section 46 is solely concerned. With the sum which "would have been payable if the Act had not passed" the section has nothing to do. The licence-holder had under the Act of 1880 alone been liable for this sum. The section leaves him as before finally liable for it. The contribution required from the brewer under the section is only to be one towards the increase in the duty on the licence under this Act. Here will, as I think, be found the guide to the true interpretation of section 46, if it be not indeed the key to its necessary construction.

And of no less importance is it, in construing the section, to ascertain and to bear in mind the date when this increase first became operative. As to this, the position is that, although the Act was not passed until April 29, 1910, the increased licence duties were imposed as from October 1, 1909. They were in the words of section 43 as from that date charged "on any licences which shall have been granted after July 1, 1909, or may hereafter be granted." This fact will, in the construction of section 46, be found to have what may prove to be decisive significance, for from it flows the consequence that the date of the passing of the Act is, in relation to the apportionment made by that section, no starting point for anything, so that interpretations of the section which treat the whole arrangement thereby enacted as being pivoted on a date which section 43 makes of no significance are at once discounted if they are not entirely destroyed.

Further, as it has now been mooted that section 46 finds its place in the statute mainly that by it the position as between the licence-holder and the brewer might be adjusted in respect of that long antecedent period, with the result that its operation was really spent with the expiration of the licensing year current at its passing, I have thought it right for my own satisfaction to examine the Finance Bill of 1909, as presented to this House in 1909 and then rejected, in order to see whether section 46 had any counterpart in that Bill. And it may now be conveniently stated that its sections 43-47 are in terms identical with those same sections of the present Act. In other words, if the Finance Bill of 1909 had in ordinary course been duly passed in 1909 in the form in which it left the House of Commons, it would have presented in relation to section 46 precisely the same problem that that section presents to your Lordships now.

I proceed to a closer examination of the section itself with these preliminary observations in mind. I need not set it out again at length. As to its wording, it must, I think, be agreed that at first sight, at all events, the meaning seems to be clear enough. The section is apportioning the increased duty, which I have described, between licence-holder and brewer on the footing that the licence-holder, who as between himself and the Revenue is alone liable for the duty, has on an occasion paid the whole of it. On that basis the section provides that irrespectively of any agreement to the contrary in the arrangement relating to the tie the brewer shall repay to the licence-holder that proportion of the increase in the duty mentioned in the section, which in turn is to be determined by the Commissioners in default of an agreement as to its proper rate being reached between the licence-holder and the brewer. The proportion repayable by the brewer being fixed by reference to the benefit accruing or estimated to accrue to him from the tie, it is a proportion which, properly ascertained, may vary

from year to year and to a degree in no correspondence whatever with any variation in the increased duty, which depends solely on some change in the annual value of the licensed premises. Accordingly the section seems to contemplate the ascertainment of the proportion with each payment of increased duty, and points to the licence-holder entitled to the benefit of the section being the person who when his liability to pay any increased duty arises is under a tie to the brewer. "Where the licence-holder is bound by any covenant . . . he shall be entitled . . . to recover." These words in the present tense followed by a consequence expressed in the future are, I think, in this connexion very striking. The grammatical turn is apparently a favourite with the draftsman of this Act. See as other examples sections 6, 8 (3), 11, 21 (1), and 31 (1). In my judgment, it conveys that the licence-holder is to be one answering the description at the moment when on any occasion he pays the increased duty, just as the later words "notwithstanding any agreement to the contrary" refer to any agreement in existence at the same moment and the expression "his licence" merely means—and for this I claim the authority of Lord Sumner in *Watney's* case (30 *The Times* L.R., 577 ; [1914] 3 K.B., 288, at p. 295)—"the licence held by the party entitled to recover." In other words these introductory words supported by the rest of the section bring the whole within the principle of cases like *In re Stevens* (20 Ch.D., 697) and *In re School Board Election for the Parish of Pulborough* (10 *The Times* L.R., 349 ; [1894] 1 Q.B., 725) to which Lord Justice Scrutton refers in his judgment.

My Lords, that statement of the section, commenced as a description of its natural effect is, I submit, for the reasons which I have added to it, a statement also of its true result. But, as such, it has, on quite divergent grounds, failed to find acceptance in many quarters. The whole effect of the section in Mr. Justice Talbot's view is determined by its preliminary words "where the licence-holder is bound." These words, he says, are ambiguous. They may mean "'hereafter bound' or is 'bound' now, that is *at the passing of this Act* [the italics are mine] . . . or 'is bound now or at any future time.'" And he holds that the words in their context have their first meaning. They cannot therefore apply to a licence-holder like the appellant who was not tied at the passing of the Act. Here the learned Judge does not seem to have observed that, as above appears, the date of the passing of the Act is a date, in relation to this section, of no relevance or significance whatever. If the section had been intended to be limited, as he has held it to be, these introductory words, instead of being what they are must surely have been "where the licence-holder was at the commencement of this part of this Act bound"—a meaning that can by no process of legitimate construction be attributed to the words actually employed. The truth is that, if section 43 has due effect given it, there is in these introductory words no ambiguity at all. They cannot, as a matter of good sense, be held to mean "is bound now" ; and their *prima facie* meaning, "is bound when any liability for increased duty arises," remains their only sensible meaning just as the following words "notwithstanding any agreement to the contrary" naturally refer, as was pointed out in *Wooler's* case (*supra*), to any agreement which is in existence at the same moment. Mr. Justice Talbot, who was apparently in complete agreement with *Wooler's* case (*supra*) as to the meaning of these latter words, stated in terms that he could not and did not rely on them for his conclusion. On the other hand, it was apparently largely on these very words that the Master of the Rolls based the same conclusion, being himself unimpressed with any significance in the introductory words.

Differing, for reasons given, with both views and merely noting that Mr. Justice Avory was, I think, in general accord with Mr. Justice Talbot, I pass to the view of the section taken by Lord Justice Sargant, and adopted, as it seemed, on behalf of the Commissioners at your Lordships' Bar.

According to the learned Lord Justice the section is dealing only with a tie existing at the passing of the Act. With reference to such an existing tie the licence-holder may, the section assumes, have bound himself by agreement to pay all duties on his licence. That is the state of things to which the section is addressed. The agreement to the contrary is to go for nothing, but, whether there has previously been agreement or none, until the parties agree otherwise —and the section leaves them at perfect liberty so to do, if they like—the increased duty is to be apportioned between them by the Commissioners in the manner prescribed by the section. And that is all.

The first observation to be made with reference to all this is that the Lord Justice reduces the impressive words "notwithstanding any agreement to the contrary" to complete sterility. According to him the section goes on to enable the parties notwithstanding to agree to anything they like and thus to make the section, so far as they are concerned, completely inoperative.

On this view certainly the enactment is a very little thing. But can it be justified ? I think not. In reaching his conclusion the learned Lord Justice seems to me to fly in the face of the rules of grammar. Only by doing so is he able to hold that by the words "as may be agreed upon" the section reserves to the licence-holder and the brewer power to agree that its provisions shall have no application to them. But these words have grammatically no such effect. It is only as to the actual proportion of the duty payable by the brewer that the licence-holder and he are by them permitted to agree. Grammatically the question is, whether the words "to be proportionate to any increased rent" are dependent not only upon the words "determined by the Commissioners" but also upon the words "agreed upon." And the answer must be in the affirmative when it is observed that the immediate antecedent "determined" &c. is not complete in itself, but has to be referred back to and brought along with the preceding subjunctive "may be." The words are "as may be agreed upon or in default of agreement determined" : they are not "as may be agreed upon or in default of agreement *may be* determined," a variant which might well have on this point produced the opposite result. As the words stand, the two branches must be brought forward together : the second is not sufficiently complete to come forward of itself : with the result that the agreement of the parties like the determination of the Commissioners is confined to the fixing of the proportions.

But this conclusion need not be rested on considerations which to some minds may savour of pedantry. Carry on to this point the most instructive comparison of the two sections made by Lord Sumner in *Watney's* case (30 *The Times* L.R., 577 ; [1914] 3 K.B., at p. 295) and compare in this connexion with those of section 46 the provisions of section 2 of the Act of 1912 so much referred to at the Bar. That section, it will be recalled, provides that "the lessee . . . shall be entitled not-

withstanding any agreement to the contrary to recover as a debt . . . so much of any increase of the duty payable in respect of the licence under the provisions of the Finance (1909-10) Act, 1910, *as may be agreed upon as proportionate to any increased rent* . . . and in default of agreement the amount proportionate . . . shall be determined . . . by a County Court." Now there, more conveniently perhaps because another authority is substituted in place of the Commissioners, the order is transposed. But can it be doubted when the two sections are placed alongside of each other that the effect of both in this matter is and is intended to be the same? The only difference, if it be a difference, is that in the later section the result by reason of the arrangement chosen is reached without calling in aid the rules of grammar.

And this construction does leave the parties free to agree a great deal. In a case submitted to them the Commissioners might quite well find that no benefit had accrued to the brewer from the tie. In such a case there would under the section be no contribution from the brewer. And that which the Commissioners might find the licence-holder may, without going to the Commissioners, agree with the brewer. The agreement would be that there was no such benefit, and it would be valid. But such an agreement must be reached in every year, and an agreement in advance, that whatever in any year the benefit of the tie to him the brewer was to make either no contribution to the increased duty or an illusory contribution, would in my judgment be a void agreement, and the section seems to me to intend that it should be.

With the greatest respect therefore to the learned Judges whose opinions I have now examined, I cannot think that the natural interpretation of the section is displaced by anything they have said.

As to the Commissioners' views, their original contention was that the section could never apply to any tie non-existing when the Act became law and created only after it passed. And this in result was the view which was apparently accepted by the four learned Judges to whom I have just referred. But when he was asked what was the effect of the section in a case where the licence-holder-owner in fee of his licensed house at the commencement of the Act mortgages to the brewer his house and licence after its passing and ties it to the brewer by one of his mortgagor covenants, the Attorney-General, on behalf of the Commissioners, while seeking, I believe all your Lordships thought unsuccessfully, to neutralize the concession in another way, was constrained ultimately to admit that such a licence-holder was within the Act.

My Lords, he could not, I think, help himself. The case supposed can only be excluded from the Act by reading into the section after the words "is bound" the words "at the passing of this Act," and I have, as I hope, already shown how impossible it is in this section to do anything of the kind.

The importance, however, of the admission in relation to the final question now to be considered will not be overlooked. It shows that in the very numerous cases which the concession covers the section is not, any more than was section 2 (2) of the Act of 1904, to be treated as inapplicable to future ties on any supposed ground that it would be futile of effect if it was.

And this brings me to the immediate question on this appeal. Even if the section covers a tie subsequent to the commencement of the Act does it extend to a licence-holder who, like the appellant, became one for the first time after the Act became operative? Is the section confined to a licence-holder who was such before the Act and so continued to the year of charge? The only grounds for saying that, extending to future ties, the section is confined to existing licence-holders is that there cannot in the case of a new licence-holder be properly any "increased" duty upon "his" licence. My Lords, the answer to this difficulty will be found, I hope, in the earlier part of this judgment. Whatever might have to be the construction in the general case I hope I have there established that an "increased" duty is in this Act as applicable to a new licence as to the renewal of an old one. And with reference to the expression "his licence" I am fortified not only by the view just expressed by my noble and learned friend Lord Carson but by the authority of Lord Sumner in the passage already taken from his judgment in *Watney's* case in the Court of Appeal ([1914] 3 K.B., at p. 295) where dealing with the words "in respect of his licence" he said, "that is, of the licence held by the party entitled to recover." My Lords, with that statement before me I have the greater confidence in expressing the view, already in this judgment adumbrated, that the ambit of the clause is to be gathered from its earlier provisions, and when so ascertained it is in no way subsequently restricted either by the word "increased" or by the expression "his licence."

There remains for consideration the view suggested by my noble and learned friend Lord Phillimore that the section has direct reference to the period between the 1st October, 1909, and the passing of the Act with no operation since the expiration of the licence year then current.

Now even the Commissioners have always acted on the assumption that the section still applies to ties existing at its date, and in view of the fact that the Act covers as it certainly does "new licences" under the Act of 1904—see section 47—which may continue without renewal for seven years—and that the relevant sections 43-46 appear in their present form in the Finance Bill of 1909, perhaps my noble friend may hesitate to advise your Lordships to adopt a view of the section at once so novel and so far-reaching in its consequences. In any case I cannot myself, for reasons already given, adopt it, and thus am I led to the conclusion that the appellant here is within the benefits of the section. In my view a critical examination of its terms merely serves to confirm the correctness of the conclusion reached on a general view of its provisions and is effective to reinforce the accuracy of the statement of Lord Wrenbury of its purpose and effect already referred to.

There are two criticisms of a general character to which I would now briefly refer. The first is that the view of the section I have felt constrained to take involves a legislative interference with freedom of contract not to be presumed. I doubt whether this criticism is ever really formidable at this time of day. It certainly loses force with the progress of the years. Moreover, this very interference was in analogous circumstances and by identical words introduced in the Finance Act, 1904, to which reference has so often been made. Nor is the principle *noscitur a sociis* far away. In a section which, on any view of it, involves a statutory interference with existing contractual rights, an interference with freedom of contract in respect of the same matter in the future is relatively a very little thing.

The second criticism is that this construction of the section is really fruitless of result because its effect, even if applicable to then existing ties for

their entire duration, can always on the adjustment of a new tie be evaded by requiring as an equivalent to the brewer's statutory burden either a reduction of discounts or an increase in prices or in the rent of the house or in the interest on the loan, as the case may be.

My Lords, the brewer would, I suspect, in the great majority of cases, find this a very insecure prop to lean upon, and the action of the respondent company here, insisting, as they have done all through, upon a separate right of audience, is eloquent upon the point. It has not been to meet the financially trivial demand of a mere yearly tenant like the appellant that they have come so far as your Lordships' House. They are here for a much more vital reason, not difficult, I think, to conjecture. Tied prices and discounts are, I suspect, in very many instances well-nigh as competitive, if at a higher rate, as free prices and discounts. Neither excessive rents nor excessive interest can be obtained from good tenants or mortgagors. An increase of rent too would quickly be reflected in an increase of duty; a proportion of which, on the present hypothesis, will as such be borne by the brewer. Most important, however, of all is the consideration that an agreement purporting to fix in advance the brewer's annual contribution, a thing, prophetically, quite unascertainable, would be in constant peril of being ignored as a mere attempt at evasion of the statutory prohibition. See on this subject *Lord Ludlow v. Pike* (20 *The Times* L.R., 276; [1904] 1 K.B., 531). As I have already indicated, the reasoning on this very point of my noble friend opposite in *Wooler's* case (*supra*) applies, as I think, to this statute with even greater cogency than it did to the section there in question.

At the outset I ventured to observe that further considerations in support of the view I have taken of the section would emerge as we proceeded. I hope that these are now sufficiently apparent. They are both negative and positive. They are negative in this, that all the alternative views (if we exclude that of Lord Justice Sargant which would reduce the section to sterility and is, I submit, demonstrably a mistaken view), diverse as they are, as to both their basis and effect, have this common difficulty to overcome, that no adequate or even plausible explanation has, so far as I can recall, been given of the action thereby imputed to the Legislature in permitting the licence-holder and the brewer by agreement to adjust the incidence of the new duty in the future while prohibiting them from doing so in the present. And the considerations are positive in this, that the view of the section which I have ventured to indorse is based upon a meaning of its words natural according to the terminology of the Act and one which embodies a principle not for the first time applied by the Legislature to burdens upon licences and withal so comprehensive that by reference to it every case that can arise under the section is at once determined with consistency and completeness.

Nor is the justification for the section according to this construction far to seek. It embodies a policy which although politically it may be a subject of keen controversy is simple of statement. This is one of the new imposts made by the Act—one, in the case of valuable licensed premises, quite indefinite in amount. By the Act the impost is thrown—presumably it had to be thrown as the licence duty has always been thrown—exclusively upon the licence-holder. But the concern of section 46 is to provide that it shall not always to its full extent remain finally his burden, in, at all events, one case where the advantages of the licence are shared with another. Accordingly the section provides that where the licence-holder is tied to a brewer who takes, as a consequence of the tie, an extra benefit, which, if not so taken, would have remained with the licence-holder as an increase on the profit made or a reduction of the loss incurred in carrying on his business, the brewer who is thus through the tie benefiting from the business carried on in the house shall, agreement or no agreement to the contrary, contribute in relief of the licence-holder a proportion of the new impost measured by that benefit. It is because the increase is really a new burden that it alone is so shared. The section may be crude in conception and troublesome to work out, but if it is permissible judicially to recall assertions current in 1910 as to the share of the good things of life pertaining to the tied-house brewer, one need feel no surprise that in a Revenue Act of that day he was made the subject of Treasury attention for a period of indefinite duration.

The support lent by the Commissioners to the brewer's views in this case must be attributable to the burden of the references being greater than was contemplated and by their desire, in consequence, to reduce them in number as much as is possible. To my mind that is not a consideration to which any Court of construction may have regard. It is for the Legislature to retrace its steps if it has gone too far: it is not for the Courts to limit statutory privileges merely in order that responsibilities which Parliament has imposed may thereby be reduced.

In my judgment this appeal should be allowed and the cause remitted to the King's Bench Division with a direction to make the rule absolute.

[Solicitors—Messrs. Maitland, Peckham, and Co.; the Solicitor of Customs and Excise; Messrs. Godden, Holme, and Ward, for Messrs. Haddock and Pruen, Cheltenham.]

Court of Appeal. (Scrutton, Lawrence, and Greer, L.JJ.) 1928. July 19.

CLAN LINE STEAMERS, LIMITED v. BOARD OF TRADE.*

Ship—Collision—War or marine risk—Meaning of "warlike operation."

A steamer belonging to the claimants was requisitioned by the British Government during the War on the terms of a charterparty by which the Government undertook responsibility for loss of the vessel owing to a warlike operation, while the claimants remained responsible for loss by ordinary marine risks. In May, 1918, the claimants' vessel was in a convoy and was carrying from the United States to France steel billets for making shells, but the bulk of her cargo consisted of cereals for the French civilian population. Owing to a defect in her steering gear she collided with an American vessel, which was also in the convoy and was carrying war stores exclusively and was admittedly engaged in a warlike operation. The result of the collision was that the claimants' vessel sank. There was no negligence on the part of either vessel. The Government refused to pay for the loss on the ground that it had not been caused by

* Reported by T. W. Morgan, Esq., Barrister-at-Law.

a warlike operation. In an arbitration it was found by the arbitrator that the claimants' vessel was not engaged in a warlike operation.

Held (Greer, L.J., dissenting), that as the question whether the claimants' vessel was engaged in a warlike operation was concluded by the finding of the arbitrator, and as the collision was caused by her sudden departure from her proper course, the American vessel being merely the instrument and not the cause of the loss, the loss was not caused by a warlike operation, and the British Government was not liable.

Decision of Wright, J. (44 *The Times* L.R., 567), affirmed.

This was an appeal by the shipowners from the judgment of Mr. Justice Wright in favour of the Crown (44 *The Times* L.R., 567), given on an appeal from an award in the form of a special case which raised again the question whether the loss of a vessel during the War was due to a warlike operation. The Clan Line Steamers, Limited, were the owners of a steamship, the Clan Matheson, which was requisitioned by the British Government during the war on the terms of the well-known charter, T.99. Under clause 19 thereof the Government, in effect, undertook responsibility for loss of the vessel owing to a warlike operation, while the shipowners remained responsible for loss by ordinary marine risks.

In May, 1918, the Clan Matheson was one of about 40 vessels sent in a convoy from the United States to France. On the night of May 22-23, 1918, the weather was fine and there was a bright moon. The Clan Matheson, owing to some defect in her steering gear which had never been explained, suddenly swung out of line and came into collision with a steamer, the Western Front, which was also in the convoy, with the result that the Clan Matheson sank.

The Clan Line claimed the value of the steamer, which was agreed at £265,000 at the time of the loss, but the Government refused to pay on the ground that the loss had not been caused by a warlike operation. The dispute was referred to arbitration, as required by the terms of charter T.99, and the arbitrator awarded that the claim succeeded, subject to a decision of the Court on a special case, because the loss was the result of a warlike operation.

Mr. Justice Wright held that the claimants' vessel, the Clan Matheson, was not engaged in a warlike operation, and, as the collision was caused by her sudden departure from her proper course, the Western Front being merely the instrument and not the cause of the loss, the loss was not caused by a warlike operation and the British Government was not liable.

The shipowners appealed.

Mr. Langton, K.C., Mr. A. T. James, K.C., and Mr. J. MacMillan appeared for the appellants; the Attorney-General (Sir T. Inskip, K.C.), Mr. Raeburn, K.C., and Mr. Russell Davies for the Crown.

Lord Justice Scrutton.—If the point at issue in this case were now coming before us for the first time, I should undoubtedly have taken time to consider, and express in a carefully written judgment, my views on the very difficult question which, in the absence of authority, is involved in it. But this is one of a series of cases raising questions with regard to the meaning of the words "a consequence of warlike operations," on which we have the guidance of six cases in the House of Lords, and, in view of the amount in dispute here, it is quite obvious that this case will also go to the House of Lords. I do not propose, therefore, to take time to put my views into more careful language. I am the more ready to take that course because, but for the guidance of the cases in the House of Lords, I should have gone very wrong, and, unfortunately, have remained under the impression that I ought to go wrong, but for the controlling influence of the decisions of the House of Lords.

The facts of this particular case are these. There was a convoy—a convoy which the arbitrator finds consisted of between 40 and 45 ships—apparently they did not take the trouble to count the precise number of them—and from what one knows of convoys in previous cases there were in the convoy probably six or seven columns of six or seven ships, and one hears that they were not all English ships. I abstain from speculating with regard to the particular nationalities of the ships which went to form the convoy, but they were not all English ships. They were running in a manner in which in peace time no sensible ship master would ever dream of running his ship—they were running without lights in columns and there were three ship's lengths between the bow of one ship and the stern of the next, and six ship's lengths between the columns. They were running to orders, zigzagging at given times, a manœuvre which required to be executed with accuracy by 40 ships in six columns, in order to avoid a most extraordinary mix-up by collision. There were no lights, it was a moonlight night, and the vessels were running in columns in that way, and a ship called the Clan Matheson was the third ship in her column, and a ship called the Western Front was the third in her column on the port hand of the Clan Matheson. In these circumstances, the steam steering gear of the Clan Matheson broke down. It was not a thing that one would detect at once. The presence of lights would probably have helped one to detect it sooner, but it was detected when the vessel ahead was observed to be getting on the starboard side of the Clan Matheson more and more. Repeated orders given by the master of the Clan Matheson to port the helm so as to get into line again did not seem to have any effect, and the mate—the officer—went over to the helm to see what the Lascar quartermaster was doing, and he found that the helm was hard-a-port, but that the ship was not paying any attention to it. The engineer was hastily summoned and he tried to do something which he thought might make the steering gear work again. It did not and the Clan Matheson altered her course 7 points to port, to the extent nearly of a right angle, and found herself in front of the Western Front which cut her down, and she sank in a couple of hours. It is quite obvious that what might have happened might have been that the sheer, instead of taking her in front of the Western Front, might have taken her into the side of the Western Front, in which case, the Western Front herself would have been cut down and lost, or it might have caused the Clan Matheson to have gone so far as to take her astern of the Western Front. It was found by the arbitrator that there was no negligence on the part of either ship—that is to say—that there was nothing that the people on the Clan Matheson could have done to avoid the sheer—and having regard to the fact that the vessels were running without lights in this form, there was nothing which the Western Front could have reasonably done to get out of the way. One must bear in mind that the Western Front had, first of all, to appreciate that the

vessel abreast of her was coming out of her column, and coming towards her, and, secondly, the Western Front, when she appreciated that, had to bear in mind that, if she stopped, the boat behind her might run into her. One therefore has the agreed facts, that the steering gear of the Clan Matheson broke down, that in consequence she sheered 7 points right across into the other column, that there was no negligence on the part of the Western Front, and no negligence on the part of those on board the Clan Matheson in not being able to arrest the sheer of the vessel. Those being the facts, what are the legal relations of the parties concerned—the owners of the Clan Matheson on the one hand and the charterers, the Admiralty, on the other? According to the terms of the charter the charterers, the Admiralty, "shall not be held liable if the steamer shall be lost" by collision. So far the Admiralty are not affected. The risks of war which were taken by the Admiralty were risks excluded by the following clause: "Warranted free of capture, seizure, or detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations."

It seems to me, therefore, that the question to be decided is, was the collision a consequence of warlike operations—not did it happen in the course of warlike operations, not are warlike operations one of the events which, in their totality, contributed to the collision, but was the collision a consequence of warlike operations in the sense in which these terms are understood in insurance matters?

One is apt to think of T.99 as introducing a new problem, but T.99 began in 1863 with the case of *Ionides v. Universal Marine Insurance Company* (14 C.B., N.S., 259), where the exception was "warranted free from all consequences of hostilities," and one has the advantage of the very careful judgments—which cannot be too often studied by people who have to argue insurance cases—of Chief Justice Erle and Mr. Justice James Shaw Willes. Chief Justice Erle, referring to the language of the policy (14 C.B., N.S., at p. 285), said: "To make the policy attach, the Court must in that case have held that the consequence of hostilities was so connected with the loss of the ship as to make the underwriters liable. The maxim *Causa proxima non remota spectatur* is peculiarly applicable to insurance law. The loss must be immediately connected with the supposed cause of it." Mr. Justice Shaw Willes says, at page 290: "If you cannot presume the exception of loss from a consequence of hostilities to involve all consequences, however remote, you are necessarily driven to say that the word 'consequences' is to be dealt with according to the ordinary rule, as meaning proximate consequences only." The question then seems to me to be: was this collision—which obviously resulted from the breakdown of the steering gear on the Clan Matheson—a proximate consequence of hostilities?

The difficulties that seem to me to follow from the decisions of the House of Lords are these: First of all, but for the decision in *The Matiana* (*Green v. British India Steam Navigation Company*, 36 *The Times* L.R., 791; [1921] 1 A.C., 99), I should have been confident—possibly wrongly confident—that sailing in convoy, under the conditions described, was a warlike operation. A number of merchant ships desire, and their Governments desire, that they shall avoid attack by the enemy, and to avoid attack by the enemy they adopt a series of precautions which they would never dream of adopting in time of peace, because they are much too dangerous. They sail in a dense convoy, some 40 ships altogether; they sail without lights at night; and they sail having orders at given times to alter their course in a particular way. I should have thought, but for the decision of the House of Lords, that these were defensive operations against enemy attack, and being defensive operations against enemy attack they were warlike operations. I do not understand that warlike operations are confined to attacking operations. Defensive operations seem to me as much warlike, appertaining to war, connected with war, as attacking operations.

I know it has been said by a learned Judge, for whose judgment I have the greatest respect, that the convoying warship is the shepherd, and the convoy are the sheep, and the shepherd may be doing something warlike but the sheep doing nothing warlike. I think that if you asked the unfortunate ships in a convoy what they were doing, and whether it was a peaceful operation, they would say that it was the very reverse—it was a very dangerous operation which they were intentionally adopting in order to avoid attack by an enemy. If it had been left to myself to decide, I should have said unhesitatingly that sailing in convoy, at night, without lights, was a warlike operation. But I have to start, in my view of the events that happened, by assuring myself that I am quite wrong, because the House of Lords, in *The Matiana* (*supra*), by three voices to two, has said that sailing in convoy is a peaceful operation. Therefore, I have to take it that such of the vessels as were merchant vessels were engaged in a peaceful operation when they sailed in convoy.

Then there comes another matter which seems to me to be peculiarly a matter for the House of Lords to solve, and not for me, and I only call attention to the differences—or what seem to me to be the differences—of opinion among certain members of their body.

The Western Front was manned by United States Naval units and was carrying war stores to a war base, and was said, therefore, to be engaged in a warlike operation. The collision happened because the Clan Matheson got in front of the Western Front, and the Western Front had not time to pull up, and the Clan Matheson could not help getting there because of the breakdown of her steering gear. If everything that happens during a warlike operation is a consequence of a warlike operation, then I can understand that Mr. Justice Wright was wrong when he—as I am disposed to do—applied the ordinary rule of *causa proxima* to the term "consequence of hostilities," and I think there is some justification in the House of Lords cases for saying that some of their Lordships think that everything that happens during a warlike operation is a consequence of that warlike operation. Of course, there is a very old fallacy, which is this, that *post hoc* is *propter hoc*, which was very well illustrated by a poem of Canning's in the *Anti-Jacobean*, where he recited all the evil things which were happening in England, including a plague of blue flies in butchers' shops, and attributed all such evils to the existence of Napoleon. *Post hoc propter hoc* is generally wrong. *Ante hoc propter hoc*, I suppose, is worse, and the question in this case seems to be whether *simul hoc propter hoc* is a right conclusion, and whether it is right to say, if two things happen at the same time, one must be the consequence of the other.

Lord Dunedin has used language in *Attorney-General v. Ard Coasters* (*The Ardgantock*) 37 *The Times* L.R., 692; [1921] 2 A.C., at p. 152), which does suggest that he is prepared to say that anything that happens during hostilities is the consequence of hostilities. He said: "I think the judgment may

be put in a form which much resembles a syllogism. Patrolling for submarines is a warlike operation. The Tartar was engaged in such patrolling." Then his Lordship omits to say—because it is pretty obvious—that the third member of the syllogism established that the Tartar was engaged in a warlike operation. Then he goes on, "In the course of that operation, and while engaged in it, she ran into the Ardgantock. The collision is therefore the consequence of a warlike operation." That does seem to me to say that if anything happens during a warlike operation it is a consequence of the warlike operation. On the other hand, Lord Sumner, in a passage which has been read to us by each counsel, in the case of *Attorney-General v. Adelaide Steamship Company* (*The Warilda*) (39 *The Times* L.R., 333 ; [1923] A.C., 292, at p. 305), undoubtedly seems to me to take the view that it is not enough that it is "during," but you must show that it is "the consequence of." "When damage is done by two ships coming into collision, one being engaged in a warlike operation and the other on an ordinary commercial voyage, the collision is a risk falling on the marine policy, unless it is taken out of it by being proved to be caused by warlike operations, and this proof fails, when it is shown to be caused by the action of the officer in charge of the commercial operation, all the more so if his action is negligent and blameworthy ; but I think the result would be the same if his action was only an error of judgment or wrong, but excusable, in what is called the agony of the moment, so long as it is his action that causes the collision effectively and proximately, for the ship engaged in the warlike operation may play a minor part, since it takes two to make a collision. I believe the whole key to these problems is to be found by remembering that negligence is directly material in collision actions, when the question is how to attribute blame to persons, but is only evidentiary in insurance actions, where the question is whether the event has happened which entitles the assured to be indemnified." I read that passage as being a statement that it is not enough that it happens during the warlike operation, you must prove that it was caused by a warlike operation. That is the view which is stated by Mr. Justice Wright in his very careful working out of the results of this case, and it is a view which I myself would take to be the correct one. Whether I have taken the correct view about the apparent differences in the views of the House of Lords, the House of Lords must settle for themselves when this case reaches them.

I notice, however, that when the first case after the War came into this Court I said this (part of it is now, I agree, wrong after the decisions of the House of Lords) in *British and Foreign Steamship Company v. The King* (34 *The Times* L.R., 546 ; [1918] 2 K.B., 879, at p. 886) : "I understand the plaintiffs do not dispute that it is not enough for them to prove that the loss happened in the course of a military operation, or that a military operation was one of the contributory causes which together produced the loss." It is the last part of that statement, "or that a military operation was one of the contributory causes" which is wrong since *The Matiana* (*supra*) and the recent decision of this Court in *Hain Steamship Company, Limited v. Board of Trade* (44 *The Times* L.R., 624). I went on : "The military operation must be the direct or dominant cause of the loss, and no new and independent cause must operate after the military operation alleged. The question then is, Have the plaintiffs proved that the direct or dominant cause of the loss was military operations without the intervention of any new and independent effective cause ?" That appears to me subject to the qualification to be derived from the *Hain Steamship Company* case (*supra*) or *The Matiana* (*supra*) to be correct. It is the line which Mr. Justice Wright has followed in his judgment in this case, and it is the line which I am disposed to follow until the House of Lords tell me that I am again wrong in the views that I have formed.

I take a case : A vessel—a war vessel—is at anchor, and a merchant vessel which should pass quite clear of her suddenly sheers owing to her steering engine breaking down, without negligence, and runs into the vessel at anchor. In my view it is impossible to say that that loss is the consequence of a military operation, because a vessel engaged on a military operation was at anchor, without anything contributing on her part, except that she was there and the merchant ship sheered into her. I take another case—an insurance case : Suppose that in consequence of railway operations a misguided person commits suicide by jumping in front of an engine. Would that be a consequence of railway operations, or would the cause of that disaster or loss be the suicidal act of the man himself, and the presence of the train not the dominant cause of the accident ? It appears to me that it would be the action of the man himself which would be the proximate cause of that loss.

For these reasons I have come to the conclusion that Mr. Justice Wright was right and, in applying the ordinary principles of marine insurance to this case, took the correct view.

Perhaps I might add this. It is said that if you look at this as a convoy case the Western Front was engaged in a warlike operation because, as I say, she was manned by units of the United States Navy, and she was going to a war base with a cargo intended for purposes of war. The learned arbitrator has found that the Clan Matheson was not engaged on a warlike operation because her position was this : she was going to a port which was both a war base and a commercial port and was carrying a mixed cargo, of which 84 per cent. in weight was for civil purposes and 16 per cent. in weight was for war purposes. The 16 per cent. in weight included 363 tons of steel for shells, and a certain proportion of oats for the military authorities—which, it is said, may have been intended for mules and may have been intended for Highland regiments, but at any rate was intended to be used for purposes of war.

The arbitrator has found that the Clan Matheson was not carrying out a warlike operation, and it appears to me that whether there is enough warlike cargo on the ship to make her to be carrying out a warlike operation is a question of degree and fact for the arbitrator to determine. I notice that, in cases in the House of Lords, requisitioned vessels which were carrying cargoes entirely of iron ore to England were not considered as carrying out a warlike operation, although the inference would be pretty strong that that ore was being carried to England in time of war for warlike purposes.

I also notice that the late Lord Cave in *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service* (39 *The Times* L.R., 133 ; [1923] A.C., 191) (*The Geelong*), speaking of the cargo of the Petersham, *Britain Steamship Company v. The King* (36 *The Times* L.R., 791 ; [1921] 1 A.C., 99), says that it was intended for warlike purposes, and yet that the vessel was not engaged in a warlike operation.

I do not feel inclined to interfere with the findings of fact of the learned arbitrator, and therefore on the

two points taken by the appellants I think that Mr. Justice Wright came to the correct decision when he applied the ordinary principles of marine insurance to this case and held that the proximate, dominant, and direct cause of this loss was the breakdown of the steering gear of the Clan Matheson, and her subsequent sheering into the column opposite to her. In other words, he held that the collision was not a consequence of hostilities in the sense in which that phrase is interpreted in *Ionides v. Universal Marine Insurance Company* (*supra*). The second point, that the Clan Matheson, because she carried 16 per cent. in weight of warlike stores, must have been engaged in a warlike operation is concluded by the finding of fact of the learned arbitrator.

For these reasons I think that the appeal must be dismissed with costs.

LORD JUSTICE LAWRENCE.—This appeal raises the question whether the loss of the Clan Matheson was a consequence of warlike operations on the part of the Western Front within the meaning of clause 19 of T. 99, and therefore excluded from the risks undertaken by the owners under clause 18, or whether, on the other hand, the collision was a sea risk within clause 18, and outside the exception under clause 19.

It is admitted that at the time of the collision the Western Front was engaged in a warlike operation, and that the Western Front was not guilty of any negligence which caused the collision.

As regards the Clan Matheson, the learned arbitrator has found that, at the time of the collision, she was not engaged in a warlike operation. It has been held by the House of Lords in *The Matiana* case, *Green v. British India Steam Navigation Company* (36 *The Times* L.R., 791 ; [1921] 1 A.C., 99), that sailing under convoy, and, in *The Petersham* case, *Britain Steamship Company v. The King* (36 *The Times* L.R., 791 ; [1921] 1 A.C., 99), sailing without lights, do not constitute a warlike operation. Mr. Langton indeed faintly argued that if you combined the two—that is to say, sailing in convoy and sailing without lights, they would amount to a warlike operation. In my opinion, there is nothing in that contention. The main ground, however, upon which the appellants challenged the finding of the arbitrator was that the Clan Matheson was proceeding to a war base and was carrying, as part of her cargo, some steel which was intended for war use, and that the arbitrator was, in those circumstances, bound, as a matter of law, or principle, to hold that the Clan Matheson was engaged in a warlike operation.

The facts were that the steel so carried weighed 360 odd tons and constituted 16 per cent. of the total tonnage of the cargo. The remaining 7,300 odd tons of the cargo consisted of barley and wheat which were intended for the Civil Commissariat, and not for war use. In the case of a vessel such as the Clan Matheson, carrying cargo consisting partly of ordinary merchandise and partly of war material, and proceeding to a port which was being used—though not exclusively—as a war base I think it is essentially a question of fact whether the carriage of such war material and the destination of the vessel cause that vessel to be engaged on a warlike operation or not. It seems to me that a case like this must be a case of degree, and one for the arbitrator. The finding of the learned arbitrator in this case was, I think, justified by the facts, and having come to the conclusion that the Clan Matheson was not engaged in a warlike operation I do not think that his finding is open to review because it does not, in my opinion, involve either a question of law or a question of principle. Therefore I think that that contention, on the part of the appellants, fails.

There remains, however, the more difficult question, whether the collision was a consequence of the warlike operation of the Western Front. On this question I am in agreement with the decision of Mr. Justice Wright, and with the judgment delivered by Lord Justice Scrutton, and I have very little to add.

In my opinion, what the Court has to discover in the present case is *what* was the real cause of the collision, and not *who* was the cause of the collision, nor whether it was due to the negligence of those handling the Clan Matheson or due to any defect in the machinery.

Both vessels were sailing under convoy with a number of other vessels, and they were sailing at prescribed distances at a prescribed speed. The Western Front, although a warship, within the decisions, was taking her place in the convoy just the same as the merchant vessels that were being convoyed. The station which she held was known to the Clan Matheson, just as much as were the stations of the other vessels in the convoy. At the time of the collision the Western Front was in her proper station, proceeding at her proper speed, and keeping at her proper distances. Suddenly, and without warning, the Clan Matheson sheered to port and impaled herself on the stem of the Western Front. Nothing that the Western Front could have done would have avoided the collision. The case seems to me to be analogous to that, put by Mr. Raeburn in the argument, of two ships in the same anchorage, one being a warship engaged in a warlike operation, the other being a merchantman, and the merchantman breaking loose from her anchorage owing to a defect in her cable, and drifting on to the ram of the warship, and sinking herself. It seems to me that, in such a case, it would be strange to hold that the loss of the merchantman was a consequence of the warlike operations of the warship.

The relevant fact to be decided in this case seems to me to be whether it was the action of the Clan Matheson or the action of the Western Front which brought about the collision, and not *what* caused the Clan Matheson to get into the position which made the collision inevitable, nor *who*, if anybody, was to blame for her getting into that position. In the case of the Trevanion (*Hain Steamship Company, Limited v. Board of Trade*, 44 *The Times* L.R., 624) this Court held that both ships were negligent and equally to blame, and that it was no answer to a claim made under clause 19 against the Government to say that there was also a claim that could be made against the underwriters under clause 18. Nothing of that kind has occurred. The only vessel at fault—not using that expression as applying to any negligence on the part of the owners or crew—was the Clan Matheson, her fault being that, as already stated, she suddenly left her proper position in the convoy and sheered across the bow of the Western Front.

In these circumstances, it appears to me that the collision was not in any true sense of the expression "a consequence of the warlike operation" of the Western Front, but was the direct consequence of the action of the Clan Matheson herself.

The present case to my mind differs altogether from such cases as *The Ardgantock* (*Att.-Gen. v. Ard Coasters*, 37 *The Times* L.R., 692 ; [1921] 2 A.C., 141) and *The Richard de Larrinaga* (*Liverpool and London War Risks Insurance Association v. Marine Underwriters of the S.S. Richard de Larrinaga*, 37 *The Times* L.R., 692 ; [1921] 2 A.C., 141). In each

of these cases the collision was directly due to the warlike operations of the warships concerned, and I think that the result would have been the same if either, or both, of the merchantmen concerned had been disabled through a breakdown of their machinery or their steering gear. In both cases the merchant vessels had a right to be in the place in which they were when they were run down. They were sailing in the open sea and had no duty to anyone to keep on a strict course and not to sheer about as they chose, and they, by their action, did not cause the collision, which was caused purely by the warships.

To hold, in this case, that the collision was due to the warlike operation of the Western Front would, in my judgment, be affirming the proposition that every collision with a ship engaged in a warlike operation was the consequence of the warlike operation, which, in my opinion, is not a sound proposition.

The authorities for that proposition cited to us consisted mainly of a passage from the judgment of Lord Dunedin in *The Ardgantock* case (*supra*) and a passage in the speech of Lord Finlay in *The Geelong* case (*Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service*, 39 *The Times* L.R., 133; [1923] A.C., 191), both of which my Lord has already commented upon, and I do not propose again to comment upon them.

In my opinion, neither of these learned Law Lords intended to lay down as a hard and fast general proposition that every loss occasioned while a ship was engaged in a warlike operation is a consequence of the warlike operation.

In the result I agree with Lord Justice Scrutton that this appeal should be dismissed.

Lord Justice Greer.—I regret to find myself in disagreement with Lord Justice Scrutton and Lord Justice Lawrence and Mr. Justice Wright, but I do not propose to be guilty of the polite insincerity of saying that, as I differ from them, I must be wrong. If that were my state of mind I should not be delivering a dissenting judgment.

The logic of Mr. Justice Wright's judgment is attractive, but I prefer the simpler proposition that underlies the decision of the learned arbitrator. We have in this case to consider the true interpretation, and the correct application to the facts, as found by the learned arbitrator, of two clauses in the charter-party known as T.99, and I feel it is desirable that I should read those two clauses. The first is clause 18: "The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather or any other cause arising as a sea risk." Clause 19: "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause: Warranted free of . . . all consequences of hostilities or warlike operations, whether before or after declaration of war."

The main fact that we have to consider in this case is whether or not the collision with the Western Front while she was in fact performing a warlike operation and navigating in the course of performing her warlike operation right up to the moment when she made a hole in the merchant ship, was a collision that was the consequence of the warlike operation which was at the moment of the collision being performed by the warship. It seems to me that the warlike operation was going on, as I have said, right up to the time of the collision. The navigation of the war vessel at the moment when the merchant vessel was holed was part of the warlike operation which she was then carrying on, and in this connexion I would call attention to the words used by Lord Sumner in the case of *Attorney-General v. Adelaide Shipping Company* (*The Warilda*) (39 *The Times* L.R., 333; [1923] A.C., 292, at p. 301). "By admission the Warilda's operation was a warlike operation throughout, and as was the whole so were the parts. Steaming into the Petingaudet was one of those parts, and none the less so, whether it was due to mere misfortune, to error of judgment, or to negligent navigation." If one substitutes for the Petingaudet the Clan Matheson, the steaming into the Clan Matheson was one of the parts of the warlike operation which was being carried on by the other vessel, the Western Front. It seems to me to be difficult, under the circumstances, to say that the collision which, if there had been no warlike operation going on, would have been a sea risk under clause 18, is not taken out of that clause by the operation of the f.c. and s. clause referred to in clause 19: "Warranted free of all consequences of warlike operations."

In my judgment, the fact that the Clan Matheson by accident was unable to steer and was in a part of the ocean where she would not have been if she had been able to steer, is not relevant to the question whether the collision was a consequence of the warlike operation being carried out by the war vessel. Pursuing that operation up to the moment of the collision with the merchant vessel, and then sinking her when she was lawfully upon the seas in the situation into which she came, without any blame attaching to those responsible for her, amount, in my judgment, to a collision caused by the warlike operation of the vessel which collided with her.

I think that is a much simpler proposition to apply to cases of this sort than the proposition to be extracted from the judgment of Mr. Justice Wright. It does not follow from that that it is the true interpretation of the agreement between the parties. But in my judgment it is, and I think it has the support—the very great support—of the authority of the House of Lords in the two cases which are known as *The Ardgantock* and *The Richard de Larrinaga* (37 *The Times* L.R., 692; [1921] 2 A.C., 141). I cannot myself distinguish the cases in principle.

It seems to me that, if sailing without lights in these cases was not the cause of the collision which took place, then the sailing without ability to steer, in this case, was not the cause of the collision that took place, but the cause of the collision was the action of the war vessel in the water, coming in contact with the merchant vessel in the position in which she was, without any fault on her part.

I also think that the case is covered, as argued in the reply in this case, by our decision in the recent case of *Hain Steamship Company, Limited v. Board of Trade* (44 *The Times* L.R., 624), where we held that the combined negligence of the two vessels did not prevent it from being said that the collision was a consequence of the action of the war vessel, which was one of the two colliding vessels.

I also desire to call attention to the principle that is referred to in all the judgments in that case: that, where you have two causes cooperating at the same time, it follows that the result of those two causes may be properly said to be the result of either of them; and if the collision was the result of the warlike operation which was being carried on by the Western

Front, it was none the less the result of that warlike operation because another cause also operated at the same time.

In my judgment, this appeal ought to be allowed, but it is satisfactory to think that, whichever way of looking at this question is right, it will probably be settled by a higher tribunal.

[Solicitors—Messrs. Ince, Colt, Ince and Roscoe; the Solicitor to the Board of Trade.]

House of Lords.
(Viscount Dunedin, Lord Shaw of Dunfermline, Lord Phillimore, and Lord Blanesburgh.) 1928. July 25.

LORD TREDEGAR v. HARWOOD AND OTHERS.*

Landlord and Tenant—Covenant by lessee—Insurance against fire—Named office—Alternative—Other responsible office to be approved by lessor.

Held (Lord Blanesburgh dissenting), that a covenant by a lessee to insure the demised premises in the joint names of the lessee and the lessor, "in the Law Fire Office or in some other responsible insurance office to be approved by the lessor," does not confer upon the lessee an alternative to be exercised at his volition; and under this covenant the lessee cannot properly tender an office which is not approved by the lessor.

Decision of the Court of Appeal (44 *The Times* L.R., 17; [1928] Ch., 59) reversed.

This was an appeal from a decision of the Court of Appeal (44 *The Times* L.R., 17; [1928] Ch., 59), reversing a decision of Mr. Justice Tomlin.

The question raised by the appeal was as to the construction of a covenant by a lessee to insure the demised premises in the joint names of the lessee and lessor.

The appellant was the ground landlord of property in the neighbourhood of Newport and Cardiff on which some thousands of houses had been erected. The respondent Mrs. Harwood was the assignee of a building lease under which a house had been built. The lease was for 99 years, and contained a covenant by the lessee to "insure and ever afterwards during the said term keep insured the said messuage . . . in the joint names of the lessee and the lessor in the Law Fire Office or in some other responsible insurance office to be approved by the lessor. . . ."

Mrs. Harwood, when the lease was assigned to her, mortgaged the demised premises by way of sub-lease to the second respondents, the Principality Building Society, and the mortgage contained a proviso that during the subsistence of the security the premises should be insured in the Atlas Insurance Company. Accordingly, Mrs. Harwood, instead of continuing the then existing policy in the Law Fire Office, insured in the Atlas Company in the names of the appellant and of herself and the building society. That was done without the knowledge of the appellant, who refused to accept that insurance or to approve the Atlas Company, and he brought this action against the respondents for forfeiture of the lease by reason of breach of covenant. The appellant, however, stated by his counsel that he did not desire a forfeiture, but brought the action for the purpose of obtaining a decision on the true construction of the covenant. His reason for requiring insurance in the Law Fire Office was to facilitate estate management.

Mr. Justice Tomlin decided in favour of the appellant, but his decision was reversed by the Court of Appeal (the Master of the Rolls, Lord Justice Sargant, and Lord Justice Lawrence), who held that the covenant conferred on the lessee an alternative to be exercised at his volition, and that the lessor could not refuse his approval on grounds unconnected with the relationship of landlord and tenant.

Mr. W. A. Greene, K.C., Mr. Gavin Simonds, K.C., and Mr. C. R. R. Romer appeared for the appellant; and Mr. Archer, K.C., and Mr. Foa for the respondents.

VISCOUNT DUNEDIN.—My Lords, The appellant in this case, Lord Tredegar, is the ground landlord of certain premises known as "Kerswell," 27, Axminster-road, Cardiff. By lease dated July 7, 1924, the appellant demised the said premises to one Henry Beavis and his assigns for 99 years from March 25, 1924, under certain covenants and conditions. One of the covenants is as follows:—

"That the lessee shall and will immediately after the roof of the intended messuage shall have been laid on insure and ever afterwards during the said term keep insured the said messuage together with all erections and buildings for the time being erected on the piece or parcel of land hereby demised against loss or damage by fire to the full value of the said erections and buildings in the joint names of the lessee and the lessor in the Law Fire Office or in some other responsible insurance office to be approved by the lessor and shall upon his request produce to the lessor or his agents for the time being the policy for such insurance and the receipts for the annual payments and that in default of the lessee so doing it shall be lawful for the lessor to insure the said premises and erections and buildings as the lessor may think fit and that the costs and charges of effecting such insurance or keeping the same on foot shall be repaid to the lessor on demand or be recovered in like manner as the rent hereby reserved is recoverable."

The lease contains the usual proviso for re-entry for breach of covenant. By an assignment dated July 29, 1924, the respondent Mrs. Harwood became lessee of the premises for the remainder of the term from that date. Henry Beavis duly performed the above quoted covenant and insured the premises with the Law Fire Office for £800. The policy was for one year from March 25, 1924, and the renewal premium became due on March 25, 1925. On March 25, 1925, the respondent Mrs. Harwood failed to renew.

By an indenture dated July 30, 1924, the respondent Mrs. Harwood had mortgaged the said premises for the remainder of the term in her, excepting the last day thereof, to the respondents the Principality Building Society. The said mortgage contained a condition that the mortgagor should insure the premises with such offices as the society should appoint. The appellant through his agents applied to the respondent Mrs. Harwood either to renew the policy issued to Beavis or take out a fresh policy with the Law Fire Office for £800, at the same time intimating that he insisted on the policy being with the Law Fire Office, and would not approve of any other office. The reason for this intimation was this: Lord Tredegar being the ground landlord of some thousands of houses in Cardiff found

* Reported by H. B. HEMMING, Esq., Barrister-at-Law.

it almost impossible, if they were insured in many various offices, to check the due renewals of the premiums, whereas, if they were all insured in the Law Fire Office, then by arrangement with that office they kept his agents informed of any default, so that he might apply for the due renewal of the premium.

The reply of the respondent Mrs. Harwood was that by order of the respondents, the building society, she had insured with the Atlas Company. The appellant pointed out that he had not approved of the Atlas. As the first respondent at the instigation of the other respondents persisted in her attitude, the appellant raised the present action to forfeit the lease in respect of a breach of covenant. It depended before Mr. Justice Tomlin and it was explained that there was no intention of really forfeiting the lease if the respondent would insure with the Law Fire Office for £800. Mr. Justice Tomlin made a declaration in the appellant's favour but suspended the decree if within twenty-one days the insurance was effected for £800 with the Law Fire Office. His view was that, if not the Law Fire Office, then any other office could only be accepted under the double condition, first, that it was responsible, and, second, that it was approved by the appellant. He found that the Atlas had not been approved by the appellant and that that ended the matter.

On appeal being taken the Court of Appeal reversed that judgment. They held that the clause gave an option to the respondent; that on proposing an office which was responsible—no question having been raised as to the responsibility of the Atlas—the appellant had no right to refuse his approval on any ground which did not directly affect the contract between him and the respondent.

My Lords, I am quite unable to concur with the learned Judges of the Court of Appeal. It seems to me that they introduce complication and inference into an expression where there is no room for one or the other. It was admitted by the learned counsel for the respondent that if the word "responsible" had been omitted it would have been impossible to say that any office could be properly tendered which had not been approved by the appellant. I think it is a quite impossible burden to put on the word "responsible" to change all this. The reason for the existence of the word is simplicity itself. It was necessary to put in some alternative to the Law Fire Office because this was a 99 years' lease, and, before the end of it, it might be that the Law Fire Office did business no longer. It might be liquidated or bought up. Then some other office had to be selected. No office that is not responsible is to be entertained, but, however responsible, it is to be approved by the appellant. The learned Judges relied on the case of *Houlder Bros. and Co. v. Gibbs* (41 *The Times* L.R., 487; [1925] Ch., 575). But in that case, as is pointed out by Mr. Justice Tomlin, there was the special proviso that consent to the assignment was not to be withheld in the case of a responsible person. Further, I would like to say that, although it is unnecessary to consider whether that case was well decided, I am not inclined to adhere to the pronouncement that reasonableness was only to be referred to something which touched both parties to the lease. I should read reasonableness in the general sense and if it was necessary—it is not so in the view already expressed—I would hold here that the appellant's reasons are eminently reasonable.

I move that the appeal be allowed, that the judgment of Mr. Justice Tomlin be restored with the variation that the twenty-one days therein mentioned do run from the date of this judgment instead of the date of the judgment of Mr. Justice Tomlin, and that the appellant should have his costs in this House and in the Court of Appeal.

LORD SHAW of DUNFERMLINE.—My Lords, The facts of this case are not in dispute. The respondent Mrs. Harwood by assignment became lessee of these premises—a plot of land with some buildings on it—for the remainder of the term of a 99 years' lease by the appellant in favour of one Henry Beavis.

The indenture of lease to Beavis and his executors, administrators and assigns contains a covenant for insurance and rebuilding in case of fire. The insurance was to be "in the joint names of the lessee and the lessor in the Law Fire Office or in some other responsible insurance office to be approved by the lessor." There follow the ordinary clauses about production of the policy and the annual receipts for premiums, and there was later in the indenture a proviso for re-entry in case of breach of covenant.

The main obligation upon the lessee or his assignee was to insure in the Law Fire Office or, in the alternative, in some other responsible insurance office to be approved of by the lessor.

No conditions or provisions are attached to the granting or withholding of this approval. In particular the case is in that respect completely distinguished from various cases as to assignment or sub-letting which have been cited. These contain, for example, the not unusual clause, as in *Houlder Bros. and Co. v. Gibbs* (41 *The Times* L.R., 487; [1925] Ch., 575), that the consent of the landlord was "not to be withheld unreasonably in the case of a respectable and responsible person or Corporation" being put forward as assignee, or the other not unfamiliar clause applicable also to assignment or sub-letting, as in *Barrow v. Isaacs and Son* (7 *The Times* L.R., 175; [1891] 1 Q.B., 417), to the effect that the consent of the landlord "should not be arbitrarily withheld."

In the present case no such restriction or condition upon the right of approval or disapproval by the landlord is imposed. The case is the simple one of one sound office being named, with the alternative given of another responsible office approved by the lessor. If the lessee will not insure in the Law Fire Office nor in any other responsible office which the lessor has approved, the covenant is broken. It is a condition precedent to the alternative being resorted to that the lessor's consent has been given to the other office suggested. I am of opinion in these circumstances that this condition precedent cannot be removed or held as satisfied because in the opinion of a Court of law the lessor's refusal was unreasonable. The Court's opinion upon that subject cannot be allowed to supply the want of the lessor's consent in fact.

The forms of contract, under which the reasonableness of withholding consent is made a term, are perfectly familiar, and they were not adopted in the present case; and the condition of the lessor's consent is a condition precedent in absolute terms.

The judgment of the Court of Appeal is, in my humble opinion, wrong in two particulars. It imports the implication of a new clause into the contract, that the consent of the lessor to any responsible insurance office selected by the lessee is not to be unreasonably withheld, and, secondly, having imported by implication a clause in those terms, the Court proceeds to attach to these terms and to this contract all that certain authorities hold is the further implication of such a clause—namely, that the lessor must furnish a justification for his refusal in something incidental to the individual contract itself and

also to the financial standing or responsibility of the alternative insurance company. I am humbly of opinion that this process of piling implication upon implication is not a legitimate mode of construing a very simple and plain condition. It is clogged neither by the one implication nor the other.

Were it necessary to inquire, then the facts of this case would show that there were sound business reasons behind this unfettered simplicity. The lessor was the owner of many hundreds of houses erected under building leases, and the development of a considerable estate required strict attention to, among other things, the insurance of the buildings erected. The difficulty in such cases is to check the failure in renewals. With properties so numerous, and insured, it may be, in a dozen different offices, this point of management becomes very complex and, in this case, it is pointed out that the cost involved becomes considerable. By a simple working arrangement with one office, such as the Law Fire, simplicity and accuracy are promptly secured.

I put the point, my Lords, of the situation of a person in Lord Tredegar's position with contracts of insurance by numerous offices offered, the names of which are the alternatives suggested by various tenants out of the many hundreds. It does not appear to me that any duty is cast upon a lessor to enter into or obtain information upon the financial situation or standing of the offices suggested, although, if the judgment appealed from were to stand, each lessee of each house could demand of Lord Tredegar an answer justifying refusal to consent, an answer which was of the nature of reasons against the financial responsibilities of a particular office. This kind of issue is totally different from the issue which arises in sub-letting cases with a specific term against unreasonable refusal of a sub-tenant. I cannot hold that, under the present contract, the refusal to consent is clogged in the manner suggested.

On the merits I should, further, hold, if the matter were gone into, that the refusal here was perfectly reasonable and that it would be wrong to confine the reason in such case to the particular house exclusive of all considerations as to the management of the estate to which it belonged. Nor would it, in my view, be in the second place reasonable to cast upon the landlord the proponing of a suggestion of the instability of an insurance company suggested by the lessee. The lessor might know that company quite well, feel that it was a strong office but an office which, from his past dealings, he had every reason to know was litigious, dilatory, or difficult to deal with: it would yet, however, remain under the category of a responsible office.

I take, however, the absolute view of this case to the effect that the lessor's consent is a condition precedent in fact to the acceptance of an alternative insurance office, and that that consent can be refused *simpliciter* without entering upon reasons. I agree.

Lord Phillimore.—My Lords, I agree with the opinions given by the noble and learned Lords who have spoken. Two persons each *sui juris* and under no constraint enter into an agreement. Why should we not give effect to the plain words of their agreement? Why should we seek for some far-fetched meaning? Moreover, if it were a question, which it is not, whether Lord Tredegar was, in seeking to enforce the agreement, acting reasonably, I should say that he was so acting. I share the doubt expressed by Lord Dunedin as to the soundness of the judgment in *Houlder Bros. and Co. v. Gibbs* (41 *The Times* L.R., 487 ; [1925] Ch., 575). If it be a question whether a man is acting reasonably as distinguished from justly, fairly or kindly, you are to take into consideration the motives of convenience and interest which affect him, not those which affect somebody else.

In the first draft of my opinion I had stopped at this point. But as I find that there is an argument (not based upon supposed grounds of policy or fairness or the previous practice of the landlord but strictly founded upon the literal construction of the words), which still finds some favour in your Lordships' House, it would be more respectful if I give my reasons for not accepting it.

I construe the covenant thus:—

No. 1.—The tenant covenants to insure against fire.

No. 2.—He covenants to insure in the Law Fire Office unless as an alternative both parties agree to some other office. No office can be substituted for the Law Fire Office except by mutual agreement. The tenant would fulfil his covenant if he insures in the Law Fire Office even though the landlord did not wish it. The landlord on the other hand can say that he will approve of no office except the Law Fire. I regard the word "responsible" as monitory. It would be of no use for the tenant, or for the landlord, through a dislike to the Law Fire to suggest any office of doubtful repute.

The idea that the introduction of the word "responsible" affects or increases the duty of the landlord to the tenant seems to me, with all respect, fanciful. During the course of the argument I made the suggestion, to substitute for the word "responsible" the word "English." Would that enable a tenant to say that he was complying with the covenant because he was tendering an office which was not Scotch nor Irish but English and which the landlord, therefore, must approve unless he could show good reason to the contrary?

Lord Blanesburgh (read by Lord Shaw).—My Lords, The question in this case is a simple one. It is not, for that reason, easy. Mr. Justice Tomlin thought the language of the clause in debate was plain, or, at any rate, reasonably plain. His decision was for the appellant. The unanimous conclusion of the Court of Appeal on the other hand was in favour of the respondents. Lord Justice Lawrence, expressing a view clearly enough shared by his two learned colleagues, observed in the course of his judgment:

"I confess that but for the opinion expressed by the learned Judge and the arguments of counsel for [Lord Tredegar] I should have thought that the construction of the covenant did not present any real difficulty."

My Lords, I regret that that divergence of judicial opinion has not yet entirely disappeared. But while I hope that I appreciate fully the considerations which have led your Lordships who have preceded me to revert to the view of Mr. Justice Tomlin, I feel bound to say, with the utmost respect, that my own opinion remains in accord with that of the Court of Appeal.

I need hardly, I feel sure, affirm that in reaching that conclusion I in no way underrate either the reasonableness or wisdom from his own point of view of the appellant's recent resolve to have effected in one office all the insurances upon his Cardiff leases. Nor, when I regard the services, clerical and other, to be rendered to him in consideration by the Law Fire Office, do I doubt that the appellant has chosen prudently in selecting that office as the favoured medium of insurance. I should equally commend his wisdom if, as a result of the tender of

even more valuable services, the appellant were, later on, to transfer his insurance favours to some other responsible office, say, for example, the Atlas. But it is not his prudence in either direction which is relevant now. The question is whether, under the insurance covenant in Mrs. Harwood's lease, Lord Tredegar can require her to insure in the Law Fire Office, to the exclusion, under all circumstances, of any other.

It must, I think, be agreed that that requirement of the appellant's is beset by at least some initial difficulty. There is a well-known common form covenant which would indubitably have established the privilege he claims. It has not been utilized. The covenant chosen as the estate covenant is an equally well-known alternative style, to some extent it must be agreed—how much is here the question—more favourable to the lessee than the other. And when it is remembered that in a building estate to be developed largely by advances made by building societies and other lenders to the lessees a covenant convenient to the lenders may be of final advantage to the ground landlord, the choice of this less stringent form of covenant may well have been deliberate. Certain it is that no such policy as that recently adopted by the estate was in view when the covenant was selected.

The arrangement with the Law Fire Office which, having been come to, has quite prudently led to the requirement now made by the appellant is a new thing. But the covenant unaltered has been in use on the estate for many years, and throughout that period the view of it still taken by the respondents has in practice been accepted and acted upon by the appellant. As appears from the correspondence very many of the houses on the estate have been built with moneys advanced by the respondent building society to lessees on the security of their leases, and the society, for reasons analogous to those now moving the appellant, has always required its mortgagor lessees—as in this case it required Mrs. Harwood—to effect their insurances with the Atlas, which, as a responsible office, has been accepted by the estate without question.

It may, of course, be suggested that this action on the part of the appellant's representatives was no more than an indulgence which the appellant was not concerned, as things stood, to withhold from his tenants. It is pertinent therefore to observe that, in circumstances not unlike the present, the covenant would certainly be unequal to the burden which the appellant now seeks to place upon it.

Suppose, as has already been suggested, that the appellant should find it to his interest to have all these insurances effected with some office other than the Law Fire. It cannot, in that case, I think, be doubted that he would nevertheless be bound to accept, as a complete performance in that behalf of the lessee's covenant, an insurance with the Law Fire, if tendered. Suppose, again, that for some reason the Law Fire disappeared or were absorbed in some other office. The appellant could not in that case require a lessee to insure in an office of his own nomination, for the privilege of nomination is not reserved to him. And if the appellant, desirous of confining insurances to one office, were to disapprove of every other office as submitted to him, however responsible or unobjectionable in every way some at all events of those submitted might be, that action on his part I cannot doubt would be held unwarranted on the well-known principle explained and applied by Chief Justice Tindal in *Dallman v. King* (4 Bing. N.C., 105, at p. 109) that, the gist of the covenant being that the office selected by the lessee and tendered for approval should be responsible, to withhold approval from every responsible office but one, and that for some reason entirely irrelevant to insurance protection, would go to the destruction of the thing granted which, "according to the well-known rule, would pass, discharged from the condition."

My Lords, the alternative form of covenant which would have resolved all these questions in the appellant's favour is a very simple one, and it will be found, with variations in detail, in every standard book of precedents. By its terms the lessee covenants to insure

"in such insurance office as shall be named by the lessor," or "in such office as the lessor shall appoint."

Indeed you have, in this very covenant, by apt words, power reserved to the appellant, in case of default by the lessee, to realize his will in this matter. He is thereby empowered

"to insure the said premises . . . as [he] may think fit."

The aptness, for the same purpose, of the covenant exacted by the respondent building society in Mrs. Harwood's mortgage of July 30, 1924, will not be missed. Thereby Mrs. Harwood covenants to

"insure and keep insured the said premises . . . in such office and for such amount as the society shall appoint."

The contrast between the present covenant and any one of these alternatives is very striking. Under it, the lessee is, as I think, in plain language given the option of fulfilling his obligation in one of two ways, either (*a*) by insuring in the Law Fire, or (*b*) in some other responsible insurance office to be approved by the lessor. The only preference enjoyed by the Law Fire Office is that it is a responsible office of which no further approval by the lessor is required. There is nothing in the covenant which either necessarily or naturally imports that the alternative is only exercisable if insurance in the Law Fire is impracticable. To introduce that qualification some such words as "failing that office" would have to be added, and they are not there. The choice of the other office rests with the lessee: the approval only is with the lessor, not the selection, and the right of the lessor is limited to considering and approving or declining to approve the responsible office so chosen. It is here that the addition of the word "responsible" to the description of the office chosen for approval is so illuminating. Unless the name of a responsible office is tendered, the lessor need not consider the proposal at all. No step towards compliance with the covenant has so far been taken. Insurance in a responsible office is the gist of the covenant, and when in exercise of his privilege of selection the name of a responsible office is tendered by the lessee then the correlative duty of approval or disapproval by the appellant immediately arises.

The action of the appellant in relation to the respondents' insurance with the Atlas was here very striking. Really, I think, he definitely refused to consider the case of any insurance office except the Law Fire. It may, however, be said that his refusal to approve the Atlas was attributable not to any objection to that office on the ground of responsibility or the reverse, but to a preference for the Law Fire or to the fact that the Atlas was not the Law Fire. Be it so. The appellant's position is not, as I see it, thereby improved. In my opinion, however unrestricted may be his legitimate grounds of objection in other directions, the action of the appellant in withholding approval on any such ground cannot, on the true meaning of the covenant, be

justified. As Lord Justice Lawrence puts it in his judgment, the avowed action of the appellant

"amounts to a complete negation of the right of the lessee to fulfil his obligation under the covenant by insuring in some responsible office other than the Law Fire Office. The lessor is in effect treating the covenant as if it were a covenant to insure in the Law Fire Office only and as if the alternative method of complying with it had not been inserted."

In other words the appellant by declaring that in no circumstances will any office other than the Law Fire be entertained by him has brought it about that the respondents' insurance in the Atlas, an admittedly responsible office, is in the result a compliance with the covenant inasmuch as the covenant must owing to the appellant's attitude in relation to that insurance be regarded as "discharged of the condition."

In my judgment it is only under some other form of covenant and not under this form that the appellant is entitled to the right which here for the reason assigned he has claimed to exercise. On these grounds, if the decision rested with me, I would be for affirming the order of the Court of Appeal.

[Solicitors—Messrs. Rider, Heaton, Meredith, and Mills, for Messrs. Davis, Lloyds, and Wilson, Newport, Mon.; Messrs. Church, Adams, Tatham and Co., for Messrs. Merrils, Ede, and Nicholls, Cardiff.]

House of Lords.
(Lord Buckmaster, Viscount Dunedin, and Lord Phillimore.)
1928, July 25.

LOCKHART v. HARRISON.*

Defamation—Libel—Defence that statement was not defamatory—Finding of jury to that effect—Refusal of new trial.

Observations on the circumstances in which the finding of a jury that an alleged libel was not defamatory is unassailable.

This was an appeal by the plaintiff from a decision of the Court of Appeal refusing to grant a new trial of an action for libel tried before Mr. Justice Talbot and a special jury, in which the jury found in favour of the defendant (the respondent) and judgment was entered accordingly.

The appellant's case was that the verdict was against the weight of the evidence.

The appellant, who was a retired solicitor, had resided in Hexham all his life, and he and his brother, Colonel Lockhart, who was now dead, were keenly interested in promoting the welfare of the Hexham Grammar School, which was founded in the time of Queen Elizabeth.

On October 4, 1924, there was published in the *Hexham Courant* an article by "Cardigan" headed "Gossip and Comment—The Grammar School." After referring to the history and development of the school, which had recently been rebuilt on a new site, and to the help given by the County Council in defraying the cost of the new buildings, the article continued as follows: "The County Education Committee has several times recently had under consideration the acquisition of a further eight acres of land on the west side of the existing school area, on which further school extensions could be made, and a much needed recreation ground laid out. . . . At their last meeting the County Education Committee, largely at the instigation of Colonel Lockhart, decided to recommend the County Council to purchase a total area of 9.85 acres at a price of £5,800. Colonel Lockhart and Mr. H. F. Lockhart [meaning the appellant] have purchased and offered to give an area of woodland between Eastgate and the land to be acquired, conditionally upon the authority purchasing the whole of the area available, and this offer was gratefully accepted. The Grammar School is a decided asset to a town of Hexham's character, and it is to be hoped that at the next meeting of the County Council the scheme will go through." On October 13, 1924, the respondent wrote to the editor of the *Hexham Courant* a letter referring to this article, and the letter was published in the newspaper on October 18. This letter, which was complained of as a libel, was as follows:—

"THE GRAMMAR SCHOOL.

"Sir,—Is the information with regard to the purchase of land contained in your interesting paragraph of the 4th inst. fully accurate? It is stated that Colonel and Mr. H. F. Lockhart have offered to give the dene in Eastgate to the County Council if the Council agree to take the whole of the adjoining land. If the Messrs. Lockhart have really made this offer it is a very handsome gift and they deserve the thanks of the community. But (1) the dene was bought for £900 odd by the late Mr. Riddle, who was, I believe, one of the late William Alexander's executors, to whom the adjacent property belongs; and (2) I was told while the negotiations with the County Council were proceeding that the Messrs. Lockhart, acting either as mortgagees of the property or as the owners by conveyance from Mr. Riddle, insisted that the Council must buy the dene as well as the site they had in view; and (3) the action of Messrs. Lockhart in making the Urban Council pay a high price for the small piece of the dene required for rounding off the corner at the top of Eastgate would appear to indicate that they were not disposed to make a gift to the public. My question as a ratepayer is whether I am to feel grateful to the Messrs. Lockhart, or whether I, with others, am paying for the dene by having its price included in the £5,800 stated to be the sum payable for the 9.85 acres adjoining. The site and the dene should go together, but do not let there be any misunderstanding as to the cost.

"Yours truly,
"RATEPAYER."

Colonel Lockhart died on May 15, 1925, and later on the same day the appellant issued the writ in this action.

By the statement of claim the appellant, after setting forth the letter, pleaded that by the said letter the respondent meant that the appellant and his brother's offer of a gift was a sham, and that posing as benefactors to the school and under the pretence of making a free gift the appellant and his brother were offering to sell the dene at a high price to the Council by insisting upon selling the 9.85 acres at an excessive price in order to recoup themselves the price which they had paid for the dene when they bought it.

The respondent denied that the words complained of bore the meanings alleged or any defamatory meaning, and he also put in a plea of fair comment.

At the trial the respondent admitted that the allegations of fact contained in the letter were not true and abandoned his plea of fair comment, with the result that the only issue before the jury was whether the words complained of were defamatory. The jury

* Reported by H. B. HEMMING, Esq., Barrister-at-Law.

returned a verdict in favour of the respondent and Mr. Justice Talbot thereupon directed that judgment should be entered for the respondent.

An application for a new trial was refused by the Court of Appeal.

The Master of the Rolls said that, though he would himself have come to a different conclusion, it appeared to him impossible for the Court to say that the letter must necessarily bear such an interpretation that twelve reasonable men could not find the verdict which they did in fact find.

Lord Justice Atkin and Lord Justice Lawrence, but for the opinion of the Master of the Rolls, would have come to the conclusion that no reasonable men could possibly have put an innocent interpretation upon the letter, but in deference to the opinion of the Master of the Rolls they agreed that the appeal should be dismissed.

Mr. Norman Birkett, K.C., and Mr. N. L. Macaskie appeared for the appellant; and Mr. Jowitt, K.C., Mr. Lowenthal, K.C., and Mr. Archibald Wilson for the respondent.

LORD BUCKMASTER.—My Lords: The appellant was the plaintiff in a libel action brought against the respondent claiming damages for defamation due to the publication in a newspaper known as the *Hexham Courant* of an anonymous letter on October 18, 1924. The action was tried before Mr. Justice Talbot with a special jury at Newcastle-upon-Tyne and resulted in a verdict for the defendant. The appellant appealed to the Court of Appeal seeking to set aside the verdict on the ground that it was against the weight of evidence. The Court of Appeal dismissed the appeal, and from that judgment this appeal was brought. The appellant, who is 75 years of age, has resided during the whole of his life at Hexham, and from 1878 to 1909 practised there as a solicitor with his brother. Both the appellant and his brother were greatly interested in the development of Hexham Grammar School. This was an old grammar school dating from Queen Elizabeth, rebuilt in 1910 upon a new site. In November, 1923, the Education Committee of the County Council entered into negotiations for the purchase of land adjacent to the school, and during the course of such negotiations the appellant and his brother offered to give a strip of land adjoining the proposed purchase, an offer which was accepted in October, 1924. On October 4 a statement appeared in the *Hexham Courant* by one of its contributors discussing the extension of the school and concluding with the following statement:—

"At their last meeting the County Education Committee, largely at the instigation of Colonel Lockhart, decided to recommend the County Council to purchase a total area of 9.85 acres at a price of £5,800. Colonel Lockhart and Mr. H. F. Lockhart have purchased and offered to give an area of woodland between Eastgate and the land to be acquired, conditionally upon the authority purchasing the whole of the area available, and this offer was gratefully accepted. The Grammar School is a decided asset to a town of Hexham's character, and it is to be hoped that at the next meeting of the County Council the scheme will go through."

It was consequent upon this that the respondent wrote to the paper the alleged libel under the signature of "Ratepayer."

[His Lordship read the letter above set out.]

In his defence the defendant among other defences said that the allegations of fact in his letter were true, and that they were fair comment made in good faith. At the hearing it was proved that all the relevant statements were false, and thereupon the defendant withdrew his plea of "fair comment" and tendered no evidence, relying merely upon the defence that the statement was not defamatory, and this issue the jury determined in his favour. The appellant alleges that no twelve reasonable men acting reasonably could fairly come to this conclusion, and on that ground seeks to set the verdict aside.

In the Court of Appeal the Master of the Rolls thought that there was no ground for saying that the answer given by the verdict was one which twelve reasonable men could not reach. It appears by the judgments of Lord Justice Atkin and Lord Justice Lawrence that they did not agree with this opinion, Lord Justice Atkin saying that if left to himself he should have decided that no reasonable men could come to the conclusion to which they did come, but that the opinion of the Master of the Rolls prevented him from giving effect to that view. In that I think he was wrong; the fact that one Judge thinks a verdict is not unreasonable does not in itself render a verdict unassailable. It is a mere expression of opinion from which others might differ, for the question of reasonability is not capable of rigid definition. Were it otherwise the opinion of one Judge in a Court of Appeal in favour of a verdict so challenged would prevent the other members forming the majority of the Court from giving a contrary decision. But though I am not satisfied with the reasoning, I think the conclusion of the Court of Appeal must be accepted. A claim for defamation is essentially a matter upon which a jury's verdict must be taken; if the words are plainly defamatory without innuendo, and the jury refuse so to decide the verdict is perverse; so also if the innuendo is so clear that there really is nothing for real consideration. If the words are not defamatory, the Judge can so hold and withdraw the case from the jury—but if the matter is one upon which the question of innuendo can be properly weighed by the jury, it is for them to find whether the words bear the defamatory interpretation or not. The question, therefore, in this case is whether the innuendo is so obvious that it is impossible to believe that it could be disregarded by twelve reasonable men, and that question is a different one from merely saying what the opinion of any Judge would be upon the document. To me this letter was a mean and spiteful reflection upon men who had acted generously towards the town; the questions in the letter themselves suggest to my mind an answer in that sense, but that is not the point for our determination. It is true, as pointed out on behalf of the respondent, that the letter was no answer to anything that the appellant or his brother had said and that it was a statement of things which they might lawfully have done. I do not agree with the further contention that to say that a man has done acts which are within the law cannot be defamatory; there are many cruel actions done in exercise of indisputable legal rights, the wrongful assertion of which against any man would be plainly defamatory, but none the less these are matters which may be borne in mind by a jury in considering their verdict. No complaint here is made against the summing up and the learned Judge leaves expressly to the jury the question whether the letter was intended as an inquiry and whether it contained a reflection on the plaintiff. With the matter so left to the jury, it seems to me impossible to complain when the verdict has been given.

This view finds strong confirmation in the authorities. Lord Blackburn in *Capital and Counties Bank v.*

Henty (7 App. Cas., 741) uses these words, at page 771:—

"Independently of all questions as to privilege, the manner of the publication, and the things relative to which the words are published, and which the person publishing knew, or ought to have known, would influence those to whom it was published in putting a meaning on the words, are all material in determining whether the writing is calculated to convey a libellous imputation. There are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances."

It is, of course, not true to say that a jury's verdict in these circumstances can never be assailed. A plain and obvious defamation incapable of any innocent explanation, if found by the jury to be non-libellous, would certainly be set aside, but such cases occur so rarely that within the last century there are only two to which our attention has been drawn in which this power has been exercised. The one is *Levi v. Milne* (4 Bingham, 195) and the other is *Parmiter v. Coupland* (6 M. and W., 105). It is unnecessary to discuss the earlier of these cases. It is even possible that a different view might be taken of it to-day, but in the latter case, according to the report, a series of libels had been published of the then late Mayor of Winchester, imputing to him partial and corrupt conduct and ignorance of his duties, as Mayor and justice of the peace for the borough. The jury having found for the defendant, the verdict was set aside, for the words were obviously libellous and the only justification appeared to be that they were spoken of a man in a public capacity —a defence, of course, that was wholly inadequate.

It is unnecessary to examine the further cases in which similar questions have arisen, for the judgment of Lord Justice Scrutton in the case of *Broome v. Agar* (44 *The Times* L.R., 339) contains a full and, in my opinion, a most accurate statement of the true position. In that case a chauffeur brought an action against his late employer, alleging that she had slandered him by saying that he gave joy rides to women in her car, and that he was a rotter. The Judge left to the jury the question whether the words were defamatory or not, and the jury answered this question in the negative. The Court of Appeal, Lord Justice Russell dissenting, refused the plaintiff's application for a new trial, based on the ground that the verdict was unreasonable and perverse. I think that that case was properly decided, and that the principle of its decision covers the present dispute. It was possible for the jury to hold, in the present case, that the words were not defamatory, and it is no ground for setting aside their verdict that this opinion is one that I do not share.

Lord Dunedin regretted the decision of their Lordships, but he was not prepared to differ upon a question of English procedure. He regretfully concurred.

Lord Phillimore.—My Lords: When an action for libel is brought to trial the written or printed words may be so plainly and necessarily defamatory that the Judge should instruct the jury that they are calculated to bring the plaintiff into hatred or contempt, and should forthwith proceed to direct their attention to the question of damages. This is well laid down in Odgers on Libel at pages 119 and 121 of the fifth edition, though the case which he relies upon as his principal authority is not a very satisfactory one.

Where a Judge does so direct a jury, if the jury should find a verdict contrary to his direction, it may be deemed perverse, and may be set aside, and a new trial may be ordered.

But in the case now pending before your Lordships, counsel for the plaintiff did not ask the Judge to give such a direction and the Judge did not give it. I quote from his summing up: "Therefore, as I say, the only question remaining for your determination, and it is one which is eminently and entirely for you, is what meaning is to be attached to this letter of which the plaintiff complains. In other words, would an ordinary person reading that letter infer that the plaintiff had done something which was not to his credit, and would anybody who read that and believed what was there have felt of the plaintiff less esteem, respect or regard than he otherwise would?"

In my opinion he was right. The letter to the newspaper which was the vehicle of the alleged libel was ungenerous and mean, and none the better for being anonymous. Its purport was to take away from the plaintiff and his brother a meed of praise which a previous article in the same newspaper had bestowed upon them. But if carefully and critically analysed it did not assert, and might be considered not to convey, the impression that the plaintiff had claimed this praise for himself or had complacently acquiesced in its bestowal by others.

The jury, it is true, might have well said to themselves that considering the hasty way in which ephemeral productions of this kind are read and the slight and possibly inaccurate recollection that a reader would have of the previous article, the reader might be led to suppose that the plaintiff and his brother were posing as public benefactors and might be led therefore to think poorly of them; and if the jury had taken this view and had found a verdict for the plaintiff with temperate damages I should have been well content. But I could not say that the letter necessarily conveys this view.

Again, there are three statements in the letter which are not true. I do not say untruthful, but not true. And the result of these is to assert or imply that the plaintiff and his brother being Governors of Hexham Grammar School were getting full price for some land which they were conveying to the school. This is going very near the wind; and again I should have been content if the jury on account of these words had found a verdict for the plaintiff. But I cannot say that they of necessity would bring the plaintiff into hatred or contempt. A man is entitled to make the best of his property. There are people who think that business and charity, or business and public spirit, should be kept apart; and if this view commended itself to the members of the jury they were the constitutional tribunal to give expression to it.

I agree with Lord Justice Atkin in his judgment in the Court of Appeal when he sets out certain hypothetical language and proceeds as follows: "If that language had been expressly used and the jury found that it was not defamatory, I apprehend that no Court would fail to come to the conclusion that such a verdict was perverse and could not stand, with the result that the case would have to be submitted to another jury."

But I do not follow many of the observations which he and the other members of the Court made with regard to the particular language of the letter which is complained of.

Concluding as I do that the words were not of necessity defamatory, I think that the verdict must stand and that the judgment of the Court of Appeal was right and should be affirmed.

[Solicitors—Messrs. Bell, Brodrick and Gray, for Messrs. L. C. and H. K. Lockhart, Hexham ; Messrs. Crossman, Block, Matthews and Crossman, for Messrs. Dees and Thompson, Newcastle-upon-Tyne.]

K.B. Div. (Roche, J.) 1928. July 30.

IN RE LEEDS CORPORATION AND CHADWICK.*

Insurance (Unemployment)—Relief work—Temporary worker — Work provided by local authority—Arrangement with Poor Law authority—Work in alternate weeks—Non-insurability of worker—Unemployment Insurance Act, 1920 (10 and 11 Geo. V., c. 30), s. 47 (1) (*b*)—Unemployment Insurance Act, 1927 (17 and 18 Geo. V., c. 30), Sched. IV.

The Court held under the Unemployment Insurance Act, 1920, that a man employed by a local authority by arrangement with the guardians of the poor, under a scheme by which he was given work each alternate week from Thursday to Wednesday, for a full period of 48 hours, at the district rate of wages, was not employed full time within the meaning of section 47 (1) (*b*) of the Act of 1920, as amended by the Fourth Schedule to the Unemployment Insurance Act, 1927, and was not, therefore, insurable.

This was a reference by the Minister of Labour under section 10 of the Unemployment Insurance Act, 1920.

Between January, 1928, and May 22, 1928, William Chadwick had been employed as a general labourer by the Leeds Corporation under an arrangement made between the corporation and the Leeds Board of Guardians, as follows :—

The guardians from time to time submitted lists of men who, owing to the amount of relief pay to which they were entitled after investigation of their cases by the guardians, and in view of their physical ability to perform manual work, were eligible, in the opinion of the guardians, for work of public utility. The corporation selected certain schemes, such as the making of roads, &c., on which the guardians' men, working under a corporation foreman, were solely employed on the alternate week system. The guardians paid the corporation the actual amount that would have been paid in relief, or an amount equal to the wages where these were less than the relief.

The rate of pay was the recognized district rate for the work done. The employing departments were responsible for the payment of wages.

Having nominated an employee, the guardians were not further concerned, except that they paid the corporation such sum, not exceeding the amount paid in wages, as would have been paid directly by the guardians in the form of Poor Law relief. Any deficiency as compared with the relief to which the employee was entitled was made good by the guardians. It was a feature of the arrangement that, to spread the benefit over as large a number of employees as possible, an employee was given a week's employment alternately with a week for which he was not employed, a week for that purpose beginning on Thursday morning and finishing on Wednesday night.

Another feature of the arrangement was that employment under it was to cease as soon as a person under it had acquired a title to unemployment benefit by virtue of the unemployment insurance contributions that had been paid by the corporation in respect of that employment. On the other hand, as soon as the person concerned ceased to be entitled to draw unemployment benefit he again became eligible for employment under the scheme until he again qualified for unemployment benefit, and so on.

Chadwick had previously been in receipt of unemployment benefit during six different periods in 1921, 1922, 1923, and 1924. He was employed under the corporation scheme in general labouring work on public works and was paid at the appropriate district rate for such work—namely, 1s. 1d. per hour. During the alternate weeks of employment he worked 8¾ hours on Thursday, Friday, Monday, Tuesday, and Wednesday, and 4¼ hours on Saturday—48 hours in all. The average number of hours normally worked by labourers in the employment of the corporation otherwise than under the scheme referred to was, from Thursday to Wednesday, also 48 a week.

Chadwick, as a married man with three children, was qualified to receive from the guardians 34s. a week poor relief in cash or in kind.

Chadwick had been previously employed under another scheme by which the corporation took men for works of public utility from the Labour Exchange on an alternate week system, working 48 hours per week, from Thursday to Wednesday.

By section 47 of the Unemployment Insurance Act, 1920 :—

" (1) For the purposes of this Act . . . (*b*) A person engaged in temporary work provided by a central body or distress committee under the Unemployed Workmen Act, 1905, or towards the provision of which any such central body or distress committee has contributed under that Act, shall not be deemed to be an employed person within the meaning of this Act. . . ."

The Fourth Schedule to the Unemployment Insurance Act, 1927, thus amends section 47 :—

" At the end of para. (*b*) of subsection (1) there shall be inserted the following words: and where in consequence of an arrangement made by a Poor Law authority a person is engaged in work provided by a local authority he shall not, if a contribution towards his remuneration is made by the Poor Law authority, be deemed to be such an employed person.

" Provided that the foregoing provision with respect to persons engaged in work provided by a local authority shall not apply in the case of any person who has previously been in receipt of unemployment benefit and is employed in full-time work provided by the authority.

" For the purpose of this provision a person shall not be deemed to have been employed in full-time work unless he has worked for such number of hours in each week as would normally have been worked by him if he had been employed on the same work otherwise than under such an arrangement as aforesaid."

The Attorney-General (Sir Thomas Inskip, K.C.) and Mr. C. W. Lilley appeared for the Minister of

* Reported by J. W. Hall, Esq., Barrister-at-Law.

Labour ; Sir Henry Slesser, K.C., and Mr. Arthur Henderson for the Leeds Corporation.

The ATTORNEY-GENERAL contended that Chadwick was not insurable. For the purpose of payment of contributions "week" meant "calendar week," and the effect of this scheme would be that for every week worked from Thursday to Wednesday two contributions were payable. After 30 contributions, or 15 weeks' actual work, the man would become entitled to unemployment benefit, possibly for as long as 18 months. Local authorities were very anxious to put on the unemployment fund men who should be relieved out of the rates. He submitted that "week" must have the same meaning throughout the Acts and that full time was not worked by Chadwick in any week.

He was stopped by the Court.

SIR HENRY SLESSER submitted that Chadwick had worked 48 hours per week in each week of employment, and this was the time which would normally be worked in other employment, and that it was immaterial that in the alternate weeks he was not employed.

Mr. JUSTICE ROCHE, in giving judgment, said that the history was, shortly, this :—Under section 47 (1) (*b*) of the Unemployment Insurance Act, 1920, persons engaged on temporary work by a distress committee, &c., were not to be deemed insured persons. But the matter was further dealt with in the Act of 1927. By section 15 of that Act amendments, set out in the Fourth Schedule, were made in the Act of 1920. One of the sections amended was section 47 (1) (*b*). The effect of the main amendment was that, if a Poor Law authority arranged with a local authority for the employment of persons, a person so employed was not to be deemed an "employed person." But there was a proviso that he was to be deemed an employed person if he had previously been entitled to unemployment benefit and was in full-time employment. Then there was a definition or explanation of full-time employment, and that was what he had to construe.

His Lordship stated the facts and proceeded : It was said that Chadwick was in full-time employment within the meaning of that definition. He was of opinion that Chadwick was not in full-time employment for the following reasons :—He thought, but it was not necessary to decide, that Chadwick was only working 24 hours of each week for the purpose of this Schedule, and that by "each week" each "calendar week" must be understood. For certain purposes the Act of 1920 defined week as "calendar week," and Chadwick's contributions, if he were insured, would be payable in respect of each calendar week. He did not think that there could be a different week for the purpose of this arrangement.

But, even if a calendar week were not required, the whole period of employment must be regarded, or at least the fortnight in respect of which the payment of Chadwick's wages and relief was in fact calculated. Whichever was required, it was manifest that the normal number of hours was not worked in the fortnight. The hours worked were 48, instead of 96, and so also if the longer period were taken.

Sir Henry Slesser had argued that the working of 48 hours and then 0 hours might be normal working ; that it was the method adopted by the corporation ; and that these were the normal hours of working on this work. He (his Lordship) could only say that he did not adopt that construction. The Schedule referred to normal hours of work otherwise than under such an arrangement.

Jones v. Ocean Coal Company, Limited (15 *The Times* L.R., 339 ; [1899] 2 Q.B., 124), a case under the Workmen's Compensation Act, 1897, had been referred to. Lord Justice Vaughan Williams there said at p. 129 :—

"It seems to me that if the state of work were such that during the whole 12 months the master could only give three days' work a week to his men, it would still be true within the meaning of this clause to say that the workmen had been employed during the whole of the 12 months, for the relation of master and servant would have existed during the whole time. The real question is whether there has been any break in that relation."

That exactly expressed his view of this case. He was not deciding that Chadwick was not insurable because there were some breaks, but if he were to be regarded as continuously in the employment of the corporation, though he only worked alternate weeks, then he was not working the normal hours in each relevant week, and was, on that ground, not insurable.

[Solicitors—The Solicitor for the Ministry of Labour ; Messrs. King, Wigg, and Brightman, for the Town Clerk, Leeds.]

Chan. Div. (Clauson, J.) } 1928. July 31.

LORD ELLESMERE AND OTHERS v. WALLACE.*

Gaming—Contract—Entry of horse for race—Money prize—Entrance fee—Forfeiture of fee in event of horse not running—Wagering contract — Unenforceability — Gaming Act, 1845 (8 and 9 Vict., c. 109), s. 18.

A contract between the Jockey Club and a racehorse owner that he will pay an entrance fee for the privilege of running a horse in a race for a money prize, and that if the horse does not run he will forfeit the entrance fee or part of it, is a contract by way of wagering and is unenforceable by reason of s. 18 of the Gaming Act, 1845.

This was an action by Lord Ellesmere, senior steward of the Jockey Club, on behalf of himself and all other members of the Jockey Club ; by Lord Wolverton, Major Sir Leonard Brassey, M.P., and Sir Samuel Scott, M.P., as trustees of the Jockey Club ; and by Messrs. Weatherby and Sons, of 15, Cavendish-square, W., printers and publishers of the "Racing Calendar," against Mr. Edgar Wallace, author, dramatist, and an owner of racehorses. The plaintiffs claimed a declaration that the defendant was liable to pay, in accordance with the rules of racing, £4 as forfeiture fees which they alleged to be due because a horse named Master Michael, which the defendant had nominated for two races at Newmarket, did not run.

The Jockey Club framed and published "Rules of Racing," which regulated all race meetings held under its sanction. Entries of horses for races at such race meetings were lodged at its "Registry Office," also at 15, Cavendish-square, and information about these meetings and the entries for them was contained in the "Racing Calendar." Messrs. Weatherby and Sons were "authorized stakeholders"

* Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.

to whom, under the "Rules of Racing," entrance money and forfeits in connexion with the race meetings were payable.

In the "Racing Calendar" of April 12, 1928, Messrs. Weatherby and Sons published a notice of the First Spring Meeting for 1928 at Newmarket, stating that the entrance money payable by the nominator of a horse entered for the "Peel Handicap" was £5 and for the "Long Course Selling Plate" £2; that these sums were payable to Messrs. Weatherby and Sons at the "Registry Office"; and that if the horse failed to run £2 of the entrance money would in each case be forfeited (if already paid), or be payable as a forfeit (if not already paid) to them.

The defendant, in acceptance of that offer, nominated a horse named Master Michael for the two races. Master Michael did not run in either of the races, and £4, it was alleged, became forfeit to Messrs. Weatherby and Sons. By letter dated May 7, 1928, Messrs. Weatherby and Sons demanded payment of the £4, but the defendant refused to pay.

Messrs. Weatherby and Sons pleaded that they were acting as principals and/or as agents of the other plaintiffs.

The defendant pleaded, *inter alia*, that there was no contract with the plaintiffs or any of them, and no consideration. He contended alternatively that if there were a contract, it was a contract by way of gaming or wagering within the Gaming Act, 1845, section 18, and was rendered void and unenforceable by the provisions of that statute and by the provisions of the Gaming Act, 1892.

The case was said to be a test action.

The Hon. Geoffrey Lawrence, K.C., and Mr. Theobald Mathew appeared for the plaintiffs; Mr. Archer, K.C., and Mr. H. M. Giveen for the defendant.

Mr. LAWRENCE, in opening the case, stated the issue, and said that the racecourse at Newmarket belonged to the Jockey Club. If the owner of a horse wished to withdraw his horse from a race he would have to pay a forfeit of £2. The forfeits went to the race fund. The substantial part of the defence was the last paragraph, pleading that the contract, if any, was a contract by way of gaming or wagering. Mr. Edgar Wallace had written, in answer to the letter demanding payment of the £4, that he did not propose to pay, and that he was interested in the controversy regarding the avoiding of nominations because, it was said, entrance fees and forfeits for which an owner had made himself liable during his life were not recoverable from his executors on his death.

Counsel read many of the rules in "Rules of Racing," including rule 86, which provided that all entries of horses for races should become void on the death of the nominator. It was said by the defendant that all entrance fees paid and forfeits incurred were bets which the nominator made with the other entrants. Rule 155 provided that if the entrance money exceeded the stake, half should be payable to the Rous Memorial Fund and the Bentinck Memorial Society, and the other half to charity.

The rules, coupled with the notice in the "Racing Calendar," formed a contract when the terms of the notice were accepted, and it was a perfectly legal contract. That depended on the provisions in the Gaming Act, 1845, section 18, and a consideration of the law previous to that statute. Section 18 was the really material section. It enacted that all contracts by way of gaming and wagering should be null and void, and that no suit should be brought to recover money or any valuable thing which was alleged to be won upon any wager, or which should have been deposited in the hands of any person to abide the event on which any wager should have been made. There was a proviso that that enactment should not be deemed to apply to any subscription, or contribution, or agreement to subscribe, or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner of any lawful game, sport, pastime, or exercise. That proviso, counsel submitted, applied to entrance moneys in respect of horseracing, which were subscriptions towards a prize.

It was clear that ever since 1740 at Newmarket, and since 1745 everywhere else, horseracing for prizes over £50 was lawful.

Counsel then cited the statutes 13 Geo. II., c. 19, 18 Geo. II., c. 34, and 3 and 4 Vict., c. 5, and *Evans v. Pratt* (3 Man. and G., 759). Statutes in the reigns of Charles II. and Queen Anne had been construed to apply to horseracing, and 13 Geo. II., c. 19, was passed to legalize horseracing.

The entrance fee for a horserace was a subscription for a prize or sum of money to be awarded to the winner of any lawful game, sport, or pastime within the meaning of the proviso to section 18 of the Gaming Act, 1845, and was, consequently, not a contract by way of gaming and wagering which that section made null and void. There was no contract between the entrants, but only between the individual entrant and the Jockey Club, and that was not a wagering contract, because the Jockey Club could not win but could only lose. The entrant also had other interests than the mere winning of the stake. He hoped by winning the race, especially such a race as the Derby, to make his horse very much more valuable. The only consideration moving from the Jockey Club was a promise to allow the entrant to run his horse in the race. There was nothing in the "Rules of Racing" which created any contractual obligation between the various entrants. If this were held to be a wagering contract so would entries for tennis club tournaments or for a cattle show.

MR. JUSTICE CLAUSON said that he saw no logical distinction between a horserace for which entrance money was paid and which was decided by the excellence of the horses and a competition such as a cattle show, where entrance money was paid and the allocation of the prize money was determined by the excellence of the beasts. At the same time, the references which had been made to cattle shows and tennis tournaments showed the far-reaching effect of the decision which was sought in the present proceedings.

Mr. LAWRENCE said that in the ordinary meaning of the English language an entrance fee was not a wager. Since 1740 entrance money which was to go eventually to one of the entrants had been recognized by the Legislature as legal and proper, and it was impossible to imagine that the Legislature, when passing the Gaming Act, 1845, intended to treat a contract to pay an entrance fee for the privilege of being allowed to enter a competition as a wagering contract. When Miss Helen Wills paid her entrance fee for the Wimbledon Tennis Tournament she did not do so with a view to winning a cup. She did it to secure the privilege of being allowed to play in the tournament and to have an opportunity of becoming champion. *Peers v. Caldwell* (32 *The Times* L.R., 190; [1916] 1 K.B., 371) showed that in every case it had to be determined what was the real consideration for which the entrance money was paid.

MR. JUSTICE CLAUSON said that he protested against having to dive into the minds of those who paid entrance fees, but unless Mr. Edgar Wallace was absolutely indifferent to his chance of winning a stake the transaction might be a wagering contract.

Lord Ellesmere, giving evidence, said that, apart from the chance to win a stake, there were many reasons for entering a horse in a race. If he ran well his value increased both as a racehorse and as a horse for stud purposes, and his winning also increased the value of his dam and his sire. The entrance money was an insignificant part of the value of a race to the winner. Winnings helped the winner to continue horse-breeding, and owners were also able to dispose of horses after selling races.

Mr. ARCHER, in opening the defendant's case, said that the plaintiffs must rely on a contract, and whatever the contract was it clearly was not one merely for the holding of the lawful sport of horseracing, but was also by way of wagering. It was part of the wagering contract that the expenses should abide the event, but the two were divisible. The executive, in effect, bet £200 to £2 against the horse of an entrant winning, and there was no difference between that and a bet with a bookmaker.

Counsel said that in the present case the Jockey Club was in the position of a stakeholder, and a contract with a stakeholder was a contract "by way of gaming or wagering" within section 18 of the Act of 1845. The element of a stakeholder was quite absent in *Carlill v. Carbolic Smoke Ball Company* (8 *The Times* L.R., 680 ; [1892] 2 Q.B., 484). The vice against which the Act of 1845 was designed was that of allowing persons to sue for money if their title to it depended on an uncertain event, and the Court, in a case like the present, had to determine whether the contract under consideration was infected with that vice. The real object of the transaction had to be regarded. No sportsman thought that the real object of a bet was the bet itself. The Act of Parliament did not call on his Lordship to decide whether in the present case there was more gaming or wagering or more consideration for the value of horses and the welfare of bloodstock. Any money put up by a competitor which he ran the risk of losing as the result of a horserace was a wager. He referred to *Irwin v. Osborne* (5 Ir. C.L.R., 404).

Mr. LAWRENCE replied.

MR. JUSTICE CLAUSON, in his considered judgment, said that the defendant nominated a horse for two races at the Newmarket First Spring Meeting, 1928 —namely, the Peel Handicap, a sweepstake of five sovereigns each, of which two sovereigns were to be forfeit, with 200 sovereigns added money, 15 entries or the race to be at the option of the Stewards ; and a Long Course Selling Plate of 200 sovereigns, entrance two sovereigns, 10 entries or the race to be at the option of the Stewards, the winner to be sold by auction for 300 sovereigns. When the time for the races came the defendant's horse did not run. The defendant did not pay any part of the entrance fee for either race. The plaintiffs claimed two sovereigns in respect of the nomination for the Peel Handicap, being the portion of the entrance fee made forfeitable; and two sovereigns in respect of the nomination for the Long Course Selling Plate, being the total entrance fee. The Jockey Club conducted the Newmarket Spring Meeting, and the plaintiffs represented the Jockey Club.

He held that the effect of the nominations by the defendant, subject to the operation of section 18 of the Gaming Act, 1845, was to constitute two contracts between the defendant and the Jockey Club, which, subject as aforesaid, were admitted to be binding and valid. Mr. Lawrence pointed out in his argument, the accuracy of which was not impugned by counsel for the defendant, that while horseracing was at common law a lawful sport certain statutes from the time of Charles II. up to 3 and 4 Vict., c. 5, operated to restrict certain forms of, and contracts relating to, horseracing, but these restrictions were swept away by the Gaming Act, 1845. Under that Act horseracing was left a lawful sport. This case accordingly turned on the application to the facts of section 18 of that Act.

His LORDSHIP read the section, and continued. The plaintiffs contended that the transactions between the defendant and the Jockey Club were, within the proviso to the section, a subscription or agreement to subscribe to a prize to be awarded to the winner of a lawful sport (as, indeed, in his (his Lordship's) opinion, it clearly was), and that even if the contracts were by way of gaming and wagering the proviso exempted them from the operation of the section. That construction was adopted, though with some hesitation, in *Batty v. Marriott* (5 C.B., 818). But there was an alternative construction— namely, that the proviso applied only to such subscriptions as were not contracts by way of wagering —and that was adopted by the Court of Appeal in *Diggle v. Higgs* (2 Ex. D., 422) and by the Privy Council in *Trimble v. Hill* (5 App. Cas., 342). The law was, therefore, settled by the Court of Appeal and the Privy Council. Accordingly, the plaintiffs failed on the first point, and the question whether the contracts were "by way of gaming and wagering" must be decided. If they were, he must hold them null and void by reason of the first sentence of section 18.

There was no contract between the various entrants *inter se* to contribute stakes which were to abide an event, and the contracts here were between the club and the defendant. It was essential to a wagering contract that each party might either win or lose under it, his winning or losing being dependent on the issue of the event (*per* Mr. Justice Hawkins in *Carlill v. Carbolic Smoke Ball Company*, 8 *The Times* L.R., 680 ; [1892] 2 Q.B., 484, at p. 491). The defendant stood to win or lose. The club stood to lose in the case of the Peel Handicap the 200 sovereigns added money, and, in the case of the Selling Plate, the 200 sovereigns. As between the club and the defendant, the club stood to win £5 on the Peel Handicap if the defendant's horse ran and failed to win or be placed, and £2 if the horse failed to run ; and on the Selling Plate £2 in the like events.

He came to the conclusion, therefore, that in the case of each of the contracts in question the essential element of wagering was present—namely, that each party might under each contract either win or lose as the event turned out. It was said that both contracts might be read as contracts under which, in consideration of the entrance fee, the club contracted to give the defendant the opportunity (said to be very important for all breeders and owners of racehorses) to exhibit his animal's powers at the Newmarket Spring Meeting, and that the prize was a mere subsidiary matter ; and that in the case of the Selling Plate the contract was to give the defendant the chance of having his horse sold in favourable circumstances. He could not so read the contracts, which appeared to be nothing more nor less than contracts under which the defendant risked his entrance fee to gain a prize, while the club risked the added money and the prize against the entrance fee.

The plaintiffs contended that, in fact, the real interest of the club in such contracts as the present was not pecuniary gain, but the encouragement of sport and horse-breeding. That might well be so, but that argument was addressed to the motive which actuated the club in entering into the contract, and he could not consider the motives of the parties or those of the club, however excellent, in relation to a contract which he found, on the face of it, to be a contract by way of wagering.

His conclusions could be summed up very shortly. He was not free, by reason of authorities which bound him, to construe section 18 of the Gaming Act, 1845, as enacting that the contracts of entrants to such races as those in question, whether they were or were not contracts by way of wagering, were enforceable in the Courts. He accordingly had to consider whether the contracts between the Jockey Club and the defendant were or were not contracts by way of wagering. He held that they were because, on the face of them, they were arrangements by which each party staked something of value on the issue of an uncertain event.

The action would be dismissed on the ground that it sought to enforce contracts which, being by way of wagering, were null and void by reason of section 18 of the Gaming Act, 1845. If the defendant wished for the costs he must have them.

Mr. GIVEEN.—I do not ask for costs.

MR. JUSTICE CLAUSON.—Then the action will be dismissed without costs.

[Solicitors—Messrs. Charles Russell and Co.; Messrs. Andrew, Wood, Purves, and Sutton.]

House of Lords.
(Lord Hailsham, L.C., Viscount Sumner, and Lord Atkin,)
1928.
July 27.

ENGLISH INSURANCE COMPANY, LIMITED v. OFFICIAL RECEIVER and LIQUIDATOR OF THE NATIONAL BENEFIT ASSURANCE COMPANY, LIMITED.*

Company — Winding up — Proof — Contract of marine insurance—No stamped policies—Rejection of proof.

Held, that the liquidator had rightly rejected a proof by the English Insurance Company, Limited, in the winding up of the National Benefit Assurance Company, Limited, in that the contract between the two companies in respect of which the proof of debt was advanced was a contract of marine insurance and no stamped policy of marine insurance was issued to the English Insurance Company, Limited, as required by law, and therefore the contract was invalid.

Decision of the Court of Appeal (44 *The Times* L.R., 14; [1928] Ch., 74) affirmed.

This was an appeal from a decision of the Court of Appeal (44 *The Times* L.R., 14; [1928] Ch., 74) affirming a decision of Mr. Justice Eve (43 *The Times* L.R., 594).

The question raised by the appeal was whether a contract entered into between the English Insurance Company, Limited (hereinafter called the English Company), and the National Benefit Assurance Company, Limited (hereinafter called the National Company), was or was not a contract of marine insurance. The National Company was in liquidation and the liquidator rejected a proof of debt by the English Company arising out of the contract on the ground that its subject matter was marine insurance, and that, as no properly stamped policies of marine had been issued to the English Company, it was invalid under the provisions of section 93 of the Stamp Act, 1891, and sections 22 and 23 of the Marine Insurance Act, 1906.

Mr. Justice Eve upheld the decision of the liquidator and the Court of Appeal (Lord Hanworth, M.R., Lords Justices Sargant and Lawrence) affirmed the decision of the learned Judge.

The terms of the agreement are stated in the report of the case before the Court of Appeal, and they sufficiently appear from the opinion of the Lord Chancellor.

Mr. Porter, K.C., and Mr. Andrewes-Uthwatt appeared for the appellants; Mr. Dunlop, K.C., and Mr. L. W. Byrne, for the respondent, were not called upon.

THE LORD CHANCELLOR.—My Lords, this is an appeal against an order of the Court of Appeal affirming an order of Mr. Justice Eve which upheld the decision of the Senior Official Receiver that the appellant company was not entitled to prove in the liquidation of the National Benefit Assurance Co., Limited, in respect of claims arising under an agreement in writing made between the appellant company and the National Benefit Assurance Company, and dated January 27, 1922. That agreement, which was described as a participation agreement, provided that the National Company should be entitled to and should accept a quota participation equal to a one-eighth share of all and every risk underwritten by the appellant company. By article II. it was provided that the participation should be equal to 50 per cent. of the share retained by the appellant company at their own risk of all marine assurances accepted on and after the first day of January, 1920, with a limit of £1,875 on any one ship. The agreement went on to make provision that the appellant company should alone settle all claims which might arise under its policies, and that the National Company should have no right to interfere with settlements but should be bound thereby. The appellant company was to have commissions on the net premiums and on the profits derived by the National Company from the business under the agreement. Accounts were to be settled and paid quarterly. By article IX. the appellant company was given a right, upon default in punctual payment, to give seven days' notice in writing to the National Company requiring payment of the amount due, and if the National Company did not pay within seven days the appellant company was entitled to cancel the agreement immediately by giving written notice to that effect; and it was further provided that, at any time after the termination of notice under the agreement, the appellant company had the right to cancel the participation of the National Company in the whole or any part of the then current or outstanding marine business.

The National Company was ordered to be wound up by the Court on July 25, 1922, and the Official Receiver became its liquidator.

No insurance policies were ever issued to the appellant company by the National Company in respect of risks accepted by the latter under the terms of the agreement, and the Official Receiver refused to

* Reported by H. B. HEMMING, Esq., Barrister-at-Law.

accept liability for losses on risks falling within the terms of the agreement, on the ground that there was no stamped policy ever issued and that the contract was therefore void under the provisions of the Stamp Act, 1891, and of the Marine Insurance Act, 1906.

It was conceded by the appellant company that if the participation agreement of January 27, 1922, was a contract for sea insurance within the meaning of the Stamp Act, 1891, or a contract of marine insurance within the meaning of section 1 of the Marine Insurance Act, 1906, they must fail in their present claim; but it was argued on their behalf that, upon its true construction, the agreement was not a contract for sea or marine insurance but was a partnership agreement under which the National Company became the insurer jointly with the appellant company of all persons who took out marine insurance policies with the appellant company.

My Lords, in my opinion, this contention fails. I regard the participation agreement as an ordinary re-insurance agreement under which the National Company agreed to indemnify the appellant company against the risks assumed by the latter on the marine policies issued during the currency of the agreement. If the appellant company's contention is correct, it follows that privity of contract was created between the insured and the National Company in respect of policies issued by the appellant company during the period covered by the participation agreement. It is to be observed that the agreement dated back for over two years, so that many of the risks in which the National Company participated had actually expired before the agreement was entered into; and it is further to be observed that under article IX. of the agreement the appellant company had the right in certain events to cancel the participation of the National Company in the then outstanding marine business. My Lords, it seems to me very improbable that an agreement couched in such language could have been intended by the parties to create any contractual liability between the persons insured by the appellant company and the National Company. It is common ground that no intimation was ever given to persons taking policies from the appellant company that the National Company had any interest therein, and in none of the policies issued by the appellant company was there any reference to the National Company as an insurer. I think the true effect of the participation agreement is correctly stated in the judgment of Lord Justice Sargant in the Court of Appeal. In my view the meaning of the document is that the appellant company were to carry on their business as principals and that the National Company were, as between themselves and the appellant company, to receive a proportion of the premiums paid to the appellant company, less commission, and were, in consideration of such receipt, to indemnify the appellant company against a proportion of the losses suffered by the appellant company as principals. The agreement seems to me to have all the elements of re-insurance and to contain the stipulations which are normally to be found in a contract of re-insurance.

It follows that in my judgment the decision of the Courts below was correct and that the absence of a duly stamped policy is fatal to the appellants' claim. I move your Lordships accordingly.

Viscount Sumner.—My Lords, I agree that the appeal must fail. The whole question turns upon the construction of a singular document, and, unless it can be shown that this document is not a treaty of re-insurance, the appellants, as has been conceded from the first, are in the wrong.

The pivot of the argument is the word "participation" and the word "participator"—words which are sprinkled with a liberal hand all over the agreement—but it is obvious that the word itself is neutral and indefinite, and until you have made up your minds in what the parties are to participate and how, I do not think that any definite conclusion can be arrived at to affect the present issue.

It is quite true that nowhere throughout the agreement is it said that the National Company is to re-insure the English Company, although the words "re-insurance" and "re-assured" are used in other connexions; nor is it ever said that this is a contract of indemnity by which the participator indemnifies the participatee, but in every other respect the features of a re-insurance treaty appear upon the face of the document. By article I. the participator is "entitled to and shall accept a quota participation equal to a one-eighth share of all and every risk." Now there is no occasion to bind the participator to accept a share in all and every risk, unless the agreement means that, as and when an original risk is taken by the English Company, the National Company is entitled and bound to stand behind it and to accept a part of that risk. Then there is in article II. a singular arrangement for relation back which, as the noble and learned Lord on the Woolsack has pointed out, is quite inconsistent with any partnership arrangement existing as from the year 1920; and in the latter part of article II. the words "any special re-insurance" are apparently used in contradiction to the arrangement with this participator, which I should therefore assume to be a general re-insurance; all the more so because the participator has a maximum limit to his participation in respect of any one ship, which is different from participating simply by a proportion of the risk originally taken and appears to me to be appropriate only to the participator's taking a re-insurance line of his own with a limit of £1,875 on any one ship re-insured. Then twice in article V. reference is made to the amount "ceded" and the risks "ceded" under this agreement—words which have their place in a re-insurance treaty and not, as it seems to me, in a partnership or a joint adventure agreement. In article VI. the company retains the right to settle all claims under *its* policies, which of course really are its policies if this is a re-insurance, but are not truly *its* policies but the common policies of the two companies, if they have entered into some kind of joint account transaction. In article IX. there is again a reference to "current or unexpired risks accepted hereunder until the expiry thereof," which seems to me to show a different basis for winding up the accounts from that which would arise under any kind of partnership transaction. Finally, under article X. there is a provision that "the participator is absolutely bound in every case to follow the fortunes of the Company," which is re-insurance practice pure and simple, expressed in rather artless words, and is quite unnecessary if it relates to some obligation between partners, as to which of course this would be implied. Then it says: "It shall not prejudice the Company if it should accidentally happen that it has incorrectly advised or omitted to advise the participator of any particulars relating to this agreement," which I think is a clause wide enough to include, among other things, the obligation of the English Company, as the re-assured, to make disclosure to the re-insuring company of matters material to the risk and known to it, and under this clause it is excused from failure

to make that disclosure before the insurance is effected, but I do not see that there is any appropriateness in the words in connexion with a partnership.

My Lords, on the other side it is contended that this agreement effects some sort of common relation between the parties, the only really definite thing about which is that it is not re-insurance, and one is left to take one's choice of any relationship that the words can describe short of re-insurance. Though it is not an impossible thing, it is a novel idea to me that two insurance companies should become partners in a regular partnership. The Lord Chancellor has pointed out the singular results that would happen if they were both engaged in writing the original risks as partners, the National Company being an undisclosed partner liable at the option of the assured to pay the whole of the loss, and having to get back its share of the loss from the English Company as it can, supposing the English Company were to fall on the same evil days as the National Company has fallen upon.

My Lords, I do not personally think that the provisions that I have referred to would have any place in any kind of partnership agreement. They would most of them be implied, and I certainly cannot construe the contract as a partnership or joint adventure agreement merely because it uses the word "participation." It was skilfully argued—because it is obvious that a good deal of resource was required to explain what the agreement really was—that, if it was not a partnership and was not a joint adventure, it was at least an agreement to share the risks as between the two parties. Now if it is an agreement to share the risks, it still appears to me it must operate by way of re-insurance. Nothing else would explain the provisions of the contract. There might be an agreement to share the results over a given period, an agreement that profits and losses should be ascertained, and, if the account was one way the participator should pay, and if it were the other way he should receive, but why then put in any provision for following settlements or receiving a share in salvages? In that view the result of the contract is what the participation is to apply to.

My Lords, I have therefore come to the conclusion as a matter of construction that the decisions in the Courts below were right. I only wish to add that, had it been otherwise, I think there might have been some difficulty in seeing how the establishment of a partnership arrangement would have saved the parties from the application of the Stamp Act, 1891. I express no opinion upon the subject, except that I wish to say that if it were necessary to draw from the case of *Brett v. Beckwith* (26 L.J.Ch., 130) the proposition that Mr. Porter extracted from that not very clearly reported case, I should wish to hear the case argued very fully before I could come to the conclusion that Lord Romilly either purported to hold or could justifiably have held that, if there was a partnership, the Act of George III. would be given the go-by.

Lord Atkin.—My Lords, I agree that this appeal fails.

The question that has been propounded to us is whether the agreement in this case amounts to a re-insurance. If it does amount to a re-insurance it is admitted that the appellants must fail. The test of whether it is a re-insurance or not has been in my view quite correctly stated to be the question whether or not the re-insurers or the alleged re-insurers have assumed a contractual liability to the original assured, for such an original contractual liability is not an incident of re-insurance, and if such an original liability had been assumed then there would have been a contract of insurance upon which a stamp had already been paid on the policy issued by the English Company, who it is said for this purpose were the partners, or the agents, apart from a partnership, of the National Company.

Now, my Lords, accepting that test, it seems to me quite plain that the parties here by their agreement did not intend the National Company to assume any liability towards the original assured. The liability is a liability which is limited in the original agreement to one-eighth of the risk in consideration of a receipt of one-eighth of the premium—it was varied afterwards by making it two-ninths. There are provisions by which the agreement is to relate back to insurances which were made within two years before the agreement in question, and there are provisions by which the interest, such as it is, of the National Company may be limited by the action of the English Company either in re-insuring or in granting similar participations to other companies. If in fact it was a partnership or an agency, then the National Company became bound in the full sum to the original assured, for there would be no limit known to him and he could have asserted as against the partner of the English Company the full liability. I cannot help thinking that the last legal result that the National Company ever contemplated was that they would or might have to assume the full and complete liability on the risks to the original assured, with no prospect of ever receiving, or no right in any case to receive, more than the particular share of the premium which the agreement gave them.

My Lords, for the reasons that have been given by the noble Lord on the Woolsack and by the noble Viscount, I am satisfied that this was in fact a policy of re-insurance. No liability was intended to be assumed by the National Company to the assured, and that being so the effect of the agreement is that for a definite portion of the premium which the English Company received the National Company undertook to indemnify the English Company against the specific proportion of the risk to be ascertained in accordance with the agreement. The result is, it appears to me, that on the contention put before us this appeal must fail.

I should like to add one other word, for I feel that this result is unfortunate in some respects from the business point of view. After all, re-insurance of marine risks is a perfectly legitimate business, and the result, as appears from the discussion before your Lordships, is that it is impossible to conduct this form of business, by which a company that engages in marine insurance tries to secure in advance that its risks shall be fairly distributed by re-insurance policies, by any contract which can be enforced in Courts of Law. As I say, I think that is a matter which might reasonably be considered. If it is the considered policy of the Exchequer that such business as this should go untaxed, then it seems to me that it would be right that the fiscal legislation should make that clear, so that parties might embark on business of this kind. On the other hand, if it is desirable, as it well may be desirable, that the Exchequer should take its share by taxing this business which goes on, as we all know, to a considerable extent, then it seems to me that it would be right that provision should be made by which the present rules relating to the taxing of marine re-insurance should be altered, so that it would be possible for persons who desire to engage in business of this kind—as I say, in my opinion legitimate business—to be entitled to come to the Courts if necessary to

enforce their rights. At present they are outlaws moving outside the pale, and it is difficult to see why that should be the position. But that has no effect upon the legal relations of the present parties, and on the matter which has been put before us I agree that this appeal should be dismissed.

[Solicitors—Messrs. Parker, Garrett and Co.; Messrs. William A. Crump and Son.]

K.B. Div.
(Lord Hewart, C.J., Acton and Branson, JJ.)
1928.
July 19.

REX v. CONFIRMING COMMITTEE OF THE COUNTY OF SOUTHAMPTON—EX PARTE SLADE.*

Licensing — Ordinary removal — Refusal on ground that monopoly value ought to be paid for a new licence—Jurisdiction—Licensing (Consolidation) Act, 1910 (10 Ed. VII. and 1 Geo. V., c. 24), s. 26

Though licensing justices have no jurisdiction to make the grant of an ordinary removal of a licence subject to any condition as to payment of monopoly value, they are entitled to refuse the removal upon the sole ground that it would confer a great pecuniary gain upon the applicant, and that he ought therefore to apply for a new licence and pay monopoly value.

Dictum of Lord Alverstone, C.J., in *Rex v. Drinkwater* (21 *The Times* L.R., 514; [1905] 2 K.B., 469) approved and followed.

These were rules *nisi* for *certiorari* and *mandamus* calling on the confirming committee of the county of Southampton to show cause why a certain order made by them on or about April 25, 1928, refusing the application of Mr. William Slade for the confirmation of the provisional grant of the ordinary removal of the licence of the Bird-in-Hand, Gosport-road, Fareham, should not be quashed, and to command them to hear and determine the application according to law, on the grounds: (1) that the confirming committee sought to attach a condition to the grant of an order for removal; (2) that they had failed to consider the convenience of the public, the fitness of the premises, the fitness of the applicant, or any other relevant matters; and (3), alternatively, that when considering such matters they had before them no evidence to warrant them in differing from the licensing justices.

Mr. William Slade was the licensee of the Bird-in-Hand, the licence being an old beerhouse on-licence within the meaning of the Licensing (Consolidation) Act, 1910, Schedule II., Part 1. The owners of the house, Messrs. Kinnell and Hartley, Limited, acquired a new site, and on March 5, 1928, Mr. Slade applied for the removal of the licence of the Bird-in-Hand to premises to be erected on the new site. A bench of 12 licensing justices unanimously resolved to sanction the removal, which was strongly supported by the police as being in the interests of the neighbourhood generally.

The Quarter Sessions of the county of Hants, as the confirming authority of that county, had duly delegated their powers to a committee, which, on April 25, 1928, heard the unopposed application of Mr. Slade, and refused to confirm the removal on the ground that monopoly value would not be attracted.

Sir Francis Charles Gore, K.C.B., chairman of the confirming committee, deposed in his affidavit that the Bird-in-Hand was situated in a somewhat sparsely populated locality and in the immediate vicinity of another licensed house, and that the proposed new site was 450 yards away and in the centre of a large number of houses occupied by persons of the working classes. The committee felt difficulty in confirming the removal order because the two sites were so far apart and in neighbourhoods with such different prospects as regarded customers. They were of opinion (*a*) that the pecuniary gain to the brewers and the tenant, if the application were granted, would be considerable; and (*b*) that the monopoly value of the new premises would be substantial.

They unanimously resolved to refuse the application because it appeared to them that this was not a case which should be dealt with by way of removal order whereby the payment of monopoly value would be avoided to the detriment of the public. No question arose as to the fitness of the applicant or of the proposed new premises.

Mr. Blake Odgers showed cause for the confirming committee; Sir Reginald Mitchell Banks, K.C., and Mr. Healy supported the rules.

The Lord Chief Justice (Lord Hewart), in giving judgment, said that it was made clear by the affidavit of Sir Francis Gore, who had been for many years chairman of the confirming committee, that that committee did direct their minds to the sort of topic which was said by the applicant to be irrelevant. It was now said, not that that topic—the escaping of monopoly value—was irrelevant, but that it ought not to afford the sole reason for refusing to give validity to the order of the licensing justices. The law on the subject was to be found, so far as the statute was concerned, in section 26 of the Licensing (Consolidation) Act, 1910. It was significant that that section provided that no such order—*i.e.*, of the licensing justices authorizing the removal—should be valid unless it was confirmed by the confirming authority. Nor were any limits set by the statute to the matters which the confirming authority might take into account in deciding whether to confirm the order.

It was conceded by Sir Reginald Mitchell Banks that the licensing justices might take into account whether what was asked was practically a new licence. When one looked at *Rex v. Drinkwater* (21 *The Times* L.R., 514; [1905] 2 K.B., 469) one found the following emphatic words of Lord Alverstone:—

"I wish, however, to say that I do not indicate or suggest that the justices have not a discretion as to whether they will, or will not, make an order sanctioning the removal; and, speaking for myself, I think they are entitled and ought to take into consideration the circumstance, if it exists, that by making the order a great pecuniary gain would be conferred upon the applicant, and the public would lose that pecuniary gain, which might have been preserved to them if the application had been for the grant of a new licence. It must not be thought, therefore, that I suggest that the justices have not a discretion to refuse to make a removal order upon that ground amongst others."

And Mr. Justice Kennedy, as he then was, said:—

"I agree with my Lord that our decision must not be taken as suggesting in any way that the justices have not a discretion with respect to the granting or refusing of the application to remove the licence."

* Reported by J. W. Hall, Esq., Barrister-at-Law.

Mr. Justice Ridley agreed without comment. It was said that those observations of Lord Alverstone and the statement by Mr. Justice Kennedy were of the nature of *obiter dicta*. So, in a sense, they were, but they were remarkably near the topic that was then being dealt with.

Sir Reginald Mitchell Banks suggested that in referring to "that ground amongst others" Lord Alverstone intended to say that they could not refuse the removal solely on the ground of monopoly value. He (Lord Hewart) did not think that that was the true view, but that Lord Alverstone was saying: "It must not be thought that I think the justices have not jurisdiction to refuse on that ground, as well as on some other grounds." It was not intended to convey that that might not be the decisive, or the sole, ground. There was nothing here to be complained of and the rules ought to be discharged.

The other learned Judges agreed.

[Solicitors—Messrs. Robbins, Olivey and Lake, for Mr. F. V. Barber, Winchester; Messrs. Godden, Holme and Ward, for Messrs. Hobbs and Brutton, Portsmouth.]

House of Lords.
(Viscount Dunedin, Lord Shaw of Dunfermline, Lord Phillimore, Lord Carson, and Lord Blanesburgh.)

1928.
July 25.

BEVAN v. NIXON'S NAVIGATION COMPANY, LIMITED*.

Master and Servant—Compensation for injury by accident—Reduction to lower grade by reason of partial incapacity—Ability to perform lower-paid work—Inability to obtain it owing to state of labour market—Workmen's Compensation Act, 1906 (6 Edw. VII., c. 58), Sched. I. (1) (*b*), (3)—Workmen's Compensation Act, 1923 (13 and 14 Geo. V., c. 42), s. 16.

Held (Lord Shaw of Dunfermline and Lord Blanesburgh dissenting), that a skilled workman who would, if uninjured, have continued to be employed as a skilled workman, but who, as the result of an accident arising out of and in the course of his employment has been reduced to the grade of an unskilled workman and driven to seek work in such lower grade, and who, though he has recovered sufficiently to be able to perform such unskilled work, is, in fact, unable to obtain such unskilled work solely on account of labour conditions, is nevertheless, for the purpose of the calculation of compensation, to be treated as "able to earn" the wages of a worker in such lower grade.

This was an appeal from a decision of the Court of Appeal affirming an award of the County Court Judge of Glamorgan under the Workmen's Compensation Acts, 1906-1925.

The facts are fully stated in the opinion of Lord Dunedin.

Mr. Upjohn, K.C., Mr. A. T. James, K.C., and Mr. W. Shakespeare appeared for the appellant; and Mr. Edward Cave, K.C., and Mr. Edgar Dale for the respondents.

* Reported by H. B. Hemming, Esq., Barrister-at-Law.

Viscount Dunedin.—My Lords, the circumstances out of which this appeal arises are as follows:—

The appellant was a collier and worked at the face. He had been employed by the respondents for forty years up to 1919. At that time his wages were £2 13s. 3d. per week. In April, 1919, he was certified as suffering from the industrial disease of nystagmus. This prevented him from working at the face. Up to May, 1920, he was paid full compensation as for total disablement at the rate of £1 per week. By this time he was fitted for surface work though not for work at the face, and he was employed on surface work up to 1922 when the pit ceased working. It was reopened in December, 1926, and is still working. From June, 1922, till May, 1927, he was paid on the basis of partial incapacity. The sum actually paid from December 2, 1926, to May 17, 1927, was at the rate of 15s. 1d. per week. Since June, 1922, he was unable to find any surface work. On April 29, 1927, he filed a request for arbitration alleging that the compensation to be paid to him should be raised from 15s. 1d. to £1 per week as from December 2, 1926. The respondents countered this by a demand that the compensation should be reduced to 5s. 3d. as from May 17, 1927. This was based on an assertion that he was able to earn, in spite of the nystagmus, wages of £2 2s. 8d. per week, and that his inability to find work had no connexion with the nystagmus.

The case came before the arbitrator. He found certain facts, and the material ones, stated in proposition, are these:—

(1) That but for the nystagmus the appellant would be getting work at the face and would be earning £2 13s. 2d. per week.

(2) That his physical condition with the nystagmus fitted him for surface work for which at current rates he would be paid £2 2s. 8d. per week.

(3) That he could not get surface work solely on account of labour conditions.

The arbitrator then stated that the two alternatives were either that he should award £1 per week, being the maximum calculated as for total incapacity, or 5s. 3d. per week, being half the difference between the pre-accident figure of £2 13s. 3d. and a wage of £2 2s. 8d. which the workman must be taken as able to earn. The arbitrator, after a long review of the cases in which he showed clearly that he was personally in favour of the first alternative, came to the conclusion that he was bound by the case of *Cardiff Corporation v. Hall* (27 *The Times* L.R., 339; [1911] 1 K.B., 1009). The Court of Appeal also held themselves bound. That case was decided on the Act of 1906. It dealt with the right interpretation of clauses (1) (*b*) and (3) of the first schedule. For clearness' sake, it may be well to set them out.

"(1) The amount of compensation under this Act shall be . . . (*b*) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound. . .

"(3) In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some

suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper."

The whole controversy turned on the words "is earning or is able to earn." Does "is able to earn" mean "is in such a physical condition that he is able to earn" and that alone, or does it also include the proviso of employment if the workman fairly attempts to get it? Sir Herbert Cozens-Hardy, M.R., took the latter view. Lords Justices Moulton and Buckley the former. Their opposing views are clearly set forth. Sir Herbert Cozens-Hardy, M.R., says, at page 1013:—

"This state of facts raises the question whether an employer, admittedly liable to pay compensation for an accident which disables the man from following his former occupation, can obtain an order for the termination or reduction of the compensation by merely proving physical ability to do light work without either offering to provide such work or adducing some evidence that light work can be obtained in the neighbourhood where the man resides, and of a suitable character. In my opinion, apart from authority, this question should be answered in the negative. The effects of the accident have not been removed, and I cannot think that the workman ought to have his compensation reduced merely on the ground that he is physically able to do a different kind of work, which, in truth, cannot be procured. It is not a case in which the effects of the original injury have completely disappeared so that the man is as capable as ever he was. In that case the employer, who does not guarantee the labour market, is free from all further liability."

Lord Justice Moulton says, at page 1020:—

"It is impossible to hold that the employer necessarily or generally guarantees the conditions of the labour market where there is partial incapacity any more than he guarantees that the workman shall get employment where incapacity has for the time ceased. An example will make this clear. Suppose that in the business of a mechanical fitter there is a class of work requiring a special fineness of touch or keenness of sight so that it can only be done by persons specially gifted in these respects and that it accordingly commands higher wages. Suppose also that an accident happens to one of these first-class fitters which injures his sight or touch to such an extent that he now has that sense only in an average degree of perfection, and thus is qualified only for the work of an ordinary fitter, but which does him no other injury. His position after the accident is that he has lost thereby the difference of earning power of a first-class fitter as compared with an ordinary fitter. But he has lost no more. I can see no reason why his chance of obtaining employment or his power of earning wages should be treated for any purpose as different from that of a man who has all his life been an average fitter, and, inasmuch as the employer does not guarantee the state of the labour market for one who is and has previously been an average fitter, I cannot see why he should guarantee the state of the labour market for the workman who has now become one."

Lord Justice Buckley says, at page 1026: "It has been laid down that upon an original arbitration the state of the labour market is altogether outside the question of compensation: that the question is, not whether the man can in the then state of the labour market get a place, but whether as a result of the accident he is under an incapacity for work which prevents him from being as eligible as he was before the accident for a place. The same in my opinion is true upon an application to review. Having regard to any incapacity for work personal to the workman arising from the injury, what is the difference between the amount of his average weekly earnings before and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident? This is the question to be answered. The two following propositions are of course distinct: First, that owing to incapacity for work arising from the accident the condition of the workman is such that his labour is not saleable or is saleable only at a reduced figure, and, secondly, that his labour is saleable or is saleable at the same figure as before the accident but that he has failed to find a purchaser. The former and not the latter is the relevant proposition in the question of compensation. To express the same thing more briefly, inability to earn for the purposes of Schedule I., paragraph 3, is inability to get employment owing to some incapacity for work personal to the workman to the exclusion of inability to get employment owing to the state of the labour market. The employer may be called an insurer of 'capacity for work' but he is not an insurer of a 'right to work.' The Workmen's Compensation Act is not a Right to Work Act."

Now the *Cardiff* case (*supra*) has ruled the practice ever since the date of it, but it is not binding on your Lordships. This appeal is truly an appeal against the *Cardiff* case (*supra*). It was argued by the appellant's counsel that the *Cardiff* case (*supra*) had been displaced by what was said in this House in the three cases reported under the name of *Portland Colliery Co., Limited v. Murray* (39 *The Times* L.R., 579; [1923] A.C. 566). My Lords, I think this is a mistake. The point in all the three cases was the same and was this. A partially incapacitated workman was paid compensation as such, he being employed in work that suited his incapacity; then in the war time the wages for that work rose beyond the figure which he had earned in pre-accident days and the compensation then ceased. Wages then fell and the question then was whether, the physical condition of the workman being unchanged, it was competent for the Court to revert to a payment of compensation. The present question was never raised. In my opinion the decision is summed up thus at page 577: "The right to receive compensation for partial incapacity then revives, and the amount due in respect thereof necessarily involves inquiry as to what the man is competent to earn."

A single sentence of the head-note is misleading; doubtless founded on the fact that in one of the cases the Second Division of the Court of Session had remitted to the arbitrator to determine compensation where the fact was established that the man could not find work, and that in my opinion I had said they had "rightly done so." But the present point was not before the House and was never argued.

My Lords, had I sat on an appeal against the *Cardiff* case (*supra*) in 1912 or 1913, I find it hard to say what my opinion would have been. I have always felt the strength of the argument that the words are not "able to work" but "able to earn," and that it is hard to say that a man is able to earn when there is no employment at which he can earn. But the present case is not in 1912, it is now. The application for arbitration bore to be made under the Act of 1925; but that is an error, for although the date of 1925 is passed yet section 50 of that Act says that it shall not apply in any case where the accident happened before the first day of January,

1924. But then there is the Act of 1923, and section 31, subsection (2), of that Act says that it is to be considered as one with the principal Act, to wit the Act of 1906. Now the Act of 1923 was passed in the knowledge that the interpretation of the original section was as stated, and section 16 of the Act of 1923 is as follows: "If a workman who has so far recovered from the injury as to be fit for employment of a certain kind proves to the satisfaction of the judge of the county court that he has taken all reasonable steps to obtain, and has failed to obtain, such employment, and that his failure to obtain such employment is a consequence, wholly or mainly, of the injury, the judge shall order that his incapacity shall, for the purposes of the principal Act, continue to be treated as total incapacity for such period, and subject to such conditions, as may be provided by the order, without prejudice, however, to the right of review conferred by paragraph (16) of the First Schedule to the principal Act:

"Provided that every such order shall be made subject to the condition that it shall cease to be in force if the workman receives unemployment benefit."

It may not be amiss to state, though it has not any real bearing on the argument, that this section is repeated *totidem verbis* in section 9 (4) of the Act of 1925, so that the decision in this case will rule cases arising under that Act.

My Lords, I am unable to resist the light thrown on the whole position by this section. It seems to me necessarily to exclude the idea that "able to earn" applies to any circumstances not personal to the man himself. It deals expressly with the case of the man who cannot find work and it sets the criterion whether the failure to find the work is due wholly or mainly to the accident. Here we are faced with the finding in fact that the failure to find work was due solely to the state of the labour market, but that state of affairs is expressly excluded by the section.

The appellant laid great stress on the fact that the accident had the effect of driving the appellant from one class of work to another. The case is actually dealt with by Lord Moulton in the opinion quoted. But as regards section 16 be it observed that that deals with fitness for employment of a certain kind, *i.e.*, not his original employment. It is as regards that which I may call substituted employment that the criterion is put. I am, therefore, somewhat unwillingly driven to the conclusion that in face of section 16 it is impossible to say that the *Cardiff* case (*supra*), when applied to a case after the passing of the 1923 Act, is wrong.

I move that the appeal be dismissed with costs.

LORD SHAW.—My Lords, I have considered and reconsidered this case. If the judgment of the Court of Appeal stands then I do not entertain any doubt that it *pro tanto* defeats the main object of the Workmen's Compensation Acts, and it unduly and improperly reduces the scale of compensation awarded therein.

The case was tried before a most experienced County Court Judge whose statement discloses his conviction to the same effect, and further indicates that but for the *Cardiff* case (27 *The Times* L.R., 339; [1911] 1 K.B., 1009) he would have had no hesitation in awarding to the injured miner on the scale or footing of £1 instead of 5s. 3d. per week. That is to say, he could not have seen his way to hold that the injured collier, who was no longer fit by reason of the accident for work at the face, could be treated as able to earn the wages of a surface worker when in point of fact no such work was procurable by him. He was forced, however, by the state of the law, and particularly by the decision of the *Cardiff* case (*supra*), to give the smaller award.

When the case reached the Court of Appeal, the learned Judges similarly referred to the *Cardiff* case (*supra*), Lord Justice Lawrence doing so *simpliciter*, and Lord Justice Atkin refraining from expressing his individual opinion on the principle involved. Lord Hanworth, the Master of the Rolls, alone committed himself to the enunciation of doctrines similar to those pronounced in the case mentioned. I am of opinion that the *Cardiff* case (*supra*) was wrongly decided.

I hold further that this House is substantially committed by declaration here made to a similar opinion.

In the *Cardiff* case (*supra*) the Master of the Rolls, Sir Herbert Cozens-Hardy, dissented, and he founded his dissent upon powerful authority. The question, although difficult to answer, can be simply stated. Under the statute the measure of compensation to be awarded to an injured workman in respect of his injury is the difference between what he earned before the accident and "the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident."

In *Clark v. Gas Light and Coke Company* (21 *The Times* L.R., 184) a gasworks coal porter was injured, but the workman had physical capacity enough to be a gate-keeper or watchman, the duties of that employment not requiring the full use of an injured hand. It was also found that the man had made all reasonable efforts to get this light work and had been unable to get it and the arbitrator accordingly refused to reduce the compensation. An appeal against this refusal was dismissed: and Sir Richard Henn Collins, Master of the Rolls, dealt with the proposition as to what was meant by "being able to earn." "It was argued," said he, "that the question whether his opportunity of finding work from which he might earn the same wages had been narrowed in consequence of the accident ought not to be taken into consideration, the one and only question being as to his physical capacity for work. Here the applicant had made *bona fide* efforts to find such work as he was capable of doing and had failed. It was said that he must put up with such incapacity to get work without having recourse to his employers, and that all considerations of the existing conditions of the market must be shut out." That appeared to him to be contrary to common sense and not to be involved in the authorities, still less in the Act itself.

Founding upon this case and upon *Proctor v. Robinson* ([1911] 1 K.B., 1004), Sir Herbert Cozens-Hardy, in a passage bearing precisely upon the facts of the present case, puts the question as to "whether an employer, admittedly liable to pay compensation for an accident which disables the man from following his former occupation, can obtain an order for the termination or reduction of the compensation by merely proving physical ability to do light work without either offering to provide such work, or adducing some evidence that light work can be obtained in the neighbourhood where the man resides, and of a suitable character." "In my opinion apart from authority," says Sir Herbert Cozens-Hardy, "this question should be answered in the negative. The effects of the accident have not been removed, and I cannot think that the workman ought to have his compensation reduced merely on the ground that he

is physically able to do a different kind of work, which, in truth, cannot be procured."

In my view these opinions of Sir Richard Henn Collins and Sir Herbert Cozens-Hardy correctly state the legal principle to be applied.

The majority of the Court of Appeal, however, consisting of Lords Justices Moulton and Buckley, were of a different opinion. Says the former at p. 1020 : "His" (the workman's) "position after the accident is that he has lost thereby the difference of earning power of a first-class fitter as compared with an ordinary fitter. But he has lost no more."

My Lords, I dissent from this view. The measure of damages given in the statute is not the difference of earning power but the difference in fact between what was earned in wages before the accident and what he is earning or is able to earn in wages. It is wages he has lost by reason of the accident. He has been displaced also by reason of the accident from a position in which *de facto* he did, and also *de facto* he could now, earn wages to a position in which he does not earn such wages and is not able to earn such wages. The learned Lord Justice proceeds to say that he cannot see why the employer should guarantee the state of the labour market for the workman so displaced.

There is no question of guarantee. The question is one of fact. The workman there, as in the present case, was displaced by reason of the accident from the region of employment into a region of unemployment. No guarantee is asked for the state of the labour market, but compensation is asked for the situation of the workman having been changed from a position in which wages were actually earned to a position in which, whether by the state of the labour market or for any other reason, wages cannot be obtained.

Lord Justice Buckley puts the question whether as a result of the accident he is under an incapacity for work which prevents him from being as eligible as he was before the accident for a place. This, in my opinion, does not correctly state the two factors of the comparison set down by the Act. These are, firstly, wages received before the accident and, secondly, wages not received after the accident. It is not a question of comparative eligibility, it is a question of difference in receipts—a money question. The learned Lord Justice adds at p. 1027 that the relevant proposition in compensation is that "The condition of the workman is such that his labour is not saleable or is saleable only at a reduced figure."

I do not think that this is at all a correct statement of the issue in a compensation case. It is not saleability of labour that is the factor of comparison set up by the Act ; that factor is the receipt of wages before and the receipt of wages after the accident. If the workman was put into the position by reason of the accident that his wages received were to be compared with what he was earning or able to earn in wages after the accident, it seems to me no solution of the problem to introduce the idea of the saleability of labour. Nor indeed, even if the phrase were employed, could the saleability of labour be introduced as a factor of comparison so as to cover the case of labour offered but not accepted by purchase. Until you have the latter operation there is no earning whatsoever. The learned Lord Justice's propositions are summed up when he says at p. 1027 : "The employer may be called an insurer of 'capacity for work,' but he is not an insurer of a 'right to work.'"

Again I think this analogy of insurance fails. It is true that "the Workmen's Compensation Act is not a Right to Work Act." No. It does not deal with a right to work ; it does not make that any standard of comparison as before and after an accident, but it does deal not with the right to work but with the power to earn wages, and it is that money comparison which makes the standard of compensation in money which the Act, I feel certain, meant to set up. For this reason I myself feel unable to accept the *Cardiff* case (*supra*) as setting forth a sound interpretation of the Act.

But, my Lords, I regret to observe that sufficient attention has not been paid to the decision of this House upon the question now again before it. The question at issue in this case is succinctly and accurately made to turn upon the words "is earning" or "is able to earn," and does the phrase "able to earn" mean and only mean "physically able to work although in fact unable to earn anything" ?

I refer in particular to the case of *Ball v. Hunt and Sons, Limited* (28 *The Times* L.R., 428 ; [1912] A.C., 496). The workman in that case lost the sight of an eye. He was unable to obtain work, being a one-eyed man, although his ability to work remained exactly as it was before. But the importance of the case is that it dealt with the general question of the introduction of the subject of labour conditions into such an issue. Lord Macnaghten put the matter thus at p. 501 : "As Lord Halsbury observed in the case of *Lysons v. Andrew Knowles and Sons, Limited* (17 *The Times* L.R., 156 ; [1901] A.C., 79), 'the first thing one has to do is to apply one's mind to what is the substantive intention and meaning of the statute.' It seems to me that the injury for which the statute gives compensation is not mutilation or disfigurement or loss of physical power, but loss or the diminution of the capacity to earn wages in the employment in which the injured workman was engaged at the time of the accident."

Lord Atkinson touches the exact point of this present case when he says at p. 505 : "There would be no meaning, it would appear to me, in these provisions making the amount of wages which were, are, or can be earned so much the basis of compensation, if the market for the workman's labour has to be left out of consideration. The earning of wages depends as much on the demand for the workman's labour as it does upon his physical ability to work."

It should be borne in mind that the case of *Ball* (*supra*) was the case in which the physical appearance of the man was so altered as to reduce his chance of employment, but it is to be borne in mind that the general question was also fully treated as those sentences show. In my own opinion I quote the case of *Clark v. Gas Light and Coke Company* (*supra*) with approval. But in *Ball's* case (*supra*), from which these citations are made, reference was made to the Scottish case of *Boag v. Lochwood Collieries, Limited* ([1910] S.C., 51), in which the Lord Justice-Clerk put the question thus:—

"Is it any reason for reviewing the payment to say that the employers cannot find him suitable work for his capacity, or that he has not been able to find such work himself? If the appellant means that his averments if proved would of themselves be a sufficient ground for saying that compensation must be increased to the full allowance under the statute, I should certainly not for myself yield for one moment to any such demand. I take it that the whole question is that of 'capacity to work,' which cannot be decided merely by the fact that the workman has not got work, but only by such evidence as satisfies the Court whether or not he is able to work."

My Lords, I pause here to observe that that is precisely the doctrine of the *Cardiff* case (*supra*). It is boldly and baldly stated. This is how I am

reported as having dealt with it in *Ball v. William Hunt and Sons, Limited* (*supra*). "This is a particular affirmance of the proposition that incapacity under the Act must be limited to physical incapacity and to that alone. So stated, I think the proposition—with which I have already dealt at length in the earlier part of my opinion—to be an unsound proposition and the decision of *Boag's* case (*supra*) to be erroneous."

A decision in *Macdonald v. Wilsons and Clyde Coal Company* (28 *The Times* L.R., 431; [1912] A.C., 513) to the same effect was pronounced by this House in 1912 also to be erroneous.

My Lords, I now ask myself how the principles that are set forth by this House apply to the facts of the present case. It has been found by the learned arbitrator that but for the nystagmus the appellant would be getting work at the face and would be earning £2 13s. 2d. per week. The first factor of comparison is thus clear. From that field of work in which to-day, but for the accident, he would have been employed at the wage stated, he had been displaced by the accident. He has been unclassed from the field of work known as work at the face. He has been declassed into the field of work known as surface work. In that field of work it is not questioned that he cannot obtain employment. That is one of the outstanding features of the position. He has been unclassed from an employed field and declassed into an unemployed field. His employment at wages has been succeeded by unemployment and no wages. The cause for his change from the one position to the other is the accident. The compensation for that accident is to be measured by the difference between the one condition and the other.

The answer is: "Oh! He may not be earning now, but he is physically able to earn now." The question is what is he able to earn? He may be able to work, but is he able to earn? Does not earning mean something more than work? Earning means working for wages and getting wages; and when the statute says "or is able to earn" that means "or is able to work for and to get wages." This unfortunate workman by reason of the accident is not able to work for and get wages. Earning means earning wages; not earning approval or gratitude, but earning money. It is replied that he is physically able, to which the answer is, of what avail is physical power if a man is driven into a sphere where it cannot be exerted so as to produce wages? The comparison between ability to work does not follow his former ability to work or to work at the face. He has been physically disabled and he is a disabled man for face working who is now confronted with the task of trying to get work where there is none available. This position has been directly brought about by the accident and consequent disease.

It appears to me that the compensatory provision provided by the Acts of Parliament is by the *Cardiff* case (*supra*) and the present case improperly impaired. The learned arbitrator points out the hardships that will result if this be reckoned to be the state of the law, and the smoothness with which the other view can in accordance with fair dealing operate.

Finally, my Lords, I think it a mistake to conclude that the undoubted hardship under the *Cardiff* case (*supra*) was ever accepted by Parliament or that Parliament meant (1) to confirm and accentuate that hardship and (2) to set at nought the above quoted pronouncements in this House by the provisions of section 16 of the Act of 1923.

The question is: Has the appellant's failure to obtain employment as surface worker resulted wholly or mainly from the injury? I am clearly of opinion that it has. The injury drove him from the working face and his employment there. He was driven to an unemployed sphere of labour, to use the language of the Act, solely or mainly by the injury. As to that radical fact the opinion of the arbitrator is clear. He expressly finds "that but for the nystagmus from which he was suffering, the appellant would, since the 2nd December, 1926, have been employed as a collier and earning wages at least equal to his pre-accident wages."

It was argued that the arbitrator attributed his plight as workman solely to labour conditions. This is quite a mistake. The arbitrator's declaration is that in labour conditions applicable to surface work he cannot get employment as a surface labourer. But labour conditions did not drive him to that rank: he was driven into that rank by the accident alone. Labour conditions in the work of a miner at the face are admitted to be such as to give him work and wages as such. Disabled from that work and wages, not by labour conditions but by the accident, he is thrown into a rank in which labour conditions preclude him from earning wages. But these conditions only apply to surface work, not to the work from which he was driven. And it humbly appears to me that the reference to labour conditions of surface work imports nothing to the purpose of this case, for the man's grievance and loss are that he was, from the accident and the accident alone, excluded from a grade where no such adverse labour conditions exist to another in which they do exist. And it is only after this has happened, because of the accident and not because of any labour conditions, that he is put under the range of labour conditions which offer him no opening. I firmly but respectfully dissent.

Lord Phillimore.—My Lords, I find myself in agreement with the opinion which has been pronounced by the noble and learned Lord on the Woolsack. If the matter were *res integra* I should have been prepared to hold that the words "able to earn in some suitable employment or business" pointed to some personal capacity of the workman and not to the concomitant circumstances in which he might exercise that capacity. But the matter is not *res integra*. Unless the reasoning in the opposite direction compelled me I would not disturb the construction which has been put upon these words since the case of *Cardiff Corporation v. Hall* (27 *The Times* L.R., 339; [1911] 1 K.B., 1009) was decided in 1911. I do not think that there has been any discontinuity in the series of cases which have been decided since. In fact, the only suggestion to the contrary is derived from an *obiter* expression of the noble Lord now on the Woolsack which he has explained, as it seems to me correctly, in the opinion which he has just delivered. In *Ball v. Hunt and Sons, Limited* (28 *The Times* L.R., 428; [1912] A.C., 496) it was the physical injury which prevented the man from earning money, though that disability was not a disability for work if he could find employment, but one which made him less presentable and therefore less likely to be employed.

But the matter does not rest here. The legislation of 1923, for which the Consolidation Act of 1925 is now substituted, appears to me to recognize the correctness of the decision in *Cardiff Corporation v. Hall* (*supra*) as defining the law as it then stood and to make such amendment of the law as later experience has shown to be desirable, and the workman who claims relief must bring himself within

the terms of section 9, subsection 3, of the Act of 1925.

LORD CARSON.—My Lords, the Court of Appeal felt bound to follow the decision in the case of *Cardiff Corporation v. Hall* (27 *The Times* L.R., 339 ; [1911] 1 K.B., 1009). That case had been fully discussed and considered by that Court as recently as the year 1927 in the case of *Lewis v. Guest, Keen and Nettlefold, Limited* (43 *The Times* L.R., 436 ; [1928] 1 K.B., 20) where the same argument as we have listened to in this case was put forward, viz., that having regard to the decisions of *Heathcote v. Haunchwood Collieries Co., Limited* ([1918] A.C., 52), *Woodilee Coal and Coke Company v. M'Neill* (34 *The Times* L.R., 10 ; [1918] A.C., 43), and *Portland Colliery Co., Limited v. Murray* (39 *The Times* L.R., 579 ; [1923] A.C., 566)—all decisions of this House—the *Cardiff* case (*supra*) could no longer be considered law. The Court of Appeal refused to accept this view, and with that conclusion I entirely agree, and in my opinion there is nothing in any of the decisions expressed in your Lordships' House which prevents us from treating the *Cardiff* case (*supra*) as correct. On the other hand, I cannot read the judgments of Lord Loreburn and Lord Shaw in *Ball v. Hunt and Sons, Limited* (28 *The Times* L.R., 428 ; [1912] A.C., 496) without coming to the conclusion that these noble and learned Lords at least approved of the decision. For my own part I would like to say that I do not, even if it is open to do so, for a moment question the soundness of the decision of the majority in the *Cardiff* case (*supra*). It is unnecessary to go into the reasoning of the learned Judges who decided that case in detail, but in my opinion to construe the words "is earning or is able to earn" as creating a liability on behalf of the employer to guarantee work in the case of partial incapacity would be to add provisions of insurance to the Schedule which are not deducible from the language used. But, my Lords, it is unnecessary to pursue this consideration further having regard to the argument addressed to your Lordships by the learned counsel for the respondents arising out of the provisions of the Act of 1923 already quoted. This argument was not considered by the Court of Appeal, as counsel for the respondents were not called upon. Although, holding the views I have already expressed about the *Cardiff* case (*supra*), it is unnecessary to go further into this argument, I would like to add that I entirely agree with the noble Viscount on the Woolsack that section 16 of the Act of 1923 seems "necessarily to exclude the idea that 'able to earn' applies to any circumstances not personal to the man himself." I should like also to point out that so far as has been suggested to us it is in this section for the first time that failure to obtain employment is incorporated as an ingredient in making a claim in such a case, and this goes far to show that such or a similar condition is not to be deduced from the language of clause 3 of the first Schedule. My Lords, I agree that this appeal should be dismissed with costs.

LORD BLANESBURGH (read by Lord Shaw of Dunfermline).—My Lords, the facts upon which the claim of the appellant here must rest may be conveniently stated in serial form. So presented they seem to be exceptionally striking. Rarely in such a case are the findings so clear.

1. The appellant's employment at the respondents' collieries was that of a collier or hewer at the coal face—a well-known branch of skilled labour with its own rules of working and its own rates of pay.

2. The appellant in April, 1919, was certified to be suffering from miner's nystagmus, one of the diseases to which the Workmen's Compensation Acts apply. The date of his disablement was the 19th April, 1919. His "incapacity for work" then commenced.

3. That expression as used in the Act of 1906, expanded, as it must be, by interpretation, means the inability of the disabled workman to earn wages by the work at which he was employed at the date of disablement. See *per* Lord Macnaghten in *Ball v. Hunt and Sons, Limited* (28 *The Times* L.R., 428 ; [1912] A.C., 496, at p. 500). It follows that it is in respect of this incapacity as so defined and none other that the appellant is entitled, under the statute, to receive compensation.

4. From the date of his disablement down to the hearing of the reference the appellant's "incapacity for work" in this sense had been complete. For him work at the face had been out of the question, and that solely as a result of his disablement. The appellant "but for his nystagmus from which he suffered would have been employed . . . as a collier earning at least his pre-war wages" of £2 13s. 2d. a week. Such is the finding of the learned arbitrator.

5. It is implicit in that finding and it is not disputed that since the termination of the coal strike on December 2, 1926, there was neither labour trouble nor economic stringency effective to interrupt the appellant's employment at his old work had his disablement permitted him to continue it.

6. This, however, has not been the case in relation to the only work which since his disablement the appellant has been capable of doing, namely, surface work—a branch of unskilled labour as well defined as is working at the face a well defined branch of skilled labour. The appellant would have taken and would take any surface work if he could get it. But none such, owing solely to labour conditions affecting the market for this class of unskilled worker, has been available for or obtainable by him. As a consequence the appellant at the time of the reference had, since the 2nd December, 1926, been idle altogether. His "capacity for work" in the statutory sense had been destroyed entirely ; and no suitable work of any other kind was available for him, willing as he was to do it if it had been.

7. It is agreed that were he able to find employment as such the wages of the appellant as a surface worker would be £2 2s. 8d. a week.

There is not to be found in the *Cardiff* case (27 *The Times* L.R., 339 ; [1911] 1 K.B., 1009), so frequently already referred to, the clearly cut divergence in labour conditions which is to be found here as affecting the workman's former work and that to which he was relegated by his disability, and it may well be doubted whether upon facts which, as in the present case, invest the true meaning of the words "incapacity for work" with a decisive significance, much that was said in the *Cardiff* case (*supra*) would have been said at all. On the above facts as found, however, the learned arbitrator conceiving, and most probably rightly, that to them the *Cardiff* case (*supra*) applied, and that he was thereby required to charge the appellant in account with the receipt in each week of the above £2 2s. 8d. —although in fact the man had received nothing and had no expectation of receiving anything from surface work—held that the maximum compensation that could be awarded to the appellant was 5s. 3d. a week—the half, to a ½d., of the difference between the two sums of £2 13s. 2d. and £2 2s. 8d. And

this was the amount actually awarded. But the learned arbitrator intimated that if he had not been prevented by a decision of the Court of Appeal—*Lewis v. Guest, Keen and Nettlefold, Limited* (43 *The Times* L.R., 486; [1928] 1 K.B., 20)—from giving effect to his own opinion that the *Cardiff* case (*supra*) was no longer law, his award in favour of the appellant would have been one for £1 a week. The award actually made having been upheld by the Court of Appeal, the first question now—it was originally the only question on the appeal—is whether in the *Cardiff* case (*supra*) the majority of the Court—Lords Justices Moulton and Buckley—were right when in effect they held that the statute precluded an arbitrator in such circumstances as have been found here from making any higher award than that which is now in question.

The answer depends entirely upon the meaning to be attributed to the words "able to earn" in the 3rd clause of the First Schedule to the Act of 1906, already under your Lordships' notice. Do these words refer to the average weekly amount which the disabled workman can earn if he cares and tries or do they extend to and include the amount which he is physically fitted to earn in some suitable work, irrespectively altogether of the question whether such work is available for him or not?

My Lords, all concerned have again and again been warned by this House that the language of this statute must be read fairly, taking the words in their common and ordinary signification. So reading this paragraph I cannot think that its meaning is difficult to discover. This portion of it is dealing with cases of partial incapacity—cases, that is to say, of disabled workmen who either may not be altogether unfitted for their old work or who, if they are, may still remain able to do work of some other kind. And as it is no part of the scheme of the Act that the injured worker, only partially disabled, is to remain in idleness at his employer's expense and is not, as against the maximum compensation provided, to be charged with his actual or potential earnings during his period of disability, the arbitrator is directed "to ascertain the average weekly amount which he is earning or is able to earn in some suitable employment or business," that is, the actual fact, if he is earning, or, if he is not earning, an estimate of what he is able to earn. See *per* Lord Justice Farwell in *Bevan v. Energlyn Colliery Company* (28 *The Times* L.R., 27; [1912] 1 K.B., 63, at p. 72). And the reason for the alternative form is given by Lord Dunedin in *Heathcote v. Haunchwood Collieries Co., Limited* ([1918] A.C., 52, at p. 56), where he explains that it is thereby open to the employer who objects to the figure of actual earnings being taken to urge and show that the amount which the claimant is earning is not really what he might earn if he were to take proper steps to get the most remunerative employment he could find.

It will be noted that there is not there nor is there in the paragraph itself a word to suggest that, even by way of estimate, is the workman to be charged with the "average" earnings of any employment or business however "suitable" if neither the employment nor the business was open to him. To my mind, indeed, the fact that it is only with his "*average*" earnings in "*some*" "*suitable*" employment or business that the claimant is by estimate to be charged, shows, if the whole frame and purpose of the clause do not already proclaim it, that there must not only be ability to do the work but an opportunity of getting it, if, in respect of earnings therefrom, the workman is to be charged by way of estimate with any receipt at all.

Mr. Cave did not suggest that the absence of opportunity could never be effectively set up by a workman sought to be charged with earnings not in fact obtainable. He agreed, as I understood him, that the appellant here could not have been charged with such earnings, if there had not been in the district in which he lived or in one to which he would naturally go, an established outlet for surface labour. The rule in the *Cardiff* case (*supra*) had no application to a case where the inability to secure employment in a lower grade was due to the fact that there was no market for such work available to the workman. The assigned reason for that rule made this clear. It is applicable only for the reason that the employer "does not guarantee the state of the labour market" or, as it was put by Lord Justice Buckley, because while the employer under the Act may be called an insurer of "capacity to work," he is not an insurer of a "right to work."

Here then is disclosed the *ratio decidendi* of the *Cardiff* case (*supra*), and with the disclosure is revealed, as I believe, the fallacy which underlies it.

In what connexion, under this statute, is the statement true that the employer does not guarantee the state of the labour market? Surely, only in this, that as liability to unemployment is a feature of all industrial labour a workman has no right to be placed in this respect by means of compensation in a more favourable position after the accident than he would have been in if he had never met with it. Accordingly the Courts have held that a workman is not entitled to compensation for unemployment due to fluctuations of trade. But, *ex necessitate rei*, these fluctuations must be and are confined to fluctuations in the demand for "the work in which the injured workman was employed at the time of the accident"—to use again Lord Macnaghten's words in *Ball v. Hunt and Sons, Limited* (*supra*). Such fluctuations, when they appear in the grade to which the workman is reduced, as a result of the accident, have merely, so far as the statute is concerned, the effect—truly as potent as the worker's actual disability for the work—of preventing him from earning anything in that otherwise "suitable" employment.

Lord Justice Moulton, in the *Cardiff* case (*supra*), evidently felt this difficulty, and he sought to meet it by his illustration of the case of the first-class fitter which, as it has already been quoted, I need not again transcribe. But if the Lord Justice had had the advantage we enjoy of Lord Macnaghten's explanation of the phrase "incapacity for work" he could not have said, as in the passage referred to he did say, that all that his first-class fitter had lost as a result of the accident was the difference of earning power of a first-class fitter as compared with an ordinary fitter. Moreover, he would have found a very good reason why his first-class fitter's chance of obtaining employment or his power of earning wages should be treated as different from that of a man who had all his life been an average fitter. Nor could his final statement with reference to the employer's guarantee of the labour market have been made. If the Lord Justice had realized what Lord Macnaghten's subsequent judgment discloses, that it was his fitter's incapacity for work as a first-class fitter that was the concern of the statute; that it was for his loss of wages in that work and for nothing else that he was entitled to compensation; that the average earnings from "suitable" work with which his fitter might, in certain circumstances, be charged was work suitable not to a second-class fitter but to

a first-class fitter, the Lord Justice must, as I think, have realized that his illustration, with his judgment founded upon it, disappeared.

At any rate, I reach the conclusion that the judgment of the majority of the Court in the *Cardiff* case (*supra*) was—certainly as applied to a case like the present, where trade depression affected the "suitable" employment only—erroneous, and that the correct decision was that enunciated by the Master of the Rolls at p. 1014 in words applicable also to the present case : "I cannot think that the workman ought to have his compensation reduced merely on the ground that he is physically able to do a different kind of work, which, in truth, cannot be procured." And this brings me to the second question raised on the appeal, namely whether the insertion of section 16 in the Act of 1923 is not the equivalent of a legislative recognition that the principle of the *Cardiff* case (*supra*) now applies to clause 3 of the First Schedule.

My Lords, this question has never before been raised in any case. It is raised now, and, in your Lordships' House too, for the first time. It is true that the respondents, not having been called upon in the Court of Appeal, had no opportunity of raising it there. But they might have taken the point in their printed case and they did not. It was, for the first time, sprung by Mr. Cave upon the House, and, I suspect, also upon the appellant, in the opening speech for the respondents. In the result your Lordships are called upon to decide a question of far-reaching importance unassisted either by the views of the Court of Appeal upon it or by any fully matured reply of the learned counsel for the appellant. In these circumstances I have considered the point so raised as carefully as I could and I have reached the conclusion, with real misgiving due to the fact that it is not the conclusion of all your Lordships, that the point now taken is not tenable.

First of all, my Lords, I would observe that it is not lightly to be assumed that the legislature would accept in such a "workmen's" Act as that of 1923 a principle which bears so heavily, and so illogically, upon the workman as that of the *Cardiff* decision (*supra*) when applied to a case like the present. Even if the view of the learned arbitrator was mistaken as to the *Cardiff* case (*supra*) it is, nevertheless, I think, difficult for that case and those cases to which he refers to live quite comfortably together, and it cannot, I believe, in any sense be affirmed that the views of the majority in the *Cardiff* case (*supra*), as contrasted with those of the then Master of the Rolls, have ever commanded general acceptance. If this judgment has anything to be said for it, they did not deserve to do so. It is true that the *Cardiff* case (*supra*) has been not infrequently cited, but it has usually been referred to for Lord Justice Moulton's observations on the "odd lot," and any approval of the case subsequently expressed has been mainly of these observations. When not cited its principle has been more than once ignored.

But approaching now the point more closely it is clear first of all that section 16 was enacted *alio intuitu*. It has been held that the section was passed for the relief and advantage of the workman and has not the effect of depriving him of any rights that he had previously possessed, *Clarke v. United Steel Companies, Limited* (18 B.W.C.C., 525), *Crossley Bros., Limited v. Brunyee* (18 B.W.C.C., 320, at p. 325). Its main innovation is contained in the words "wholly or mainly" and it has by these words done two things. It has modified the previous rule that an arbitrator could not give compensation on the footing of total incapacity unless the workman could show that his failure to obtain employment was due *wholly* to his injury. It did, however, something much more immediately beneficial. By enabling, in certain cases, partial incapacity to be treated as total, the section preserved in being for the benefit of these cases, in respect of an accident occurring on or before December 31, 1903, the provisions of the Workmen's Compensation (War Additions) Acts which otherwise as to them would have been repealed by the Act of 1923.

But further, the section does not, in fact, even for its own purposes, embody the principle of the *Cardiff* case (*supra*). It requires the applicant to prove that his failure to obtain employment was a consequence "wholly or mainly" of the injury. Under the principle of the *Cardiff* case (*supra*) it was never necessary for the workman, in order to escape from its application to him, to show more than that his failure to obtain employment in suitable work was *to some extent* a consequence of the injury.

And, finally, and perhaps most important of all, let this be said. As a result of the Act of 1923, the new section, with the First Schedule to the Act of 1906, is now found in the same statute—clause 3 of the Schedule—quite unaltered. The section and the clause deal with different matters in quite different words, and while, so far as the section is concerned, common sense would seem to require that before a workman can be treated, even in a statute, as retaining a status of total incapacity, his failure to obtain employment should be attributable at least "mainly" to his injury, there is no reason, either in common sense or otherwise, why in order that an employer should remain liable to compensate a workman is respect of his "incapacity for work" it should be necessary for more to be shown than that other suitable work is not obtainable. In other words, neither in principle nor in outlook nor in result is there any connexion at all between the section and the clause.

In my judgment, therefore, this new and ingenious suggestion—the first and true invention, I cannot doubt, of the respondents' advisers—fails them on examination.

On the whole case I would be for allowing the appeal.

[Solicitors—Messrs. Smith, Rundell, Dods, and Bockett, for Messrs. Morgan, Bruce, and Nicholas, Pontypridd ; Messrs. Bell, Brodrick, and Gray, for Messrs. Kensholes and Prosser, Aberdare.]

Court of Appeal.
(Lord Hanworth, M.R., Sankey and Russell, L.JJ.)
1928.
July 30.

LAWRENCE v. GEORGE MATTHEWS (1924), LIMITED.*

Master and Servant—Compensation for injury by accident—Commercial traveller killed by falling tree while cycling on employers' business—Accident arising "out of . . . the employment."

A commercial traveller, motor-cycling along a road in the course of his employment, was struck by a falling tree and killed. The fall of the tree was caused by a violent wind which was blowing at the time. Compensation was

* Reported by G. T. Whitfield-Hayes, Esq., Barrister-at-Law.

awarded to the widow. On an appeal upon the ground that the accident occurred by reason of the gale, and did not arise out of his employment,

Held, by Sankey and Russell, L.JJ. (Lord Hanworth, M.R., dissenting), that as the deceased's employment brought him into a zone of danger the accident arose out of that employment, and the question what caused the fall of the tree was immaterial and irrelevant.

This was an appeal from a decision of the Judge of the Wolverhampton County Court, sitting as arbitrator under the Workmen's Compensation Act, 1925.

The following statement of facts is taken from the judgment of Lord Hanworth, M.R.

By an award dated May 25, 1928, the County Court Judge, sitting at Wolverhampton, decided in favour of the applicant, the widow of Victor Allen Lawrence, claiming as a dependant upon her husband who died on November 2, 1927, as the result of an accident.

Victor Allen Lawrence was a commercial traveller, and by an agreement made between him and George Matthews (1924), Limited, on February 11, 1927, he agreed to devote his whole time to the service of, and to use his best endeavours to obtain orders for, and promote the interests of, that company within the counties of Salop, Stafford, Chester, Worcester, and Hereford.

Lawrence was paid by a commission on orders introduced to the company and accepted by them, and he had to defray his own travelling expenses. Although the company did not prescribe his journeys, he travelled to the knowledge of the company on a motor-cycle with a side-car. He was engaged upon his duties as such traveller on October 28, 1927, and, while returning by road—apparently homewards—from a journey on which he had secured at least one order for the company, he was struck by a falling tree blown down by a severe gale which swept the district on that evening, and was so seriously injured that he died, as already stated.

Several points were taken by the employers at the arbitration. The Judge decided in the widow's favour that the deceased was a workman within the Act, that she was a dependant, and that the accident arose out of and in the course of his employment.

The appeal is taken on the one point, which was argued before this Court—namely, that the accident did not arise out of his employment.

The evidence proved that the employers did not interfere with or direct the deceased's journeys—he went on his business in his own way and at his own times. The County Court Judge held that the deceased died from an accident which, if not ordinary in the sense that it occurs every day, yet is not infrequent, and is the kind of accident to which anyone who travels on the road is exposed. He decided that it arose out of and in the course of the employment, and awarded compensation as stated.

The employers appealed.

Mr. Cave, K.C., and Mr. Collingwood, for the employers, contended that the accident arose purely and simply from the gale. It was not an ordinary risk of the highway and had nothing to do with the employment. Any person along the road might have met a similar piece of bad luck. It was something altogether outside the ordinary risks of a commercial traveller.

Mr. Edgar Dale and Mr. H. A. Tucker, for the applicant, submitted that the test governing these cases was whether the employment brought the deceased into the zone of danger. It was not easy to divide risks into exact categories. Whether a risk might or might not be expected, the test was whether it was incurred by reason of the employment.

Their Lordships reserved their decision, and delivered the following written judgments:—

Lord Hanworth, M.R., after stating the facts, as set out above, continued:—

The appellants claim that the accident was due to the forces of nature, and not to any duty, or obligation, or cause incidental to the employment, and that there was no evidence upon which the Judge could hold that it arose out of his employment.

There are a number of cases in which it appears to have been decided that employers are not liable to their workmen for accidents due to extraneous forces, unless the employment exposed the workman specially to risk, or placed him under a disability by depriving him of the means of protection from, or avoidance of, the dangers.

Thus in *Kelly v. Kerry County Council* (1 B.W.C.C., 194)—the case of a workman whose duty it was to clear out gullies, and who, while so engaged, was struck by lightning—it was held that his death was not occasioned by an accident arising out of his employment. But it was held otherwise in *Andrew v. Failsworth Industrial Society, Limited* (20 *The Times* L.R., 429; [1904] 2 K.B., 32), where a man was struck by lightning when engaged upon a scaffold in laying bricks at a height of over twenty feet from the ground. So in *Knyvett v. Wilkinson Bros., Limited* (87 L.J., K.B., 722), where a man was in course of his duty collecting debts, and was killed by a bomb from an enemy aircraft, in the street, that case was decided not to be within the Act; and a similar result was reached in *Allcock v. Rogers* (34 *The Times* L.R., 324; 11 B.W.C.C., 149) in the case of a potman killed by a bomb while cleaning a brass plate on a door in the street, for there was no evidence of any special danger attaching to the spot where the man was told to work. Then in *George Anderson and Co.* (1905), *Ltd. v. Adamson* (6 B.W.C.C., 874), in the case of a man who was placed by his work at a disadvantage in protecting himself, it was held that there was evidence to support a finding in favour of the workman.

In *Allcock v. Rogers* (*supra*) it is recognized that if a workman is called by his duty to face street risks he is protected by the Act if the accident arises from such risks—such as collisions—as indeed was decided in *Dennis v. White and Co.* (33 *The Times* L.R., 434; [1917] A.C., 479). Slipping on ice on the pavement while walking along it in the course of duty has been similarly accepted as giving a right to compensation —*White v. W. and T. Avery, Limited* (9 B.W.C.C., 663).

In *Allcock v. Rogers* (*supra*) Lord Wrenbury propounds a test. He says (11 B.W.C.C., at p. 153): "In the course of his employment this man was in a certain place. Was there any evidence that it was a dangerous place? For the present purpose a dangerous place is a place which as a place is dangerous, a place which has some quality which results in danger—for instance, that an insecure wall, which may fall, exists there." Applying the above rules to the case before them the House of Lords negatived the right of the potman to recover while in the street cleaning a brass plate.

In the present case it would seem that there was no evidence that the injury suffered by the deceased

was by an accident arising out of his employment, for it cannot be surmised in general that passing along a road involves a general risk of falling trees. Such an incident can occur, but only if the forces of nature are exercised upon the tree, and to such a mishap all persons in the locality are liable. Earl Loreburn, L.C., in *Warner v. Couchman* (28 *The Times* L.R., 58 ; [1912] A.C., 35, at p. 37), quoted with approval the following passage from the judgment of Lord Justice Fletcher Moulton in the same case in the Court of Appeal (27 *The Times* L.R., 121 ; [1911] 1 K.B., 351, at p. 357): "When we deal with the effect of natural causes affecting a considerable area, such as severe weather, we are entitled and bound to consider whether the accident arose out of the employment, or was merely a consequence of the severity of the weather to which persons in the locality, and whether so employed or not, were equally liable. If it is the latter it does not arise out of the employment."

Again (see *per* Lord Wrenbury in *Allcock v. Rogers, supra*), there is in the present case no evidence that the road where the accident occurred had any quality which made it more dangerous than any other place, unless the presence of trees adjacent to the road is to be deemed a standing danger. The only evidence was that danger resulted in the place, but not that it resulted from any danger connected with the road as a road.

To revert to *Dennis v. White and Co.* (*supra*), that decision appears to have turned upon this: that the boy was directed to go on a bicycle to fetch some plaster—the errand and the mode of executing, it were directed by his employers. "As soon as it is established that the work itself involves exposure to the perils of the streets the workman can recover for any injury so occasioned." See *per* Lord Finlay, L.C. ([1917] A.C., at p. 482). He adds that there are cases in which it is necessary to inquire whether the nature of the employment specially exposes a workman to a risk of a general nature. Where the risk is one shared by all men, whether in or out of the employment, in order to show that the accident arose out of the employment it must be established that special exposure to it is involved. In his closer application of that principle to the case before him Lord Finlay adds ([1917] A.C., at p. 482) : "But when a workman is sent into the street on his master's business, whether it be occasionally or habitually, his employment necessarily involves exposure to the risks of the streets, and injury from such a cause arises out of his employment."

Lord Parker ([1917] A.C., at p. 492), dealing with this class of cases, says that the contrast is between persons engaged in the particular employment, or under the particular circumstances, and persons not so employed or not so employed under the same circumstances.

Now in the present case Lawrence chose his own means of locomotion. He might have gone by train, or in some cases in a horse vehicle, or walked. I cannot find any evidence that he was directed to travel in a manner that necessarily exposed him to this risk.

Applying the reasoning in the speeches of the learned Lords in *Dennis v. White and Co.* (*supra*) it appears to differentiate the present case from the one before them. Owing to the manner, method, and time of transit, which Lawrence himself selected, he chanced to be on this road where, owing to the forces of nature which happened to be expended on the tree, he was involved in its fall and suffered injuries ; but there appears to be lacking any direction by his employers which caused him to be where he was at that moment.

Dennis v. White and Company (*supra*) was decided in June, 1917, after *Thom or Simpson v. Sinclair* (33 *The Times* L.R., 247 ; [1917] A.C., 127) (March, 1917), which is referred to in the Lord Chancellor's speech in *Dennis v. White and Company* (*supra*). The latter case, therefore, must be taken to embody the principles laid down in *Thom or Simpson v. Sinclair* (*supra*). The workgirl was obliged by the conditions of her employment to be in a particular building, which as a place was dangerous and subjected her to the risk of the particular accident that befell her. Certain principles are stated by Lord Haldane for guidance as to the interpretation of the Act.

He holds that the doctrine whereby it is said that an injury by accident arises out of the employment, if injury has been inflicted on the workman by any accident, such as something falling upon him, which would not have happened to him if his employment had not caused him to be in the place at which the accident occurred at the time of its occurrence, the place and time having thus been conditions of the result brought into existence by the employment, is too vague.

He says that a further condition seems to be required: a condition that the injury should have arisen, not merely by reason of presence in a particular spot at a particular time, but because of some special circumstance attending the employment of the workman there—in other words, his duty calling him there.

In his conclusion upon the facts of the case before him Lord Haldane said in *Thom or Simpson v. Sinclair* (*supra*), at p. 136: "It is enough that by the terms of her employment the appellant had to work in this particular shed and was in consequence injured by an accident which happened to the roof of the shed." Lord Shaw says (at p. 142) that the expression "'arising out of the employment' applies to the employment as such—to its nature, its conditions, its obligations, and its incidents. If by reason of any of these the workman is brought within the zone of special danger and so injured or killed, it appears to me that the broad words of the statute, 'arising out of the employment,' apply."

Once more testing the facts of the present case by the above rules, I do not find it possible to hold that Lawrence met with this accident by reason of any of the four facets of his employment above stated.

The cases of *Upton v. Great Central Railway Company* (40 *The Times* L.R., 204 ; [1924] A.C., 302), where the workman was sent from station "A" to station "B" to do some work, and on his return journey met with an accident at station "B"; and *Dennis v. White and Company* (*supra*), where the boy was sent on an errand on his bicycle in the streets, both contain a direction from the employers which is absent in the present case. Lawrence was where he was because of his own free-will. He laid out his plans and methods and times as he pleased. He rode homewards—if that is the right inference—when he did, and by the route that he selected, not under any orders of his employers. He was not acting in execution of any particular duty. If liability for the accident is laid upon his employers they would be rendered his insurers against almost any personal accident which he might incur during the whole subsistence of the agreement of February 11, 1927, except during such time as he was actually within his own curtilage.

Upon the question whether the point under discussion is one of fact or law, I think the observations of Lord Finlay, L.C., in *Dennis v. White and Company* ([1917] A.C., at p. 489) are conclusive. The question is whether, on the facts proved and recorded by the County Court Judge, the accident arose out of the employment. The Lord Chancellor adds that this is not a question of fact but of law. This Court can therefore review the conclusion of the County Court Judge, and, in my judgment, ought to do so. I must add that I have found the case a very difficult one, and have hesitated long in coming to the above conclusion ; more especially as I am not in accord with my colleagues. But I feel bound to express my opinion as above because of the absence of any direction or duty chargeable to the employers. On all other points, and on their general view of the law and the decisions, I am in agreement with them.

Lord Justice Sankey stated the facts, and continued :—

Quite early in the case-law on the subject two lines of authority began to emerge, among many others ; the first being where the personal injury to the workman was caused by an accident resulting from the forces of nature, the second being where the personal injury arose from the ordinary risks incurred by the workman when in a street or public place. With regard to the first of these cases—namely, accidents arising from the forces of nature—the rule appears to have been established that to enable the workman or his dependents to succeed it was necessary to prove that the position in which he was in the course of his employment subjected him to more than an ordinary risk of being injured.

This rule was established in the English, Irish, and Scottish Courts of Appeal in what may be conveniently classified as the lightning or heat cases, for example, in the English Court of Appeal in *Andrew v. Failsworth Industrial Society, Limited* (20 *The Times* L.R., 429 ; [1904] 2 K.B., 32), where the man was struck by lightning while working in a place where he was subject to more than an ordinary risk of being struck ; a similar case would be that of a steeplejack at the top of a steeple in a storm. The converse case, where the doctrine was established in the Irish Court of Appeal, was *Kelly v. Kerry County Council* (1 B.W.C.C., 194), where it was held that the workman in question, who was struck by lightning, was not in a position where he was subjected to more than an ordinary risk of being struck.

In the Scottish Court of Appeal there was the case of *Robson, Eckford and Company, Limited v. Blakey* (5 B.W.C.C., 536), where the bending position in which the workman was at the time when he was seized with heat apoplexy rendered him more liable in hot weather to be so seized. The liability for accidents arising from the ordinary risk of the streets and public places proceeds upon the ground that, where in the course of the man's employment he has to incur the risk of such accidents, personal injury caused by them arises out of his employment. This was the effect of the decision of the House of Lords in *Dennis v. White and Company* (33 *The Times* L.R., 434 ; [1917] A.C., 479).

Lord Finlay, L.C., says ([1917] A.C., at p. 482): "Where the risk is one shared by all men, whether in or out of employment, in order to show that the accident arose out of the employment it must be established that special exposure to it is involved. But when a workman is sent into the street on his master's business, whether it be occasionally or habitually, his employment necessarily involves exposure to the risks of the streets and injury from such a cause arises out of his employment. There is nothing in the Act about any necessity for showing that the employment involves an extra or special risk, and once it is clear, as it is in the present case, that the accident was the result of a risk necessarily incidental to the performance of the servant's work, all inquiry as to the frequency or magnitude of the risk is irrelevant. It is quite immaterial whether the nature of the employment involves continuous or only occasional exposure to the dangers of the streets. The frequency of the exposure to a risk increases the chance of the occurrence of an accident, but it has no bearing on the question whether it arose out of the employment, which is settled by the fact that such exposure was one of its terms, whether on many occasions or on one."

The lines and the reasons upon which all these decisions proceed are fairly clear, and, if one had to look to this class of decisions only, there might be a difficulty in supporting the judgment of the learned Judge in saying that the accident arose out of the employment of the deceased in this case ; for it is not easy to say that there was any evidence which showed that he was subjected to more than an ordinary risk of being struck by the falling tree. The difficulty in the present case is that it partakes in some measure of both classes of case above referred to—that is to say, that to some extent the street accident cases, and to some extent the forces of nature cases, apply to it. The principles applicable to it may to some extent be deduced from the case of *Thom or Simpson v. Sinclair* (33 *The Times* L.R., 247 ; [1917] A.C., 127).

That case was decided by the House of Lords on March 8, 1917, while *Dennis v. White and Company* (*supra*) was decided by the House of Lords on June 14, 1917. It appears to me that it made some modification in the reasoning and would probably have caused some difference in the results of cases decided previously to it.

With regard to the forces of nature cases, Lord Haldane in *Thom's* case (*supra*) seems to draw a distinction between an accident which arises directly, say, for the sake of example, from a stroke of lightning, and indirectly, in this sense that the stroke of lightning brings about a collapse of a wall which falls upon, and so causes the personal injury to, the workman. He says ([1917] A.C., at p. 136) : "Whether the remoter cause of the roof falling was the collapse of a neighbouring wall, or the falling down of some high adjacent building, or a stroke of lightning, seems to me immaterial in the light of this construction. It is enough that by the terms of her employment the appellant had to work in this particular shed and was in consequence injured by an accident which happened to the roof of the shed. The accident is one arising out of the employment not the less if ultimately caused by the fall of someone else's wall than if it had been caused by inherent weakness of the employer's roof."

With regard to the street accident cases the decision emphasizes the importance of locality in considering whether the accident arose in the course of a man's employment. Earlier in his judgment Lord Haldane says ([1917] A.C., at p. 134): "But where a man is ordered to work under a particular roof and that roof falls in on him, it is not clear that the accident belongs to that category. If the particular accident would not have happened to him had he not been employed to work under the particular roof, there seems to be nothing in the language of the Act which

precludes an occurrence from being held within it which satisfies the test proposed by the first of the alternative constructions modified to the extent I have suggested. The falling of the particular roof could only happen in one place, and the presence there of the person injured was due to the employment. The question really turns on the character of the causation through the employment which is required by the words 'arising out of.' Now it is to be observed that it is the employment which is pointed to as to be the distinctive cause, and not any particular kind of physical occurrence. The condition is that the employment is to give rise to the circumstance of injury by accident. If, therefore, the statute when read as a whole excludes the necessity of looking for remoter causes, such as some failure in duty on the part of the employer as a condition of his liability, and treats him rather as in a position analogous to that of a mere insurer, the question becomes a simple one. Has the accident arisen because the claimant was employed in the particular spot on which the roof fell? If so, the accident had arisen out of his employment, and there is no necessity to go back in the search for causes to anything more remote than the immediate event, the mere fall of the roof, and there need be no other connexion between what happened and the nature of the work in which the injured person was engaged."

Again Lord Shaw says ([1917] A.C., at p. 144): "My Lords, the cases above cited, nine in number, are in truth all what might be termed 'location' cases, and, although there is much variety of expression by the learned Judges, I think that they form a body of authority in support of the construction of the statute which your Lordships are now sanctioning. In each and all it was because of the nature, conditions, obligations, or incidents of the employment by which the workman was brought within the zone of special danger that injury by accident was pronounced to have arisen out of the employment."

And Lord Parmoor says ([1917] A.C., at p. 145): "The fact that the risk may be common to all mankind does not disentitle a workman to compensation if in the particular case it arises out of the employment. Any stranger walking along a road in a mine may be exposed to the risk of an accidental fall of coal, but this does not affect the claim of a miner who in the course of his duty, or to obtain access to his work, is unfortunately injured by such fall."

The view of the House of Lords in *Thom's* case (*supra*) may be summed up as follows: Where death or personal injury results directly from the operation of natural forces—*e.g.*, lightning—the dependents of a workman must show that the workman was specially exposed to such forces. Where the death or personal injury does not directly result from natural forces but from a cause which is induced by some natural force—*e.g.*, where lightning knocks down a wall or a storm blows down a tree, and the wall or tree, as the case may be, causes personal injury at any place to the workman—he is entitled to recover if he was at the time when he suffered the injury at the place during the course of his employment.

Applying these cases, I think it may be difficult to divide the question for determination into two watertight compartments, but, having regard to the fact that the tree fell upon the deceased I do not think it is necessary to go into the remoter question what caused the tree to fall upon him, and, having regard to the fact that the incidence of the man's employment brought him within the zone of special danger, I am of opinion that the Judge was right in finding that the accident arose out of and in the course of the employment, and that the appeal should be dismissed.

I need hardly say that I have reached this conclusion with great diffidence as my Lord, the Master of the Rolls, holds a contrary opinion, but I think we do not differ on the principles to be applied; his view is that there was no evidence upon which the County Court Judge could find as he did.

LORD JUSTICE RUSSELL stated the facts, and continued:—

The point whether the accident arose out of the employment, in view of the various authorities, occasions much difficulty. For an accident to arise out of the employment, some "causal relation" or "causal connexion" between the accident and the employment must be established. The difficulty is (1) to determine upon the authorities what character of causal relation or causal connexion is sufficient for this purpose, and (2) to decide whether the facts of a particular case establish a causal connexion of the character required.

Upon a consideration of the numerous decisions which were cited to us, the authorities to me seem to establish the following propositions:—

(1) If the accident results from a risk which is necessarily incident to the performance of the servant's work, the accident arises out of the employment; all inquiry as to the frequency or magnitude of the risk is irrelevant, and it makes no difference that members of the public face the same risk. That appears to me to be a correct statement of the decision of the House of Lords given in *Dennis v. White and Company* (33 *The Times* L.R., 434; [1917] A.C., 479) on June 14, 1917.

(2) If a workman is injured by an accident resulting from a risk to which everyone is subject, but of which it can be said that the workman runs more than the normal risk, the accident arises out of his employment because the abnormal risk was necessarily incident to the performance of his work. That appears to me a correct statement of the decision of the Court of Appeal in *Andrew v. Failsworth Industrial Society, Limited* (20 *The Times* L.R., 429; [1904] 2 K.B., 32), where a bricklayer in an elevated position on a scaffold was killed by lightning. The proposition also covers the decision in *George Anderson and Company* (1905), *Limited v. Adamson* (6 B.W.C.C., 874), where the necessity of the workman's adopting a stooping position at his work caused him to run more than the normal risk.

(3) If a workman is injured from an accident resulting from a risk to which every one is subject, but which is not necessarily incident to the performance of his work or to which he is not by his work abnormally subjected, the accident does not arise out of his employment.

Thus in *Knyvett v. Wilkinson Brothers, Limited* (87 L.J., K.B., 722), where a traveller was injured by a bomb while walking in the street in the discharge of his duties, it was held that the accident did not arise out of his employment; and in *Allcock v. Rogers* (34 *The Times* L.R., 324; 11 B.W.C.C., 149) the House of Lords held (on March 21, 1918) that where a potman was injured by a bomb while standing in the street cleaning his employer's brass door-plate the accident did not arise out of his employment.

In cases falling within the first two propositions sufficient causal relation or causal connexion is established between the accident and the employment.

In cases falling within the third proposition it is *not*.

The case now under appeal before us cannot, I think, be brought within either of the first two propositions. The risk of being injured or killed by a falling tree was not necessarily incident to the performance of Mr. Lawrence's work, nor can it be said to be a risk to which he was abnormally subjected. The case would fall within the third proposition, and, but for the element to which I now call attention, the accident could not be said to arise out of his employment.

The authorities seem to me, however, to establish a fourth proposition—namely, that sufficient causal relation or causal connexion between the accident and the employment is established if the man's employment brought him to the particular spot where the accident occurred, and the spot in fact turns out to be a dangerous spot. If such a locality risk is established, then the accident arises out of the employment—even though the risk which caused the accident was neither necessarily incident to the performance of the man's work nor one to which he was abnormally subjected.

This fourth proposition is based upon the decision of the House of Lords in *Thom or Simpson v. Sinclair* (33 *The Times* L.R., 247 ; [1917] A.C., 127) on March 8, 1917. In that case a girl employed as a fish curer was at her work in a shed. A wall on adjoining land and belonging to a third party collapsed from its own instability on to the shed ; the shed in consequence fell in and injured the girl. It was held by the House of Lords that the accident arose out of the employment. The causal relation was established because the employment having brought the worker to the particular spot exposed her to the danger which, in fact, existed there. Lord Haldane discusses the matter in detail. He considers the two rival contentions as to the meaning of the words "arising out of the employment." The first contention was expressed thus ([1917] A.C., at p. 133): "According to one of them the language used is satisfied if injury has been inflicted on the workman by any accident, such as something falling on him, which would not have happened to him if his employment had not caused him to be in the place at which the accident occurred at the time of its occurrence, the place and time having thus been conditions of the result brought into existence by the employment. Once establish this and it is said that no further causal connexion need be sought." That contention, Lord Haldane says, is too vague. It seems that this must be so ; otherwise I think the two bomb cases, *Knyvett v. Wilkinson Brothers, Limited* (*supra*) and *Allcock v. Rogers* (*supra*), would have been decided differently. The second contention ran thus ([1917] A.C., at p. 134) : "Unless . . . . the accident was due to something the man was doing in the course of his employment or was exposed to as a peculiar danger by the nature of his employment, the conditions required by the statute are not fulfilled." That, according to Lord Haldane, is too strict. Indeed it seems clear that if the second contention were correct the decision in *Thom or Simpson v. Sinclair* (*supra*) itself must have been the other way. The contention adopted and applied in *Thom or Simpson v. Sinclair* (*supra*) appears to me to be this: If the accident has occurred to the workman by reason of the employment bringing about his presence at the particular spot and so exposing him to a danger which in fact is proved to exist at that particular spot, then the accident arises out of his employment. That I believe to represent correctly the effect of the decision in *Thom or Simpson v. Sinclair* (*supra*). I will refer to some passages in the speeches and then apply their language to the present case.

Lord Haldane says ([1917] A.C., at p. 135):—

"Has the accident arisen because the claimant was employed in the particular spot on which the roof fell? If so, the accident has arisen out of the employment and there is no necessity to go back in the search for causes to anything more remote than the immediate event, the mere fall of the roof, and there need be no other connexion between what happened and the nature of the work in which the injured person was engaged."

Later he says ([1917] A.C., at p. 136) :—

"If, therefore, the language in question were to be construed upon principle and apart from authorities, I should be prepared to hold that it was satisfied where, as here, it has been established as a fact that it was as arising out of her employment that the appellant was under the roof by the falling in of which she was injured. Behind the fact that the roof fell we cannot go. . . . . Whether the remoter cause of the roof falling was the collapse of a neighbouring wall, or the falling down of some high adjacent building, or a stroke of lightning, seems to me immaterial in the light of this construction. It is enough that by the terms of her employment the appellant had to work in this particular shed and was in consequence injured by an accident which happened to the roof of the shed. The accident is one arising out of the employment, not the less if ultimately caused by the fall of some one else's wall than if it had been caused by inherent weakness of the employer's roof."

Lord Shaw says ([1917] A.C., at p. 142) :—

"In short, my view of the statute is that the expression 'arising out of the employment' is not confined to the mere 'nature of the employment.' The expression, in my opinion, applies to the employment as such—to its nature, its conditions, its obligations, and its incidents. If by reason of any of these the workman is brought within the zone of special danger and so injured or killed, it appears to me that the broad words of the statute 'arising out of the employment' apply."

At page 144—after citing numerous authorities—he says : "My Lords, the cases above cited, nine in number, are in truth all what might be termed 'location' cases, and although there is much variety of expression by the learned Judges, I think that they form a body of authority in support of the construction of the statute which your Lordships are now sanctioning. In each and all it was because of the nature, conditions, obligations, or incidents of the employment by which the workman was brought within the zone of special danger that injury by accident was pronounced to have arisen out of the employment."

In this case of Mr. Lawrence the accident arose because his employment took him to the particular spot on which the tree fell. The immediate event, the fall of the tree, is sufficient ; there need be no other connexion between what happened and the nature of Mr. Lawrence's work. It was as arising out of his employment that Mr. Lawrence was within reach of the tree by the falling of which he was injured. Behind the fact that the tree fell we cannot go ; whether the remoter cause was a violent wind seems immaterial. By reason of the nature, conditions, obligations, or incidents of Mr. Lawrence's employment he was brought within the zone of special danger ; the accident to him which happened there arose out of his employment.

In *Allcock v. Rogers* (*supra*) the House of Lords, on March 21, 1918, affirmed the decision of the Court of Appeal on the ground that there was no locality risk. *Thom or Simpson v. Sinclair* (*supra*) was cited and the principle of that decision is embodied in and indeed specifically referred to in the speech of Lord Wrenbury when he uses this language (11 B.W.C.C., at p. 153): "In the course of his employment this man was in a certain place. Was there any evidence that it was a dangerous place? For the present purpose a dangerous place is a place which as a place is dangerous—a place which has some quality which results in danger—for instance, that an insecure wall, which may fall, exists there. If this is so, it does not matter whether anyone knew or anticipated that it was dangerous. . . . This place was not by any evidence shown to be a dangerous place ; there is no evidence that it had any quality which made it more dangerous than any other place. The only evidence is that danger resulted in the place, but not that it resulted from any danger connected with the place as a place. *Thom or Simpson v. Sinclair* (*supra*), in my opinion, does not apply."

The result is that, in my opinion, Mr. Lawrence's case fails within my fourth proposition, which is founded on *Thom or Simpson v. Sinclair* (*supra*). His employment brought him to a danger spot—*i.e.*, a spot which had a quality which resulted in danger. The lurking danger was the tree. The danger materialized—*i.e.*, the tree fell. The cause of the fall is immaterial and irrelevant. The falling tree caused injury to him ; this was an accident which arose out of his employment.

The appeal fails.

[Solicitors—Messrs. Berrymans, for Mr. T. Haynes Duffell, Birmingham ; Mr. W. Addiscott, for Mr. B. Burrell Davis, Cannock.]

K.B. Div.
(Lord Hewart, C.J., Acton and Branson, JJ.) 1928. July 18.

THOMAS v. HUGHES.*

Education—School attendance—Employment—Refusal of exemption—Non-attendance—Extenuating circumstance—Education Act, 1921 (11 and 12 Geo. V., c. 51), Part IV.

Where an education authority has refused an application for exemption from school attendance on the ground of employment the fact of such employment can be neither a "reasonable excuse" for non-attendance, nor an extenuating circumstance entitling the justices under the Probation of Offenders Act, 1907, to dismiss a summons against the parent.

This was a case stated by justices for the county of Carnarvon.

On February 20th, 1928, an information was preferred by John Owen Thomas, school attendance officer (hereinafter called "the appellant"), against William Hughes (hereinafter called "the respondent") for that he on February 13th, 1928, and on divers other dates within six months then passed, then being the parent of a certain child named Robert Hughes of not less than five years, nor more than 15 years of age, to wit, of the age of 15 years or thereabouts, who was then residing with him, unlawfully and without reasonable excuse did neglect and omit to cause such child to attend school as required by the bye-laws duly made by the education authority, the Carnarvonshire County Council.

The justices were of opinion that the case against the respondent had been proved, but having regard to the extenuating circumstances under which the offence was committed and in exercise of the discretion vested in them under and by reason of the Probation of Offenders Act, 1907, they deemed it inexpedient to inflict any punishment and dismissed the said information and made no order as to costs.

The following facts were admitted or proved :

(a) That the respondent's child, the said Robert Hughes, was born on February 2nd, 1913, and was therefore at the date of the hearing of the said information 15 years of age.

(b) That bye-laws made by the Education Committee of the Carnarvonshire County Council on July 31st, 1924, under Part IV. of the Education Act, 1921, which bye-laws were still in force, provided (*inter alia*) as follows:—

"2. The parent of every child of not less than 5 nor more than 15 years of age shall cause such child to attend school, unless there be a reasonable excuse for non-attendance.

"3. Any of the following reasons shall be a reasonable excuse, namely :—

(a) That the child is under efficient instruction in some other manner.

(b) That the child has been prevented from attending school by sickness or any unavoidable cause.

(c) That there is no Public Elementary School open which the child can attend within three miles measured according to the nearest road from the residence of the child, provided that, where the Local Education Authority provides suitable means of conveyance for a child between a reasonable distance of its home and a Public Elementary School such reason shall not be a reasonable excuse.

"6. Every parent who shall not observe, or shall neglect, or violate these bye-laws, or any of them, shall, upon conviction, be liable to a penalty not exceeding, with the costs, twenty shillings for each offence."

(c) That between January 24th, 1928, and February 13th, 1928, respectively, there had been twenty-nine openings of the school and that the said Robert Hughes had not attended school once between the said dates.

(d) That on four occasions application had been made under section 46 (3) of the Education Act, 1921, to the appropriate authority on behalf of the said Robert Hughes for exemption from the obligation to attend school but that such applications had been refused on the ground that no financial hardship was thereby involved.

(e) That provision had been made at the Llandudno Central School for the education of children over 14 years of age.

On behalf of the appellant it was contended :—

(a) That although the said Robert Hughes attained the age of 15 years on February 2nd, 1928, he was bound under the said bye-laws and under section 138 (1) of the Education Act, 1921, to attend school until the conclusion of the current term in or about the first week in April, 1928.

(b) That the discretion of the education authority or committee of the said County Council to grant or refuse exemption from the obligation to attend school was absolute and unfettered.

* Reported by J. W. HALL, Esq., Barrister-at-Law.

(c) That the education authority and not the justices were the judges of whether exemption should be granted on the ground of employment or otherwise.

(d) That the justices could not entertain the question whether the fact of employment was a reasonable excuse.

On behalf of the respondent it was stated, but not on oath, that the said Robert Hughes was employed by Messrs. W. H. Smith and Son, stationers, of Llandudno, at wages amounting to 15s. a week, and that they were prepared to employ him permanently if the applications for exemption made on his behalf were successful. It was also stated that two previous informations against the respondent for similar offences had been dismissed on payment of costs.

The question upon which the opinion of the Court was desired was whether the justices, upon the above statement, came to a correct determination and decision in point of law.

Mr. Pritt, K.C., and Mr. Ralph Sutton appeared for the appellant ; the respondent was not represented.

The LORD CHIEF JUSTICE (LORD HEWART) [after reading the case].—It has been held more than once, and it has been made perfectly clear, that where there has been under the Education Acts a refusal by the education authority to grant exemption, that refusal is not to be defeated by any circuitous method. Otherwise the Act would be so much waste paper. If there has been a refusal to exempt on the ground of employment, it is not a reasonable excuse for non-attendance that there is employment in fact. Here it is not said that there was a reasonable excuse, but that there were extenuating circumstances. What are said to be the extenuating circumstances ? There is not in the case a hint of anything that gives an answer to that question unless it be paragraph 8 : "On behalf of the respondents it was stated, but not on oath, that the said Robert Hughes was employed by Messrs. W. H. Smith and Son, stationers, of Llandudno, at wages amounting to 15s. a week and that they were prepared to employ him permanently if the applications for exemption made on his behalf were successful. It was also stated that two previous informations against the respondent for similar offences had been dismissed on payment of costs." If that standard were applied to the Act it would follow that where exemption on the ground of employment had been refused, the fact of employment might nevertheless be an extenuating circumstance. The very thing which was rejected as a ground of exemption might be used to nullify the refusal.

One may feel sympathy with the parent who is not allowed to accept for his son employment at a commencing wage of 15s. a week with a prospect of permanent employment, but that reasoning cannot prevail. The words of Mr. Justice Avory in *Rennie v. Boardman* (78 J.P., 420) are very much in point : "The question was whether the respondent had failed in the duty of causing the child to attend school, and the fact that he had sent the child to work at a mill could not be an excuse for not causing it to attend. By sending it to the mill he was preventing it from attending school. How that could be an excuse I do not see. The whole of these contentions were bad, and there only remains the question whether the justices were warranted by section 1 (1) of the Probation of Offenders Act, 1907, in dismissing the information. This Court has more than once pointed out that that provision does not justify the justices in saying that a particular offence created by statute is in their opinion a trifling offence and that therefore they will not put the law in force, but it only justifies them in saying that when an offence has been committed the circumstances make that particular offence an offence of a trifling nature." Here the justices have thought fit to employ the phrase, not that the offence was of a trivial nature, but that they had regard to the extenuating circumstances. Upon analysis the extenuating circumstances seem to be no more than a restatement of the fact that the offence was committed. The boy was not at school because he was at work ; he ought not to have been at work because he ought to have been at school. There were no materials on which the justices could dismiss this under the Probation of Offenders Act, 1907, but the amount of the penalty is, of course, entirely for them.

Mr. JUSTICE ACTON.—I agree.

Mr. JUSTICE BRANSON.—I agree.

[Solicitors—Messrs. T. D. Jones and Co. for Mr. David G. Jones, Carnarvon.]

K.B. Div.
(Lord Hewart, C.J., Acton and Branson, JJ.)
1928.
July 20.

LAKE v. CRONIN.*

Revenue — Bookmaker's certificate — Clerk of bookmaker—Carrying on the business—Requirement of certificate—Finance Act, 1926 (16 and 17 Geo. V., c. 22), ss. 15 (1) (*b*), 17 (1) (*b*), 18.

This was a case stated by York justices.

Mr. Charles William Joseph Cronin, the respondent, an officer of Customs and Excise, preferred an information under the Finance Act, 1926, against the appellant, Mr. Lawrence Lake, alleging that on October 5, 1927, he carried on at York the business of a bookmaker without having in force a proper certificate as required by section 15 (1) (*b*) of the Finance Act, 1926, whereby, and by force of section 17 (1) (*b*) of the Act, the appellant was liable in respect of that offence to an Excise penalty of £100. On February 20, 1928, the justices convicted the appellant and fined him £10.

The following facts were proved or admitted :—Mr. Lewis Lindley Hunt was a bookmaker and had taken out a bookmaker's certificate and also an entry certificate in respect of premises at 43B, Fosgate, York. On October 5, 1927, the appellant, Mr. Lake, was in sole charge of the premises and was seen by the respondent to receive two or three bets by telephone and enter them on a slip. The respondent asked Mr. Lake to take out a bookmaker's certificate, and Mr. Lake requested a week's grace to find out if that was necessary. On October 22, 1927, Mr. Lake received a letter from the Commissioners of Customs and Excise telling him that a certificate was necessary.

No one else was employed at the premises except Mr. Lake. He was engaged by Mr. Hunt on a weekly salary basis and had sole charge of the premises in the absence of Mr. Hunt, who attended race meetings in other towns during the flat racing season. At one period Mr. Hunt had been absent for ten days consecutively.

Mr. Lake admitted that, though he had no authority to open new accounts with any person in the

* Reported by J. W. HALL, Esq., Barrister-at-Law.

absence of Mr. Hunt, he could accept personal bets and bets over the telephone up to a certain amount fixed by Mr. Hunt; and that he had no responsibility. He answered the telephone and recorded messages.

The respondent contended that Mr. Lake was a bookmaker within the meaning of section 18 of the Finance Act, 1926, which provides:—

"The expression 'bookmaker' means any person who, whether on his own account or as servant or agent to any other person, carries on, whether occasionally or regularly, the business of receiving or negotiating bets. . . ."

He said that if Mr. Lake were receiving or negotiating bets for Mr. Hunt, which was admitted, and had no certificate, he should be convicted.

The appellant contended that a person, simply because he took instructions over the telephone in regard to transactions and wrote them on a piece of paper, could not be carrying on the business of a bookmaker under the definition. The Act did not say that a person who received or negotiated bets should hold a certificate, but a person who carried on the business of receiving or negotiating bets. Mr. Lake said that he was merely taking bets as Mr. Hunt's clerk.

Reference was made to a circular on Betting Duty, No. 129, issued by the Commissioners of Customs and Excise on October 11, 1926. Paragraph 5 read:—

"Persons employed by and under the direction of bookmakers in a merely subordinate and mechanical capacity (such as clerks, telephone operators, messengers, &c.) are not required to take out personal certificates."

The justices found that Mr. Lake did carry on the business of a bookmaker without having in force a proper certificate, and fined him as stated.

Mr. Birkett, K.C., and Mr. Bertram Long appeared for the appellant; the Solicitor-General (Sir Boyd Merriman, K.C.) and Mr. W. Bowstead for the respondent.

The Lord Chief Justice (Lord Hewart), in giving judgment, recapitulated the facts found in the case, read the definition of "bookmaker," and said that it was not easy to imagine a much more comprehensive definition. A bookmaker was a person who carried on the business of receiving and negotiating bets. It mattered not whether he carried it on on his own account or as the servant or agent of some other person, or whether he did so occasionally or regularly. What were the suggested limits of that definition? Mr. Birkett had suggested two: (1) that the business referred to must be the business of the bookmaker himself; in other words, that the business which the person accused was carrying on must be his own and not another's. That seemed manifestly at variance with the plain words of the definition. How could it be his own business if he were carrying it on as a servant or agent? (2) That if the person accused were to fulfil the character of one carrying on the business as servant or agent, he must be clothed with an authority so utterly complete as to be, as it were, the duplicate original of the owner, and that when a restriction of any sort was imposed he could not be said to be carrying on the business.

Reference had been made to the cases of *Robbins v. Commissioners of Inland Revenue* (36 *The Times* L.R., 542; [1920] 2 K.B., 677) and *Graham v. Lewis* (5 *The Times* L.R., 21; 22 Q.B.D., 1). With all respect to Mr. Birkett's ingenious argument, these cases, instead of helping it, were directly opposed to it. They depended on the fact that though the persons there concerned were carrying on the business it was not their own business. That was not merely not this case but the direct opposite of it, because the Act here involved said, "whether on his own account or as servant or agent to any other person."

It was said that it was untrue to describe Mr. Lake, though he was in sole charge, as carrying on the business of receiving or negotiating bets because the total business of receiving or negotiating bets would require the authority of the principal. The case of *Robbins v. Commissioners of Inland Revenue* (*supra*) showed how ill-founded that contention was.

It might be that there were persons employed in a bookmaker's office in a merely subordinate or mechanical capacity, and it would be manifestly incorrect to say that they were carrying on the business. When the justices had correctly apprehended the definition it became a question of fact in each case for them to say whether the person charged was carrying on the business. Circumstances might be various, but on these materials it was impossible to say that there was not evidence, and ample evidence, on which they might hold that Mr. Lake was carrying on the business.

If the argument on behalf of the appellant were to prevail it would follow that a bookmaker could employ any number of servants in different parts of the United Kingdom and so long as he told them that no account must exceed, say, half a million pounds, none of them would require a certificate, The appeal would be dismissed.

Mr. Justice Acton and Mr. Justice Branson agreed.

[Solicitors—Messrs. J. Tickle and Co., for Messrs. Pullan, Davies, and Co., Leeds; the Solicitor of Customs and Excise.]

K.B. Div.
(Lord Hewart, C.J., Acton and Branson, JJ.)
1928. July 20.

HART v. HUDSON BROS., LIMITED.*

Weights and Measures—False or unjust weight—Charge against principal—Actual offender—Right of principal to bring before the Court—Weights and Measures Act, 1878 (41 and 42 Vict., c. 49), s. 25—Sale of Food (Weights and Measures) Act, 1926 (16 and 17 Geo. V., c. 63), ss. 12 (5), 15 (1).

By s. 12 (5) of the Sale of Food (Weights and Measures) Act, 1926, "Where an employer or principal is charged with an offence against this Act, he shall be entitled on information duly laid by him, and on giving not less than three days' notice of his intention to the prosecution, to have any other person whom he charges as the actual offender brought before the Court at the time appointed for hearing the charge, and, if after the commission of the offence has been proved, the employer or principal proves to the satisfaction of the Court that he had used due diligence to enforce the execu-

* Reported by J. W. Hall, Esq., Barrister-at-Law.

tion of this Act, and that the said other person had committed the offence in question without his consent, connivance or wilful default, the said other person shall be summarily convicted of the offence and the employer or principal shall be exempt from any penalty. . . ."

Held, that as s. 15 (1) of the above Act provides that it is to be construed as one with the Weights and Measures Acts, 1878 to 1926, a defendant who is charged under s. 25 of the Act of 1878 with having a false or unjust weight for the sale of food may adopt the procedure provided for by s. 12 (5) of the Act of 1926.

This was a case stated by Surrey Justices.

The respondents were charged at Sutton on an information laid by the appellant on behalf of the Surrey County Council with unlawfully having in their possession for use for trade a scale which was false or unjust contrary to section 25 of the Weights and Measures Act, 1878. The following facts were proved or admitted:—

On February 3, 1928, an inspector of weights and measures visited the premises of the respondents at 40, High-street, Sutton, where he examined a 20lb. price-computing weighing instrument which the repondents had in their possession for use for trade. It was found to be ½oz. deficient in weight. The respondents' manager in the shop agreed that that was so and at the inspector's request adjusted the scale with a balancing key. The inspector retested the instrument and found it correct.

The respondents gave notice to the appellant under section 12 (5) of the Sale of Food (Weights and Measures) Act, 1926, that they intended to bring before the Court at the time appointed for hearing the charge their servant, the manager of the branch shop where the offence had been committed, as the person whom they charged as the actual offender.

At the hearing, after the commission of the offence had been proved to the justices' satisfaction, the respondents proved to the justices' satisfaction that they had used due diligence to enforce the execution of the Weights and Measures Act, 1878, and that the manager had committed the offence in question without their consent, connivance, or wilful default.

The appellant contended that the procedure under section 12 (5) of the Sale of Food (Weights and Measures) Act, 1926, was not applicable to proceedings in respect of offences under the Weights and Measures Act, 1878, but that such procedure was applicable only to proceedings under the Act of 1926.

The respondents contended that as by section 15 (1) of the Act of 1926 that Act was to be construed as one with the Weights and Measures Acts, 1878 to 1926, the provisions of section 12 (5) of the Act of 1926 must be read into each and all of the earlier Acts, and that the safeguards therein provided were applicable in respect of offences under all the Weights and Measures Acts.

The justices found that the respondents had committed the offence charged and were of opinion that the provisions of section 12 (5) of the Act of 1926 were applicable to the proceedings and dismissed the information against the respondents. They also dismissed the case against the manager on payment of costs.

By section 12 (5) of the Sale of Food (Weights and Measures) Act, 1926:—

"Where an employer or principal is charged with an offence against this Act he shall be entitled on information duly laid by him, and on giving not less than three days' notice of his intention to the prosecution, to have any other person whom he charges as the actual offender brought before the Court at the time appointed for hearing the charge, and if, after the commission of the offence has been proved, the employer or principal proves to the satisfaction of the Court that he had used due diligence to enforce the execution of this Act, and that the said other person had committed the offence in question without his consent, connivance, or wilful default, the said other person shall be summarily convicted of the offence and the employer or principal shall be exempt from any penalty. . . ."

By section 15 (1) "This Act . . . shall be construed as one with the Weights and Measures Acts, 1878 to 1926. . . ."

Mr. H. D. Roome appeared for the appellant; Mr. Montgomery, K.C., and Mr. Walter Frampton for the respondents.

The Lord Chief Justice (Lord Hewart), in giving judgment, read the case and said that it might be observed that the scale was unsatisfactory not in the sense that it was wrongly constructed or inherently defective but only that it was not adjusted with a key, a defect quickly remedied in the presence of the inspector.

The argument for the appellant was that the procedure under the later statute was not applicable to proceedings taken under the earlier statute. But Mr. Roome, with his usual candour, had directed their attention to the two cases which were most against him. In *Canada Southern Railway Company v. International Bridge Company* (8 App. Cas., 723) Lord Selborne said, at p. 727:—

"It is to be observed that those two Acts are to be read together by the express provision of the seventh and concluding section of the amending Act; and therefore we must construe every part of each of them as if it had been contained in one Act, unless there is some manifest discrepancy making it necessary to hold that the later Act has to some extent modified something found in the earlier Act."

"Some manifest discrepancy." Applying that canon, he could not think that there was any manifest discrepancy in giving in the case here charged the kind of possible defence to the employer which was contemplated in section 12 (5). See *Willingale v. Norris* (25 *The Times* L.R., 19; [1909] 1 K.B., 57) *per* Lord Alverstone, C.J., and Mr. Justice Bigham.

In the present case it was expressly provided that "This Act shall be construed as one with the Weights and Measures Acts, 1878 to 1926." Construing the Act in that way, he found it impossible to say that the justices were wrong in law, and he had come to the conclusion, not without hesitation at first, that the appeal failed. The words of Mr. Justice Walton in *Willingale v. Norris* (*supra*) were applicable:—

"This case is a striking example of the difficulties and obscurity which arise from legislation by reference to and incorporation of other statutes."

Mr. Justice Acton and Mr. Justice Branson agreed.

[Solicitors—Messrs. Wyatt and Co., for Mr. Dudley Aukland, Kingston; Messrs. Smith and Hudson.]

K.B. Div.
(Lord Hewart, C.J., Acton and Branson, JJ.)
1928.
July 17.

ADAMS v. CAMFONI.*

Licensing—Supply of liquor otherwise than during the permitted hours — Unauthorized act of errand boy—Non-liability of licensee—Licensing Act, 1921 (11 and 12 Geo. V., c. 42), s. 4 (*a*).

A boy of 16, employed by the holder of an off-licence solely as an errand boy, supplied two bottles of whisky to a customer in his employer's absence, at a time when the premises were not open for business, and outside the permitted hours. He had never at any time been authorized to sell to or supply customers.

Held, that he was not a servant or agent of the employer within the meaning of s. 4 (*a*) of the Licensing Act, 1921, so as to make the employer liable under that section for supplying intoxicating liquor otherwise than during the permitted hours.

This was a case stated by the Stipendiary Magistrate for Cardiff.

On January 18, 1928, the respondent, Alfonso Camfoni, was charged by an information preferred against him by the appellant, Sidney Adams, an inspector of police, for that he, on December 14, 1927, did unlawfully by his agent supply in certain licensed premises, to wit, 168, Bute-street, Cardiff, during hours other than permitted hours, certain intoxicating liquor, to wit, whisky, to be consumed off the premises, contrary to section 4 of the Licensing Act, 1921. And one Ernest John was charged by the said information with unlawfully aiding and abetting the said Alfonso Camfoni in the commission of the said offence. Both charges were dismissed.

By section 4 of the Licensing Act, 1921, no person shall, except during the permitted hours (*a*) either by himself or by any servant or agent sell or supply to any person in any licensed premises or club any intoxicating liquor to be consumed either on or off the premises. It is enacted by section 18 of the said Act that the provisions of the said Act with respect to licensed premises apply to any premises or place where intoxicating liquors are sold by retail under a licence.

The following facts were proved or admitted :—

(*a*) On December 14, 1927, Alfonso Camfoni was the holder of a spirit dealer's Excise licence authorizing him to sell spirits by retail for consumption off the premises at 168, Bute-street aforesaid.

(*b*) On that date one Angel Gonzalez was in the employment of the said Alfonso Camfoni as manager of the wine and spirit business carried on by the said Alfonso Camfoni at 168, Bute-street aforesaid.

(*c*) On the same date the said Ernest John, a youth 16 years of age, was in the employment of Camfoni as an errand or messenger boy in connexion with the said business carried on at 168, Bute-street aforesaid.

(*d*) On December 14, 1927, whilst the said premises were not open for business, the said Ernest John, in the temporary absence of the said Alfonso Camfoni and of the said Angel Gonzalez, served one George Paris with two bottles of whisky from the stock at 168, Bute-street, during hours other than permitted hours.

(*e*) The said Ernest John received no payment from the said George Paris in respect of the said bottles of whisky.

(*f*) The said Alfonso Camfoni, when charged on the same day with the offence mentioned in the information, replied : "John has no right to supply anything at all."

No evidence was adduced by the appellant that the said Ernest John:

(*a*) Had any express or implied authority either on December 14 or at any other time to sell or supply to any customer any part of the stock in 168, Bute-street aforesaid.

(*b*) Had been left in charge of the said premises 168, Bute-street aforesaid, either on that day or at any other time.

(*c*) Had ever taken any part in selling or supplying to customers any of the stock in the said premises.

(*d*) Had ever been employed by the said Alfonso Camfoni or the said Angel Gonzalez in any capacity other than that of a mere errand or messenger boy.

It was contended on behalf of the said Alfonso Camfoni that the mere fact that the said Ernest John was employed by the said Alfonso Camfoni as an errand or messenger boy was not by itself sufficient to make the said Ernest John an agent or servant of the said Alfonso Camfoni within the meaning of section 4 of the Licensing Act, 1921, and that in the absence of any other evidence the information against the said Alfonso Camfoni ought to be dismissed.

It was contended on behalf of the appellant that the mere fact that the said Ernest John was employed by the said Alfonso Camfoni as an errand or messenger boy was by itself sufficient to make the said Ernest John an agent or servant of the said Alfonso Camfoni within the meaning of section 4 aforesaid, and that even in the absence of any other evidence the said Alfonso Camfoni and the said Ernest John ought to be convicted.

The Stipendiary Magistrate was of the opinion that the contention on behalf of Alfonso Camfoni was correct and that there was no evidence from which he could infer that the said Ernest John was acting as an agent or servant of the said Alfonso Camfoni. He therefore dismissed the said information against the said Alfonso Camfoni and the said Ernest John.

The question for the opinion of the Court was whether upon the above statement of facts the said determination was correct and what should be done in the premises.

Mr. P. B. Morle appeared for the appellant ; Mr. Joshua Davies, for the respondent, was not called upon.

The Lord Chief Justice (Lord Hewart) said, in giving judgment, that it was not clear from the case whether in supplying the whisky John was honestly, though mistakenly, intending to serve his master's interests by supplying one of his master's customers on credit, or whether he was dishonestly taking his master's goods and supplying them to some person for his own ends.

It had been contended that the effect of section 4 of the Licensing Act, 1921, was to put the respondent in the position of an insurer warranting that neither he nor anybody else on his premises should sell or supply his goods otherwise than during permitted hours. He could not find any such meaning in the section. The section was said to be taken from the

* Reported by J. W. Hall, Esq., Barrister-at-Law.

Defence of the Realm Regulations, but it did not appear that the interpretation contended for had been put upon those words ; on the contrary, in *Williams v. Pearce* (32 *The Times* L.R., 285 ; 80 J.P., 229), in which they were dealt with, Lord Reading, C.J., said, at page 232 : "This regulation only carries out the policy manifested in the Licensing Acts. It is nothing new. I cannot find in the authorities to which our attention has been called anything which assists the contention for the respondent on this point," and this was concurred in by Mr. Justice Sankey and Mr. Justice Low. On the evidence the magistrate came to the conclusion that what happened was something of an accidental kind done by one who, no doubt, in a sense was in the respondent's service, but against orders and not in the course of performing any duty delegated to him. It was impossible to say that the magistrate was wrong, and the appeal must be dismissed.

MR. JUSTICE ACTON and MR. JUSTICE BRANSON concurred.

[Solicitors—Messrs. Smith, Rundell, Dods and Bockett, for Mr. C. G. Brown, Town Clerk, Cardiff ; Messrs. Pritchard, Englefield and Co., for Messrs. W. B. Francis and Son, Cardiff.]

K.B. Div.
(Lord Hewart, C.J., Acton and Branson, JJ.)
1928. July 25.

REX v. MINISTER OF TRANSPORT—EX PARTE LEICESTERSHIRE AND WARWICKSHIRE ELECTRIC POWER COMPANY.*

Electricity—Special order—Revocation—Electricity Supply Act, 1919 (9 and 10 Geo. V., c. 100), s. 26.

The power conferred by s. 26 of the Electricity Supply Act, 1919, to amend or revoke by special order any provisional order made under the Electric Lighting Acts and confirmed by Parliament does not include a power to amend or revoke a special order by another special order.

This was a rule *nisi* for a *certiorari* calling upon the Minister of Transport to show cause why a Special Order made by the Electricity Commissioners, entitled the Polesworth and District Electricity Special Order, 1927, should not be quashed on the ground that clause 12 thereof was *ultra vires* the Commissioners. The prosecutors were the undertakers under the Atherstone and District Electricity Special Order, 1922, and they complained that clause 12 of the Polesworth Order illegally purported to revoke the Atherstone Order so far as concerned a considerable part of their district, and to substitute the Pooley Hall Colliery Co., Ltd. as undertakers in the district so transferred. All other relevant facts and the material statutory provisions are set out fully in the judgment of the Lord Chief Justice.

The Solicitor-General (Sir Boyd Merriman, K.C.) and Mr. W. Bowstead showed cause for the Minister of Transport ; Mr. Tyldesley Jones, K.C., and Mr. Arthur Moon, K.C., appeared for the Pooley Hall Colliery Co. ; Mr. W. A. Greene, K.C., and Mr. Frederick W. Wallace supported the rule.

* Reported by J. W. HALL, Esq., Barrister-at-Law.

THE LORD CHIEF JUSTICE.—This is an order *nisi* for a writ of *certiorari* to be directed to the Minister of Transport to remove into this Court a Special Order made by the Electricity Commissioners under the Electricity Supply Acts, 1882 to 1926, in respect of the rural district of Tamworth in the counties of Stafford and Warwick, part of the rural district of Atherstone in the county of Warwick, and parts of the rural districts of Ashby and Market Bosworth in the county of Leicester, and entitled "The Polesworth and District Electricity Special Order, 1927," upon the ground that clause 12 of that Order is *ultra vires* the Commissioners. Clause 12 of that Order is in these terms : "As from the commencement of this Order so much of the Atherstone and District Electricity Special Order, 1922, as relates to (a) the Rural District of Tamworth (b) the Parishes of Baddesley Ensor, Baxterley and Polesworth in the Rural District of Atherstone and (c) the part of the Parish of Grendon in the last-mentioned rural district which is situate to the north-west of the south side of Whittington Lane and its continuation as a footpath from Whittington to the Atherstone to Pinwall Road shall be and is hereby revoked." To express that matter in a more concise and simpler form, it comes to this, that in 1922 a Special Order, under the Electricity Supply Act, 1919, and the other Electricity Acts, was made which is called "The Atherstone and District Electricity Special Order." In 1927 another Order was made under these statutes called "The Polesworth and District Electricity Special Order," and the area of country comprised in the later Order coincides, as to part of it, with the area of country comprised in the first Order, and the second Order not only enables persons there mentioned to exercise powers in that area, but excludes from that area the persons who had been given certain powers in it by the previous Order ; in other words, the later Order to a certain extent revokes the previous Order ; and the question is whether there is power, by one Special Order under these Acts, to revoke another Special Order.

The question is one of jurisdiction, and it is said, on the part of the applicants for the rule, that in making this Order, so far as it amounts to a revocation of the previous Order—in other words, to the extent of clause 12 of the new Order—the Electricity Commissioners have exceeded their jurisdiction. The question is whether that allegation is correct.

One naturally asks first of all : Where is it said that the power is to be found which enables the Electricity Commissioners to do that which they have done? The answer to that question is that it is said the power is to be found in section 26 of the Electricity Supply Act, 1919. That section provides as follows: "Anything which under the Electric Lighting Acts may be effected by a Provisional Order confirmed by Parliament may be effected by a Special Order made by the Electricity Commissioners and confirmed by the Board of Trade under and in accordance with the provisions of this Act, or by an Order establishing a joint electricity authority under this Act, and references in those Acts and the Electric Lighting (Clauses) Act, 1899, to Provisional Orders shall be construed as including references to such Special Orders and Orders as aforesaid, except that the paragraphs numbered (1) to (4) of section four of the Electric Lighting Act, 1882, shall not apply to such Special Orders and Orders as aforesaid, and any Provisional Order made under the Electric Lighting Acts and confirmed by Parliament may be amended or revoked by any such Special Order or Order as aforesaid." There

follows a proviso that "a Special Order made in pursuance of the powers conferred by this section shall be laid before each House of Parliament, and shall not come into force unless and until approved, either with or without modifications, by a resolution passed by each such House." Now it is apparent at once that that section does not in terms confer a power to revoke a Special Order. It does in terms confer a power to revoke a Provisional Order, and it is said that the result is grotesque, if, while a Provisional Order, which needed confirmation by Act of Parliament, may be revoked by Special Order, a Special Order in its turn cannot be revoked except by Act of Parliament.

Now it is quite obvious that this section is a difficult section, and it is deplorable that a matter which could have been made perfectly clear should have been left in any sort of obscurity, especially where the subject matter of the controversy involves such a question as taking away or diminishing acquired rights. It therefore becomes a little important to see how this question of revocation stood before the passing of the Act of 1919. In section 3 of the Electric Lighting Act of 1882 it was indeed provided that "The Board of Trade may from time to time license any local authority as defined by this Act, or any company or person, to supply electricity under this Act for any public or private purposes within any area," subject to certain provisions; and one of these provisions was that "the licence may make . . . regulations"—among other things—"for the revocation of the licence where the licensees fail to perform such duties." As the matter stood, therefore, at that time the revocation of a licence depended upon the power to revoke expressed in the licence, but by section 4 of that Act it was provided that "The Board of Trade may, from time to time, by Provisional Order authorize any local authority, company, or person to supply electricity for any public or private purposes within any area, without requiring such consents as are required to the granting a licence under this Act, and for such period, whether limited or unlimited, as the Board of Trade may think proper, but in all other respects subject to the like provisions as in the last section contained with respect to licences, and subject also to the following provisions." To pause there for one moment, the employment of that phrase "in all other respects subject to the like provisions as in the last section contained with respect to licences" involved this result, that the Provisional Order, in its turn, might contain a provision about the revocation of the licence if and when the licensees failed to perform their duties. But over and above the power to be derived from what was expressed in the Provisional Order itself the power of revocation depended upon two things: one was the remaining four paragraphs of section 4; and it is not until one comes to the last of these paragraphs that anything is said about revocation; and it is to be observed that everything which section 4 of this statute has to say upon the topic of revocation is contained in the last of these four paragraphs: "Any Act confirming any Provisional Order granted in pursuance of this Act may on the application of the undertakers thereby authorized to supply electricity, be repealed, altered, or amended by any subsequent Provisional Order granted by the Board of Trade and confirmed by Parliament." In other words, subject to anything that might be expressed in the Provisional Order akin to that which might have been expressed in a licence on the topic of revocation, revocation could take place only so far as this section is concerned on the application of the undertakers thereby authorized to supply electricity. If it was desired to repeal or to alter or to amend the Provisional Order by a subsequent Provisional Order, it needed initiative on the part of the undertakers.

Then came the Electric Lighting (Clauses) Act of 1899, and that Act provided by section 1 among other things that certain provisions contained in the Schedule to the Act "shall be incorporated with and form part of every Provisional Order made by the Board of Trade after the commencement of this Act under the Electric Lighting Acts, save so far as they are expressly varied or excepted by the Order"; and when one turns to these clauses one finds that the topic of revocation is dealt with in two ways. First of all, where the clauses are dealing with particular matters such as area of supply or security and accounts, there is a provision for revocation of the Order in case of proved default; and again, under the heading "Revocation of Special Order" in clause 63, it is provided that if certain events happen and certain matters are ascertained and certain inquiries are made the Board of Trade may revoke the Order; more than that, it is provided by clause 66 that in addition to the other powers which the Board of Trade shall have in that behalf they may revoke the Special Order at any time with the consent and concurrence of the undertakers.

So the matter stood when the Electricity Supply Act of 1919 was passed. What is it that emerges from an examination of these various provisions? It is this: that except where some express provision in the Order itself had been fulfilled or where some specified default had been made or suffered, or where the undertakers themselves made application, there was no power to alter, revoke, or amend the Provisional Order by any subsequent Order, subject, of course, always to what may be done in this respect as in so many other respects by an Act of Parliament.

Now it is in these circumstances that section 26 of the Electricity Supply Act of 1919 in terms provides that "any Provisional Order made under the Electric Lighting Acts and confirmed by Parliament may be amended or revoked by any such Special Order or Order as aforesaid." It is said if "any Provisional Order," why not "any Provisional or Special Order"? Speaking for myself, I cannot help thinking the answer is obvious, in the form of another question. If the words "any Provisional Order may be revoked" were intended to mean "any Provisional Order or any Special Order may be revoked," why in the name of lucidity and fairness did the Act not say so? It has not said so. What has it said? The section says, "Anything which under the Electric Lighting Acts may be effected by a Provisional Order confirmed by Parliament may be effected by a Special Order made by the Electricity Commissioners and confirmed by the Board of Trade under and in accordance with the provisions of this Act, or by an Order establishing a joint electricity authority under this Act." Now what do these words mean? These words are manifestly a reference to section 6 and section 7 of the Act, which provide for the setting up of joint electricity authorities; but section 7 of the Act, dealing with the Order giving effect to schemes for that purpose, expressly provides by subsection 3, "an Order made under this section may be altered by a subsequent Order made, confirmed, and approved in like manner as the original Order." In other words, it took an express statutory provision to enable the Electricity Commissioners to alter, by a subsequent Order, an Order made under that section.

To return to section 26 of the Electricity Supply Act, 1919, the section continues in these words:

"and references in those Acts and the Electric Lighting (Clauses) Act, 1899, to Provisional Orders shall be construed as including references to such Special Orders and Orders as aforesaid, except"—now comes this remarkable exception—"that the paragraphs numbered (1) to (4) of section four of the Electric Lighting Act, 1882, shall not apply to such Special Orders and Orders as aforesaid, and any Provisional Order made under the Electric Lighting Acts and confirmed by Parliament may be amended or revoked by any such Special Order or Order as aforesaid." Now what is the paragraph numbered (4) of section 4 of the Electric Lighting Act of 1882? That is the paragraph which confers the power to repeal, alter, or amend. It is said that that is the paragraph which contains the limitation upon the power. True; but the very same paragraph as that which contains the limitation is the paragraph, and the only paragraph, which confers the power; in other words, the power was given and was given only subject to the limitation. What is it? "Any Act confirming any Provisional Order granted in pursuance of this Act may, on the application of the undertakers thereby authorized to supply electricity, be repealed, altered, or amended by any subsequent Provisional Order granted by the Board of Trade and confirmed by Parliament." Take that paragraph away and what becomes of the power of revocation? It is said that if you take that paragraph away you leave the power of revocation but you take away the limitation upon it. That seems to me to be an impossible contention. It would be strange indeed if the meaning of this section were, when it says that paragraph (4) shall be of no application, that the true intention of the legislature was that the power of revocation should indeed remain, but should remain unfettered by the condition which is therein imposed. Then one comes to the last words of section 26 of the Act of 1919: "and any Provisional Order made under the Electric Lighting Acts and confirmed by Parliament may be amended or revoked by any such Special Order or Order as aforesaid"; "any Provisional Order," but not "any Special Order." It is said that that is a grotesque result, a ludicrous result, but is it? What was the position? Here was an expert body of Electricity Commissioners being set up. May it not well have seemed right and proper that that body, bringing its skill and judgment to bear upon previously existing Provisional Orders, should have power to revoke them? May it not well have been thought that the Electricity Commissioners should have the power of starting with a slate which they had made to their satisfaction clean; but there is nothing inconsistent in making a provision of that kind with the further provision that what the Electricity Commissioners then proceed to write upon the slate must remain, subject, of course, to the overriding power of Parliament to alter and amend or revoke by statute. I see myself no repugnancy between the notion that the Electricity Commissioners should have power to revoke antecedent Orders and prepare the ground for their own work and the notion that when they proceed to their work there must be finality about it, subject to a statute. But what is the contrary suggestion? As the argument has proceeded, it has been borne in upon me with increasing force that the contrary suggestion, however ingeniously and however persuasively it may be put, involves nothing less than this: that we are to read into section 26 of the statute, which expressly confers the power to revoke a Provisional Order, the power which is not there to revoke a Special Order, and that too although the revocation of the Special Order may involve the result that individuals are deprived of valuable rights which they have acquired at no small expense. It is answered that at any rate the section does contain the power to revoke a Provisional Order. So it does, but that power is expressed in clear words. Where are the words conferring the power to revoke a Special Order? I am extremely reluctant to think that this Act or any Act of Parliament ought to be construed as depriving individuals of acquired rights of value to them, without using unambiguous language for that purpose. If this statute had said, as it might have said, "any Provisional or Special Order made under the Acts may be amended or revoked by Special Order," there would have been no controversy. The section would have contained two more words than it does, and that is the extent of the variation. These two words are not there, and as they are not there, I am not prepared to read this section as if they were there.

In my opinion, therefore, the Electricity Commissioners, in making this Order, have exceeded their jurisdiction, and I think that this rule ought to be made absolute.

MR. JUSTICE ACTON.—I agree.

MR. JUSTICE BRANSON.—I agree.

[Solicitors—The Treasury Solicitor; Messrs. Lewin, Gregory, Torr, Durnford, and Co.; Messrs. Linklaters and Paines.]

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ANNUAL DIGEST *of*

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AGRICULTURAL HOLDINGS] agreement—Agricultural Holdings Act, 1923 (13 and 14 Geo. V., c. 9), s. 16, Schedule II., paragraph 15].—An agreement in regard to costs between parties to a dispute under the Agricultural Holdings Act, 1923, made before an arbitration thereunder, is valid and enforceable, despite the fact that no reference to such agreement is made at the hearing. *Prince v. Haworth* (21 *The Times* L.R., 402; [1905] 2 K.B., 768) applied.—MANSFIELD v. ROBINSON AND OTHERS [Div. Ct.] 518

Notice to quit — Statutory provision for 12 months' notice — Whether applicable to notice by tenant — Agricultural Holdings Act, 1923 (13 and 14 Geo. V., c. 9), s. 25 (1)].—By s. 25 (1) of the Agricultural Holdings Act, 1923, "Notwithstanding any provision in a contract of tenancy to the contrary, a notice to quit a holding shall be invalid if it purports to terminate the tenancy before the expiration of 12 months from the end of the then current year of tenancy. . . ." Held, that this provision applies to a notice to quit given by a tenant, as well as to a notice to quit given by a landlord.—FLATHER v. HOOD [Charles, J.] 698

AGRICULTURE — Minimum wage — Deduction —Sale of milk by employer—Set-off price—Agricultural Wages (Regulation) Act, 1924 (14 and 15 Geo. V., c. 37), s. 8 and Orders thereunder].—By an Order of the Agricultural Wages Board minimum rates of wages were fixed for workers in agriculture in the county of Dorset, and by an Order of the Dorset Agricultural Wages Committee it was provided that no benefit or advantage, except a cottage or board and lodging, should be reckoned as payment of wages in lieu of payment in cash. The respondent employed a cowman under a contract in pursuance of which the employer supplied one pint of new milk daily, which was to be purchased by the cowman. The purchase price, amounting to 1s. 5½d. per week, was deducted from the cowman's wages. The justices found that the arrangement was "in the nature of a sale," and that the cowman "in effect" paid the purchase price by the deduction, but as there was, apart from his allowance, a deficiency in the wages paid they convicted the respondent. On a case stated as to the deduction of the price of milk, Held, that the respondent had done the very thing

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which the statute and Orders forbade. The set-off of the purchase price was simply reckoning the milk as payment in lieu of payment in cash.—HAYES v. CURTIS [Div. Ct.] 619

ALIENS—Hotel—Registration—British subject—Statement of nationality—Duty of hotel-keeper—Aliens Order, 1920 (S.R. and O., 1920, No. 448), Art. 7 (3)].—It is the duty of the keeper of a hotel, under Art. 7 (3) of the Aliens Order, 1920, to require every person staying at his hotel, whether known to him to be a British subject or not, to sign a statement of nationality. If that statement shows the guest to be an alien the keeper must then require the particulars which aliens have to furnish under the Order.—WILLIAMS v. JONES [Div. Ct.] 511

Treaty of Peace — "Nationals of the former Kingdom of Hungary"—Charges on British property—Acquiring nationality of Allied or Associated Power—Satisfaction of the Administrator—Jurisdiction of the Court—Treaty of Peace (Hungary) Order, 1921, ss. 1 (ix.), 2].—By s. 1 (ix.) of the Treaty of Peace (Hungary) Order, 1921, it is provided that "All property rights and interests within his Majesty's Dominions or Protectorates belonging to nationals of the former Kingdom of Hungary at the date when the treaty came into force"—namely, on July 26, 1921, shall be charged as therein mentioned. *Held* (following *Rothschild v. Administrator of Austrian Property* [1923] 2 Ch., 542), that the expression "nationals of the former Kingdom of Hungary" meant persons who were Hungarian nationals on October 28, 1918, when the Austrian Empire ceased to exist by the deposition of the Emperor. Where the Administrator of Hungarian property has determined that he is not satisfied that a national of the former Kingdom of Hungary has acquired *ipso facto* in accordance with the provisions of the Treaty the nationality of an Allied or Associated Power, the Court cannot go behind the decision of the Administrator and investigate the question anew. *Baron Reizes de Marienwert v. Administrator of Austrian Property* (40 *The Times* L.R., 698; [1924] 2 Ch., 282) followed.—GROEDEL v. ADMINISTRATOR OF HUNGARIAN PROPERTY [Romer, J.] 65

See also TREATY OF PEACE.

ANIMALS—Damage by—Liability of owner—*Scienter*—Horse accustomed to bite other horses—Whether owner liable for bite of human being].—The fact that the owner of a horse knew that it was accustomed to bite other horses is not sufficient to establish his liability for its biting a human being.—GLANVILLE v. SUTTON AND CO., LIMITED [Div. Ct.] 98

Disease—Notice to police constable—Knowledge of owner—Diseases of Animals Act, 1894 (57 and 58 Vict., c. 57), ss. 4, 52, 57.—WILSON v. YATES [Div. Ct.] 25

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ARBITRATION—Contract—Assignment to third party of moneys due thereunder—Arbitration clause—Whether transferred to third party—Power of arbitrator—Effect of assignment—Law of Property Act, 1925 (15 Geo. V., c. 20), s. 136 (1)].—Building contractors assigned to a bank all moneys due and to become due to them under the building contract, which contained an arbitration clause, and the proper notice of the assignment was served on the building owners. Disputes having arisen regarding a claim by the contractors for compensation and extra payment, recourse was had to arbitration. Held, that the arbitrator had jurisdiction to entertain the arbitration since the contractors' rights under the arbitration clause did not constitute a "legal" or "other remedy" for the debt within the meaning of s. 136 (1) of the Law of Property Act, 1925, and were, therefore, not passed and transferred to the bank by the assignment. Held, further, that the arbitrator had to consider not merely the terms of the contract within the limits of the document but also the application and enforcement of those terms having regard to the whole legal position which the parties had created, including the relinquishment by the contractors themselves by the assignment of their right to claim the debt, and, therefore, that he must make his award in favour of the building owners.—COTTAGE CLUB ESTATES, LIMITED v. WOODSIDE ESTATE COMPANY (AMERSHAM), LIMITED [Wright, J.] 20

See also AGRICULTURAL HOLDINGS and PRACTICE.

BANKERS—Bank-note—Accidental destruction—Partial reconstruction of fragments—Oral evidence—Number of note missing—Liability of bank on note—Bills of Exchange Act, 1882 (45 and 46 Vict., c. 61), s. 64].—The Board held that in the special circumstances of the case it was possible for the holder in due course of a bank-note, which by accident had been almost destroyed, to establish by means of the fragments, assisted by oral evidence, a claim against the bank for the amount due upon the note, although the number of the note was missing.—HONG-KONG AND SHANGHAI BANKING CORPORATION v. LO LEE SHI [P.C.] 233

Bill of exchange — Acceptors' direction to pay — Indorsement in blank — Payment to payees' servant — Fraud of servant — Claim by payees against bank—Bills of Exchange Act, 1882 (45 and 46 Vict., c. 61), s. 59].—The plaintiffs having sold goods drew a bill on the purchasers for the price. The purchasers accepted the bill and instructed their bank, the defendants, to pay the bill when due. When the bill became due the plaintiffs indorsed it in blank and handed it to their cashier to take to their own bank for collection. The cashier, however, took it to the defendants and asked for cash over the counter. He received the cash and absconded. In an action for negligence, breach of trust, and conversion, Held,

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(1) that, as there was no privity of contract between the plaintiffs and the defendants, there was no duty to take care and therefore no negligence ; (2) that the defendants did not hold the money in trust for the plaintiffs; (3) that, as the demand for payment over the counter was, on the evidence, not so unusual that the defendants' suspicions ought to have been aroused, the defendants were protected by s. 59 of the Bills of Exchange Act, 1882 ; and that therefore the action failed.—AUCHTERONI AND CO. v. MIDLAND BANK, LIMITED [Wright, J.] .. 441

Crossed cheques — Protection of collecting banker — No title in customer — Receipt of payment by banker without negligence—Failure of banker to discharge burden of proof—Bills of Exchange Act, 1882 (45 and 46 Vict., c. 61), s. 82].—One L., who was the chief accountant at a branch of the plaintiff bank, and who had authority to sign cheques on their behalf, fraudulently drew upon another bank crossed cheques, signed by himself and by another official of the branch, and payable to the defendant bank, and, by letters written on the plaintiffs' office paper, he instructed the defendant bank to credit the proceeds to the joint account of himself and his wife at the defendant bank. The defendant bank collected the amounts of the cheques and credited them to the account, and L.'s practice was to draw the amounts out quickly after paying them in, and observation of the account would have shown that L. was engaged in extensive speculations through stockbrokers. In an action for damages for conversion of the cheques the defendants relied on the provisions contained in s. 82 of the Bills of Exchange Act, 1882. Held, that although the cheques were payable to the defendants themselves they had received payment "for a customer" within the meaning of the section and had done so in good faith, but that they had not discharged the burden of proving the absence of negligence on their part, and the plaintiffs were entitled to recover. Decision of MacKinnon, J. (44 *The Times* L.R., 165), affirmed with a variation.—LLOYDS BANK, LIMITED v. CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA [C.A.] 534

BANKRUPTCY—Goods in possession, order, or disposition of bankrupt—Goods on sale or return or on approval—Custom of antique furniture trade].—IN RE FORD—EX PARTE HAWKINS [Clauson, J.] 643

Married woman — Carrying on a business —Series of speculative transactions—Bankruptcy Act, 1914 (4 and 5 Geo. V., c. 59), s. 125 (1)].—A series of speculative transactions by a married woman, if they involve the making of genuine commercial contracts extending over a long period of time, may amount to carrying on a "business" within s. 125 (1) of the Bankruptcy Act, 1914, so as to make her subject to the bankruptcy laws.—IN RE

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A BANKRUPTCY NOTICE (No. 292 OF 1928) [C.A.] 533

Reputed ownership — Sale of goods by bankrupt before bankruptcy — Delivery not taken by purchaser up to date of receiving order — Claim by trustee of bankrupt's property—"Possession, order or disposition of bankrupt"—Bankruptcy Act, 1914 (4 and 5 Geo. V., c. 59), s. 38 (*c*)].—A bankrupt, before the date of the receiving order, had sold goods and handed over delivery orders to the purchasers upon payment made. The purchasers did not attempt to take delivery of the goods, which were in store, until after the date of the receiving order, and delivery was then refused upon the instructions of the bankrupt's agent, by whom the delivery orders had been signed, and in whose name and to whose order the goods were held in store. The trustee in bankruptcy claimed that the goods were in the possession, order, or disposition of the bankrupt at the date of the receiving order, and formed part of the bankrupt's estate. Held, on the facts, that the goods were not in the possession, order, or disposition of the bankrupt in such circumstances that he was the reputed owner thereof within the meaning of s. 38 (*c*) of the Bankruptcy Act, 1914 and did not form part of the bankrupt's estate.—SIMEONS AND COMPANY, LIMITED v. SHARLES [Finlay, J.] 310

BILLS OF SALE—Validity—Contemporaneous mortgage forming part of contract—"Defeasance or condition"—Bills of Sale Act, 1878 (41 and 42 Vict., c. 31), s. 10 (3)].—By the Bills of Sale Act, 1878, s. 10 (3) : "If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void." The grantor of a bill of sale for £1,000 was being pressed by other creditors and approached the grantee for further financial assistance. It was ultimately agreed that the grantee should pay the other creditors a sum of £600, and receive a new bill of sale from the grantor for £1,600, the old bill being cancelled. Contemporaneously with the bill of sale, and as part of the same bargain, a mortgage instrument was executed by way of collateral security. The bill of sale provided for the repayment of the principal "on the 24th day of December next," and the mortgage instrument provided as follows : "The mortgagor . . . covenants with the mortgagee to pay him on the 24th day of December next the sum of £1,600 . . . and it is hereby agreed and declared that (subject to the right of the mortgagee to require repayment of the said principal sum on the 24th day of December next according to the foregoing covenant by the mortgagor or at any time thereafter)

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the principal money secured shall be repaid by instalments of not less than £20" on agreed dates. Held, that the clause in the mortgage providing for the repayment of the principal by instalments was not a variation of the terms of the bill of sale so as to amount to a "defeasance or condition" within the mischief of section 10 (3) of the Bills of Sale Act, 1878. Decision of the Divisional Court (44 *The Times* L.R., 210) affirmed.—STOTT AND ANOTHER v. SHAW AND LEE, LIMITED [C.A.] 493

CANADA — Alberta — Escheated lands — *Bona vacantia*—Title of Crown—Whether in right of Dominion or of Province—Alberta Act, 1905 (Dominion statute) (4 and 5 Edw. VII., c. 3), s. 21—Ultimate Heir Act, 1921 (Alberta statute), s. 1].—In Alberta the Crown possesses the title to escheated lands in right of the Dominion and to *bona vacantia* in right of the province. The Ultimate Heir Act, 1921, of the province of Alberta, so far as it affects the Crown's right to escheated lands, is *ultra vires* by reason of section 21 of the Alberta Act, 1905, of the Dominion Parliament. Decision of the Supreme Court of Canada ([1927] S.C.R., 136) affirmed.—ATTORNEY-GENERAL FOR ALBERTA v. ATTORNEY-GENERAL FOR CANADA [P.C.] 651

Alberta — Legislation — Validity — Taxation —Whether direct or indirect — British North America Act, 1867 (30 and 31 Vict., c. 3), s. 92 (2)—Mine Owners Tax Act, 1923 (Alberta statute)].—The Mine Owners Tax Act, 1923 (Alberta statute), is invalid as it imposed indirect and not direct taxation within s. 92 (2) of the British North America Act, 1867. Decision of the Supreme Court of Canada ([1927] S.C.R., 257) affirmed.—REX v. CALEDONIAN COLLIERIES, LIMITED [P.C.] 622

Bankruptcy Acts — Collocation of judicial hypothecs].—Under the Canadian Bankruptcy Acts a judicial hypothec upon real estate of a debtor resulting from the registration of a notice under Article 2121 of the Civil Code of Quebec is intended to be postponed to a subsequent authorized assignment for the benefit of his creditors. The Bankruptcy Act, 1919, to that effect is within the legislative authority of the Dominion Parliament under the British North America Act, 1867.—ROYAL BANK OF CANADA (ATTORNEY-GENERAL FOR QUEBEC INTERVENANT) v. LARUE AND OTHERS [P.C.] 267

Nova Scotia — Constitution — Legislative Council — Number of members — Tenure of office — British North America Act, 1867 (30 and 31 Vict., c. 3), ss. 88, 92 (1)—Revised Statutes of Nova Scotia of 1923, c. 2, ss. 1, 2].—The Lieutenant-Governor of Nova Scotia, acting by and with the advice of the Executive Council of Nova Scotia, has power to appoint in the name of the Crown so many members of the Legislative Council of Nova Scotia that the total number would (*a*) exceed 21 or (*b*) exceed the total number at

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the union mentioned in section 88 of the British North America Act, 1867. The membership of the Council is not limited in number. The tenure of office of members of the Council appointed before May 7, 1925, is during the pleasure of his Majesty the King represented in that behalf by the Lieutenant-Governor of Nova Scotia acting by and with the advice of the Executive Council of Nova Scotia.—ATTORNEY-GENERAL FOR NOVA SCOTIA v. LEGISLATIVE COUNCIL OF NOVA SCOTIA [P.C.] 1

Nova Scotia—Direct taxation—Powers of Province — Business tax — Imposition on owner of premises instead of occupier—Whether a "direct" tax—British North America Act, 1867 (30 and 31 Vict., c. 3), s. 92 (2)].—The respondent estate, which was the owner of premises in Halifax, Nova Scotia, and leased them to the Crown for use as a railway ticket office, the Crown to pay the business taxes (if any), was assessed and rated to business tax on the premises by the Halifax Corporation under its charter, which provided that the owner of property let to the Crown or to any person exempt from taxation should be deemed to be in occupation thereof and should be assessed and rated to business tax if the premises were used for business purposes. Held, that the tax was a direct tax falling within the authority of s. 92 (2) of the British North America Act, 1867, and was therefore within the powers of the Province under that section.—HALIFAX CORPORATION v. FAIRBANKS' ESTATE [P.C.] 5

Ontario — Education — Roman Catholic separate schools — British North America Act, 1867 (30 and 31 Vict., c. 3), s. 93 (1)].—By s. 20 of the Separate Schools Act, 1863, of the United Province, afterwards divided into the provinces of Ontario and Quebec, "Every separate school shall be entitled to a share in the fund annually granted by the Legislature of this Province for the support of common schools, and shall be entitled also to a share in all other public grants, investments and allotments for common school purposes now made or hereafter to be made by the province or the municipal authorities. . . ." By section 26 the Roman Catholic separate schools were to be subject to such inspection as might be directed from time to time by the Chief Superintendent and were to be "subject also to such regulations as might be imposed from time to time by the Council of Public Instruction for Upper Canada." The above Act was in force at the passing of the British North America Act, 1867, which provided by s. 93: "In and for each province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions:—(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union. . . ." Held, that as the legislation in force in 1867, in what is now the province of Ontario, pro-

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vided for the regulation of separate schools and did not entitle them to a fixed share in the fund granted for the support of common schools, the Legislature of the province of Ontario was not precluded by s. 93 (1) of the Act of 1867 from passing Acts for the regulation of separate schools and for the alteration of the amount of their share in the educational grant. Judgment of the Supreme Court of Canada ([1927] S.C.R., 637) affirmed.—TINY TOWNSHIP ROMAN CATHOLIC SEPARATE SCHOOLS TRUSTEES v. THE KING [P.C.] 611

Quebec — Legislation — Validity — Education — Rights of Jews — British North America Act, 1867 (30 and 31 Vict., c. 3), s. 93—3 Edw. VII., c. 16 (Quebec statute), ss. 1, 6].—By s. 1 of the Quebec statute, 3 Edw. VII., c. 16, "Any provision to the contrary notwithstanding, in all the municipalities of the Province, whether governed, as regards schools, by the Education Act or by special laws, or by the Education Act and by special laws, persons professing the Jewish religion shall, for school purposes, be treated in the same manner as Protestants, and, for the said purposes, shall be subject to the same obligations and shall enjoy the same rights and privileges as the latter." By s. 6, "After the coming into force of this Act, the children of persons professing the Jewish religion shall have the same right to be educated in the public schools of the Province as Protestant children, and shall be treated in the same manner as Protestants for all school purposes." Held, that under s. 93 of the British North America Act, 1867, this statute is not *ultra vires* except so far as it would enable persons professing the Jewish religion to be appointed to the Protestant Board of School Commissioners in the City of Quebec or Montreal or to any Protestant Board of Examiners or to take part with Protestants in the establishment of a dissentient school outside those cities, and except so far as it would confer the right of attendance at dissentient schools outside the cities of Quebec and Montreal upon persons of religious faith different from that of the dissentient minority. The Provincial Legislature can pass legislation to establish separate schools for persons who are neither Roman Catholics nor Protestants, provided that it does not interfere with the rights of the two Christian communities in their denominational schools. Decision of the Supreme Court of Canada ([1926] S.C.R., 246) varied.—HIRSCH AND ANOTHER v. MONTREAL PROTESTANT SCHOOL COMMISSIONERS AND OTHERS [P.C.] 287

CARRIAGE OF GOODS BY SEA—Damage—Carrier's liability — Exception — Default of servants "in the management of the ship"—Management of refrigerating machinery—Sea Carriage of Goods Act, 1924 (Australian Statute) — Carriage of Goods by Sea Act, 1924 (14 and 15 Geo. V., c. 22), Schedule, Art. IV. (2) (*a*)].—The exception in Art. IV. (2) (*a*) of the Carriage of Goods by

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Sea Act, 1924, which protects the carrier from liability for damage resulting from an act, neglect, or default of his servants "in the management of the ship," does not cover a default in the management of refrigerating machinery.—FOREMAN AND ELLAMS, LIMITED v. FEDERAL STEAM NAVIGATION COMPANY, LIMITED [Wright, J.] 250
See also CONTRACT and SHIP.

CEYLON—Agreement affecting land—Statutory mode of execution—Non-observance—Nullity of agreement—Whether curable—Part performance—Ceylon Ordinance No. 7 of 1840, cl. 2].—By clause 2 of the Ceylon Ordinance No. 7 of 1840, no agreement for the sale or purchase of land "shall be of force or avail in law unless the same shall be in writing and signed by the party making the same or by some person lawfully authorized by him or her in the presence of a notary public and two or more witnesses present at the same time and unless the execution of such writing deed or instrument be duly attested by such notary and witnesses." Held, that where an agreement affecting land has not been executed and attested in the manner required by the above enactment, the operation of the enactment cannot be avoided either by an application of the principle of the decision in *Forster v. Hale* (3 Ves., 696; 5 Ves., 308) or under the equitable doctrine of part performance, but such an agreement may be valid merely for the purpose of establishing a partnership between the parties. *Pate v. Pate* (31 *The Times* L.R., 590; [1915] A.C. 1100) applied.—ARSECULERATNE v. PERERA [P.C.] 151

CHAMPERTY — Maintenance — Speculative actions — How far permissible].—Observations as to the circumstances in which a solicitor may take up a speculative case on behalf of a poor client, and as to the terms on which he may do so.—WIGGINS v. LAVY [C.A.] 721

COMPANIES—Agreement by director confirmed by secretary — Ostensible authority — Estoppel].—Two rival companies, the P. Company and the W. Company, formed a new company, the respondent company, to take over certain branches of their business of fruit importers, the shares in the new company being held in equal proportion by the old companies, and the board of the new company consisting of two directors of the P. Company, namely, M.L. and his brother, and two directors of the W. Company. By an agreement embodied in a letter of July 22, 1924, between M.L. and the appellants, a firm of fruit brokers, it was arranged that the appellants should make certain advances to the P. Company and should receive all fruit consigned either to the P. Company or to the respondent company and keep back 70 per cent. of the net proceeds in reduction of the advances, and it was stipulated that the respondent company should subscribe to this arrangement. This arrangement was followed by a formal

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agreement under the seal of the P. Company, but there was no corresponding agreement by the respondent company. The secretary of the respondent company, however, wrote to the appellants purporting to confirm the arrangement. This arrangement was not known to the directors of the respondent company, other than the L. brothers, until some months after it had been put in operation, and, as soon as they became aware of it, it was put an end to. The appellants obtained certain fruit consigned to the respondent company without production of the bills of lading on giving an indemnity to the ship, and they sued the respondents for delivery of the bills of lading. The respondents counterclaimed for the proceeds of fruit belonging to the respondents and not accounted for. Held (Lord Shaw of Dunfermline dissenting), (1) that there was not in fact any agreement binding on the respondents; (2) that the respondents were not estopped from denying the existence of the agreement by the knowledge of the two directors who were participators in the wrong done to the respondents, or on the ground that an inspection of the books of the company would have disclosed the arrangement. *In re Hampshire Land Company* (12 *The Times* L.R., 517; [1896] 2 Ch., 743) applied. Decision of the Court of Appeal ([1927] 1 K.B., 246) affirmed.—J. C. HOUGHTON AND CO. v. NOTHARD, LOWE AND WILLS, LIMITED [H.L.] 76

Debentures—Compromise of rights of holders — Power of majority to alter terms — Redemption at less than par — Redemption figure above market price — Validity of scheme.—MEADE-KING v. USHER'S WILTSHIRE BREWERY, LIMITED [Eve, J.] .. 298

Debentures — Powers of receiver — Getting in property — Action without company's consent].—A debenture of a limited company empowered the holder to appoint a receiver and manager and provided: "A receiver and manager so appointed shall be the agent of the company and shall have power (1) to take possession of and get in the property hereby charged. . . ." A receiver and manager having been appointed brought an action in the name of the company for the rescission of an agreement by the defendant for the purchase of land from the company and forfeiture of the deposit, and alternatively for specific performance. Held, that the debenture empowered the receiver and manager to bring the action without the company's consent. — M. WHEELER AND CO., LIMITED v. WARREN [C.A.] 693

Director — Remuneration fixed by Board — Not confirmed by company — Validity of agreement — Companies (Consolidation) Act, 1908 (8 Edw. VII., c. 69), Table A, Art. 69].—The plaintiff was a director of the defendant company (which had adopted Table A with some modifications), and at a meeting of the board a

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service agreement was approved, signed, and sealed appointing the plaintiff "overseas director" at a salary of £1,800 a year. The plaintiff proceeded overseas and performed his duties under the agreement till differences arose and he resigned. In an action by the plaintiff for salary due under the agreement, Held, that the agreement was *ultra vires* the board, and since the plaintiff's remuneration had never been determined by the company in general meeting, as required by Art. 69 of Table A, he could not recover, but must repay to the company on their counterclaim the money paid to him under the agreement.—KERR v. MARINE PRODUCTS, LIMITED [Finlay, J.] 292

Dissolution — Subsequent discovery of assets — Motion to declare dissolution void — Defunct company — Removal from Register—Notice to Treasury Solicitor—Companies (Consolidation) Act, 1908 (8 Edw. VII., c 69), ss. 223 (1), 242].—Where a limited company has been dissolved, and on the subsequent discovery of assets a motion is made under s. 223 (1) of the Companies (Consolidation) Act, 1908, to declare the dissolution void, notice of the motion ought to be given to the Treasury Solicitor since on dissolution the undistributed assets pass to the Crown as *bona vacantia*. Under s. 242, as to removal of defunct companies from the Register, the same practice should be adopted where there are undistributed assets. —IN RE HOME AND COLONIAL INSURANCE COMPANY, LIMITED [Maugham, J.] 718

Prospectus — Offer of shares to the public — Issue to the public — Invitation — Document signed by directors — Strictly private and confidential—Companies (Consolidation) Act, 1908 (8 Edw. VII., c. 69), ss. 81 (1) (*e*), 285].—The plaintiff had invested £3,000 in a company of which the defendant was the principal promoter and managing director, having been induced to do so by statements contained in two documents drafted by the defendant, one being signed by the defendant and his co-directors, of which about 20 to 30 copies were typed for circulation by the directors among their friends with the object of raising additional capital, and the other being a letter, on the company's notepaper on which the names of the directors appeared, sent by the defendant to a co-director. The letter was marked private and confidential. The plaintiff, who was an utter stranger to the company and unknown to any of its directors, received a copy of the documents through a friend of one of the directors of the company to whom the documents had been sent with the knowledge of the defendant and other directors of the company with the object of raising capital from wealthy clients or from fathers who had a son to place. In an action by the plaintiff, claiming damages for a breach of the requirements of section 81 (1) (*e*), of the Companies (Consolidation) Act, 1908, in that the documents omitted to state the number and amount of shares which within the two preceding years had been issued as

fully paid otherwise than in cash, these two documents were found by the jury on the evidence to constitute an offer of shares made by the company to the public. This finding was not challenged; but to the question whether the documents were in fact issued to the public, the jury answered, "There is no proof of this." They also found that the plaintiff had suffered damage because the documents had omitted to state that a number of the shares had been issued as fully paid up otherwise than in cash within the two preceding years. Held (Scrutton, L.J., dissenting), that the plaintiff was a member of the public, and it had been proved that the documents, which had been settled and approved by the directors of the company, who were making desperate efforts to raise capital, were reproduced for the purpose of reaching a limited section of the public, and that the documents, which ultimately reached the hands of the plaintiff, a stranger, were issued by or on behalf of the company or by or on behalf of a person who was or had been engaged or interested in the formation of the company within the meaning of section 81 of the Companies (Consolidation) Act, 1908, and as the plaintiff had proved that he had suffered damage by reason of the omission of the documents to state the information required by subs. (1) (*e*) of that section the plaintiff was entitled to recover damages against the defendant.—LYNDE v. NASH [C.A.] 357

Residence — Foreign State — Jurisdiction of State Courts — Test of residence]. —To constitute residence by a British company in a foreign State so as to render the company subject to the jurisdiction of the Courts of that State, the company must to some extent carry on business in that State at a definite and reasonably permanent place.—LITTAUER GLOVE CORPORATION v. F. W. MILLINGTON (1920), LIMITED [Salter, J.] 746

Shares — Participating preferred ordinary shares — Whether dividend cumulative— Resolutions sanctioning creation of shares— Construction].—J. I. THORNYCROFT AND CO., LIMITED v. THORNYCROFT [Tomlin, J.] 9

Winding-up — Debenture — Fraudulent preference—Jurisdiction of County Court— Companies (Consolidation) Act, 1908 (8 Edw. VII., c. 69), ss. 131 (2), (3), and (6), 210, 212].—Less than three months before the commencement of its compulsory winding-up in a County Court, a company having a paid-up capital of less than £10,000 issued debentures to the extent of £4,500 in favour of two persons. The liquidator moved in the County Court for a declaration that the debentures were invalid either as a fraudulent preference under s. 210 or as a floating charge created otherwise than for cash under s. 212 of the Companies (Consolidation) Act, 1908, and that the persons named in the debentures had no rights in respect of the sums expressed to

be secured thereby except as unsecured creditors. Held, that the deputy County Court Judge had jurisdiction to entertain the liquidator's application, and, as he had done so, his discretion could not be interfered with. *In re Ilkley Hotel Company* ([1893] 1 Q.B., 248) and *In re Centrifugal Butter Company, Limited* ([1913] 1 Ch., 188) distinguished.—IN RE F. AND E. STANTON, LIMITED—HOGG v. MAULE AND ANOTHER [Div. Ct.] 118

Winding-up—Insurance of company against claims—Judgment against company—Subsequent liquidation—Payment by insurers to liquidator—Whether amount payable to judgment creditor—Availability for general creditors].—The applicant obtained judgment against a limited company for damages for personal injuries and costs. Afterwards the company went into liquidation, and the insurance company with which the company in liquidation was insured paid the amount of the damages and costs to the liquidator. Held, that the applicant was not entitled to have the amount in question paid to him by the liquidator, but it formed part of the assets for distribution among the general creditors, including the applicant. Decision of Eve, J. (43 *The Times* L.R., 684), affirmed.—IN RE HARRINGTON MOTOR COMPANY, LIMITED [C.A.] 58

Winding-up — Proof — Contract of marine insurance — No stamped policies — Rejection of proof]. — Held, that the liquidator had rightly rejected a proof by the English Insurance Company, Limited, in the winding-up of the National Benefit Assurance Company, Limited, in that the contract between the two companies in respect of which the proof of debt was advanced was a contract of marine insurance and no stamped policy of marine insurance was issued to the English Insurance Company, Limited, as required by law, and therefore the contract was invalid. Decision of the Court of Appeal (44 *The Times* L.R., 14; [1928] Ch., 74) affirmed.— ENGLISH INSURANCE COMPANY, LIMITED v. OFFICIAL RECEIVER AND LIQUIDATOR OF THE NATIONAL BENEFIT ASSURANCE COMPANY, LIMITED [H.L.] 801

CONFLICT OF LAWS — Domicile — Abandonment of domicile of choice — Revival of domicile of origin—Reacquisition of domicile of choice only by renewed residence with intention to settle — Domicile sole issue in contesting grant of probate—Costs].—If a man abandons his domicile of choice he can reacquire it only by fulfilment of the same conditions of intention and residence as those by which he previously acquired the same domicile of choice. There is no authority for allowing costs out of the estate in a probate action to an unsuccessful party who merely seeks to prove, in the case of a will duly executed by a testator of sound disposing mind, that the testator had a domicile under the law of which that party would take a large part of the testator's

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estate in opposition to his wishes. The costs should follow the event in such a case.—FLEMING AND ANOTHER v. HORNIMAN AND ANOTHER (FLEMING INTERVENING) [Hill, J.] 315

Foreign revenue law — Whether enforceable].—The Court has no jurisdiction to entertain an action for the enforcement of the revenue law of a foreign State.—IN RE VISSER—QUEEN OF HOLLAND v. DRUKKER AND OTHERS [Tomlin, J.] .. 692

CONSPIRACY—Duress—Trade union—Member's breach of rule—Threat to put on "stop list"—Offer to withdraw threat for payment—Payment—Whether money recoverable].—The plaintiffs were motor dealers and were members of a trade union which had rules providing that motor cars were not to be sold below a certain price and that persons breaking the rules might be put on the "stop list," in which case other members were forbidden to deal with them. By giving certain allowances to the purchaser of a car the plaintiffs sold it at less than the fixed price and the "stop list" committee of the trade union informed them that their names would be put on the "stop list" unless they paid £200 to the indemnity fund of the union. The plaintiffs paid a first instalment of £100 and brought an action against an official and two members of the committee of the union to recover it on the ground of conspiracy to obtain it from them under duress. Held, that it was lawful to put a man on the "stop list" for breaking a rule, and the intimation of an intention to put him on it when he had broken a rule could not be unlawful, and the agreement to accept the payment was not unlawful but was a mere compromise of a dispute which involved no criminality, and therefore the action failed. *Rex v. Denyer* (42 *The Times* L.R., 452; [1926] 2 K.B., 258) disapproved.—HARDIE AND LANE, LIMITED v. CHILTON AND OTHERS [C.A.] 470

CONTEMPT OF COURT — Distinction from criticism — Imputation of partiality].—Observations on the distinction between legitimate criticism of a Judge and such an imputation of unfairness and lack of impartiality as constitutes contempt of Court.—REX v. EDITOR OF THE NEW STATESMAN—EX PARTE DIRECTOR OF PUBLIC PROSECUTIONS [Div. Ct.] 301

Pending proceeding — Publication prejudicing fair trial — Absence of intention — Proceeding not genuine — No attachment].—A publication made with the clear intention of prejudicing the fair trial of an issue pending before a Court is obviously a contempt of Court and will be punished as such. But where the Court is satisfied that there was no such intention and yet the publication might prejudice a pending trial, the Court will, in considering whether a writ of attachment should issue,

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take into account the circumstances of the case, and no attachment will be granted unless (*inter alia*) the Court is satisfied that the pending proceeding is a genuine proceeding, brought and intended to be prosecuted to effect its avowed purpose.—REX v. EDITOR OF THE DAILY MAIL—EX PARTE FACTOR [Div. Ct.] 303

CONTRACT — Actor — Appearance — Leading actor of company—Provision for substitute in case of illness of a principal—Illness of leading actor—Impossibility of appearing—Whether basis of contract gone].—The plaintiff, who was an actor, made with the defendants an agreement by which the plaintiff was to find a company, described as consisting of himself and a full company, and in the event of the non-appearance of a principal the plaintiff was to provide a deputy to the satisfaction of the defendants. The plaintiff became too ill to appear, but he provided a substitute. The defendants thereupon alleged that as the plaintiff could not appear the basis of the contract was gone. In an action for damages for breach of the contract, Held, that the plaintiff was a principal to whom the clause as to the provision of a deputy applied and his absence was not a frustration of the contract and he was entitled to damages. Decision of Rowlatt, J. (44 *The Times* L.R., 242), reversed].—TERRY v. VARIETY THEATRES CONTROLLING COMPANY, LIMITED [C.A.] .. 451

Breach — Restraint of trade — Penalty or liquidated damages — Hops pickable but not picked — Whether grown or produced].—The plaintiff company, which was formed to act as selling agents for members growing hops, made with the defendant, who was a member and a hop grower, a contract whereby the defendant agreed that he would deliver to the plaintiffs, for sale by them, all the hops "grown" by him on particular lands in certain years, including 1926, and that if he failed to deliver to the plaintiffs any hops "produced" by him, or if he disposed of such hops otherwise than through the plaintiffs, he would pay to the plaintiffs £100 per acre as liquidated damages. The defendant cultivated the 1926 crop in the usual way, and from August 10, when the hops were pickable, but not picked, he leased the lands in question for five years to a company controlled by himself. In an action for breach of contract by reason of failure to deliver the 1926 crop to the plaintiffs, Held, (1) that although the defendant had leased the lands with the hops still growing upon them he had nevertheless "grown or produced" the hops inasmuch as they were pickable, and by disposing of them otherwise than to the plaintiffs he had broken the contract; (2) that the contract was not an unreasonable restraint of trade; (3) that the £100 per acre was to be deemed to be liquidated damages and not a penalty; and that therefore the plaintiffs were entitled to recover that amount.—ENGLISH HOP GROWERS, LIMITED v. DERING [C.A.] .. 443

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Building contract — Retention fund — Specific fund — Assignment — Debentures—Floating charge—Appointment of receiver —Priorities].—By a lump sum building contract entered into in 1922 between S. and Co., Limited ("the contractors"), and the defendants, provision was made for interim payments on the architect's certificates, to be given monthly at the rate of 90 per cent. of the value of all work executed. The remaining 10 per cent. ("the retention fund") was to be retained and deposited in a bank until the final adjustment of accounts. The contract was varied by consent, and in the events that happened the retention fund amounted to £1,000 at the beginning of 1924; this was never deposited in a bank and remained a merely notional fund, but both parties treated it as a separate sum capable of being earmarked. It was included, without distinction, in the architect's final certificate for £1,848 10s. 2d., on January 28, 1927. Meanwhile, the plaintiffs, who were supplying cement to the contractors, found that the latter were getting into arrears with their payments, and to obtain further credit the contractors, being then indebted to the plaintiffs in the sum of £671 on April 7, 1924, assigned to them the retention fund by a document in these terms: "In reduction of the amount now or to be owing from us to you for goods supplied by you, we hereby assign to you all moneys now or hereafter to become due to us from the Hemsworth R.D.C. for retention moneys in respect of the G. Housing Scheme, and for which your receipt shall be a sufficient discharge. . . ." Due notice of that assignment was given to the defendants next day. The contractors had at various dates between 1900 and February 2, 1924, issued to the Manchester and County Bank, Limited, a number of debentures charging the undertaking of the contractors and all their property, both present and future, the charge being a specific charge on the contractors' freehold and leasehold property, machinery, goodwill, and uncalled capital, and a floating charge on all the company's other assets, subject to a proviso that the contractors were not to be at liberty to create any mortgage or charge on any of their assets in priority to the debentures. On October 13, 1924, a receiver for the debenture-holders was appointed, who duly entered into possession. On October 20, 1924, a resolution was passed for the voluntary winding-up of the company. The receiver refused to recognize the right of the plaintiffs to payment under their assignment in priority to the debenture-holders, and on the architect's final certificate being given in January, 1927, the defendants declined to interplead and paid the retention moneys to the receiver for the debenture-holders, and the plaintiffs thereupon brought their action on their assignment. The Judge gave judgment for the plaintiffs, and the defendants appealed, not raising any question as to priorities, but contending that the assignors ought to have been joined as parties. Held, that the retention money, although not becoming payable until a later

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date than the assignment, constituted a debt or legal thing in action which could be assigned, and could be sued for in an action without joining the assignors as parties; and that the assignment was a good assignment, and the plaintiffs were entitled to recover on it. Decision of Wright, J. (44 *The Times* L.R., 605), affirmed.—G. AND T. EARLE, LIMITED v. HEMSWORTH R.D.C. [C.A.] .. 758

Carriage of goods by sea — Obligations of shipowners — Alleged breach of duty — Repair of ship — Hatches left open — Damage to cargo—Negligence—Exception—"Management of ship"—Carriage of Goods by Sea Act, 1924 (14 and 15 Geo. V., c. 22), Schedule, Art. IV. (2) (*a*)].—The plaintiffs had a quantity of tinplates shipped for conveyance by the defendants' steamer from Swansea to Vancouver, and, after the tinplates had been taken on board, the ship went to Liverpool and had to be detained there for repairs. For this purpose part of the cargo had to be shifted, and through the negligence of the ship's officers the hatches were left open with the result that rain got into the hold, and when the tinplates were discharged at Vancouver they were found to have been damaged by rust. In an action for damages for breach of duty in the carriage of the tinplates, Held (Greer, L.J., dissenting), that as the negligent management of part of the ship, namely, the hatches, caused the damage, and as this management was in the course of repairing the ship for the voyage, there was "management of the ship" within the exception in Article IV. (2) (*a*) of the Schedule to the Carriage of Goods by Sea Act, 1924, and the action failed. Decision of Wright, J. (43 *The Times* L.R., 544; [1927] 2 K.B., 432), reversed.—GOSSE MILLARD, LIMITED v. CANADIAN GOVERNMENT MERCHANT MARINE, LIMITED [C.A.] 143

See also CARRIAGE OF GOODS BY SEA and SHIP.

Commercial traveller — Use of motor-car — Motoring offence — Suspension of licence — Dismissal — Claim for damages — Non-disclosure of motoring offence before the agreement].—The plaintiff, who was a commercial traveller, was employed by the defendants under an agreement which provided that the plaintiff was to use a motor-car for the carriage of samples. The plaintiff was convicted of driving the car to the common danger and was fined £10 and his driving licence was suspended for three months. The defendants thereupon terminated the plaintiff's employment on the ground that these facts constituted misconduct justifying dismissal. In an action for wrongful dismissal the defendants also pleaded that before the agreement was made the plaintiff ought to have informed them that he had previously been convicted of being drunk when in charge of a motor-car and been sentenced to imprisonment for driving it in a manner dangerous to the public. Held, that in the case of such an

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agreement as the plaintiff had with the defendants there was no obligation on him to disclose his previous conviction for a motoring offence, and that the conviction during the currency of the agreement, even although the plaintiff's licence was suspended, was not a ground for terminating the agreement, as the plaintiff could have got someone to drive the car. The plaintiff was therefore held entitled to damages.—HANDS v. SIMPSON FAWCETT AND CO., LIMITED [Finlay, J.] .. 295

Company — Russian insurance company—Decree of Soviet Government — Confiscation — Effect on reinsurance treaties with English reinsurance company—Frustration].—By virtue of a Decree of the Soviet Government, which came into operation on December 1, 1918, and of certain subsequent decrees, insurance business in Russia was declared to be the monopoly of the State and financial transactions in Russia were regulated. An action was commenced for the determination of the effect of the above decrees on certain treaties of reinsurance entered into between a Russian reinsurance company, having a branch office in London, and an English reinsurance company. Held, that the above decrees did not prevent the Russian company from discharging their liabilities to the English company under one of the treaties by a payment in London out of their assets outside Russia or by means of a set off against the liabilities of the English company to them under the treaties.—FIRST RUSSIAN INSURANCE COMPANY (IN LIQUIDATION) v. LONDON AND LANCASHIRE INSURANCE COMPANY, LIMITED [Romer, J.] 583

Determination — No provision giving power to determine — Supply of gas to local authority — Whether contract binding for ever].—The plaintiffs, a gas company, made a contract with the defendants, a local authority, to light all the public lamps in the defendants' area "from and after the first day of September in every year up to the following first day of May inclusive." The contract contained no provision for its determination by either party, but it recited an earlier agreement which was to remain in force until the defendants should determine it; and a supplemental agreement provided that the property in new lamps was to vest in the defendants if the contract lasted 15 years. After some years the defendants served on the plaintiffs a notice determining the contract on the expiration of four months. In an action for a declaration that the defendants could not determine the contract without the plaintiffs' consent, Held, that it was in the power of the defendants to determine the contract, and the action failed. Decision of Russell, J. ([1927] W.N., 325) affirmed.—CREDITON GAS COMPANY v. CREDITON URBAN DISTRICT COUNCIL [C.A.] 369

Hiring of crane-barge — Owners to insure crane against all risks — Accident not covered by policy—Claim by owners against

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hirers for damage to crane—Owners' breach of contract to insure—Failure of claim].—The defendants hired a crane-barge from the plaintiffs, one of the terms of the contract being that the plaintiffs would insure the crane against all risks, the defendants paying the premium. The plaintiffs accordingly took out a policy covering, as they thought, all risks. The crane, when proceeding to lift a load, broke away from its bedplate and fell over and was damaged. It was then found that the accident was not covered by the policy, and the defendants refused to pay for the damage. In an action for breach of contract, Held, that though the defendants had failed to discharge the onus, which was upon them, of proving that what happened was not the result of negligence by their servants, yet, as the agreement in regard to insurance was intended to be an arrangement for the benefit of both parties, and as the accident came within the description "all risks" and the defendants had stipulated that they were not to bear those risks, the action failed.—BRICE AND SONS v. CHRISTIANI AND NIELSEN [Rowlatt, J.] 335

Indemnity — Undertaking to indemnify against all claims — Whether inclusive of claims by the persons giving the undertaking].—The plaintiffs took a lease of premises from the defendant railway company, and, by an agreement supplemental to the lease, the defendants gave the plaintiffs permission, on certain terms, to use for the transport of materials a portable gangway which could be moved over certain of the defendants' railway lines. One of the terms was that the plaintiffs "agree and undertake to indemnify the said [railway] company against all claims and demands or liability whatsoever whether in respect of damage to person or property arising out of or in connexion with the existence or user of the said gangway." When the plaintiffs were using the gangway some trucks were shunted down the line, and a lorry standing on the gangway was damaged. In an action for damages for negligence and/or breach of duty the defendants denied liability and pleaded the aforesaid term of the supplemental agreement. On a preliminary point as to the construction of the agreement, Held, that the undertaking was only one to hold the defendants harmless against claims by third parties, and the preliminary point must be decided in favour of the plaintiffs. Decision of the Court of Appeal (43 *The Times* L.R., 679) affirmed.—GREAT WESTERN RAILWAY COMPANY v. J. DURNFORD AND SON, LIMITED [H.L.] 415

Sale of goods — C.i.f. contract — Resale by buyers — Bill of lading — Date of shipment incorrectly stated—Repudiation by sub-purchasers—Measure of damages payable by vendors to original buyers].—In 1920 the plaintiffs bought from the defendants a quantity of sugar in Java, the sale being c.i.f. Bombay, and shipment was to be made in September, 1920. The sugar was not loaded on the steamer till October. The

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bill of lading, which was dated September 30, stated that the sugar had been shipped, and the plaintiffs, being unaware of the true facts, took up the shipping documents on presentation and paid the price. The plaintiffs then resold part of the sugar by a contract which stated that the bill of lading should be conclusive evidence of the date of shipment. The market was falling, and the sub-purchasers, having discovered that the sugar was not of September shipment, refused to carry out their contract, and the plaintiffs sold the sugar by auction at a lower price. In an action by the plaintiffs against the defendants for breach of contract, Held, that it was an implied condition of the contract that the bill of lading should correctly state the date of shipment, and the plaintiffs were not bound to enforce against their sub-buyers a statement which they (the plaintiffs) knew to be untrue, and the measure of the damages to which the plaintiffs were entitled was the difference between the contract price which they had paid on taking delivery and the market price of the sugar.—JAMES FINLAY AND CO., LIMITED v. KWIK HOO TONG HANDEL MAATSCHAPPIJ [Wright, J.] 643

Sale of goods — Conditions — Notice of appropriation — Date of bill of lading to be stated — Notice to be given within seven days from such date — Provisional invoice — Whether a good notice of appropriation — Whether despatch within the seven days sufficient].—The respondents in Rotterdam contracted to buy from the appellants in Hamburg 6,000 tons of South Russian wheat, the conditions of the contract providing that notice of appropriation with ship's name and date of bill of lading should be given by the shippers to the buyers within seven days from date of bill of lading, and that provisional invoice with ship's name and date of bill of lading should be sent by the shippers' London house to the buyers within three days from the arrival of the documents in London. The sellers shipped the wheat at Novorossisk, and within the seven days the sellers sent to the buyers a telegram and confirming letter, which the sellers alleged to be a notice of appropriation, but neither document stated the date of the bill of lading. On the same day the sellers posted to the buyers a provisional invoice which gave the date of the bill of lading, but the provisional invoice was not received by the buyers until after the expiry of the seven days. The buyers contended that there had been no tender in conformity with the contract, and it was found by the Appeal Committee in an arbitration that there had been no good notice of appropriation in the telegram and confirming letter and that the provisional invoice was not intended as a notice of appropriation, and that it was a recognized custom that notice of appropriation and provisional invoice should be separate documents, and that therefore the buyers were under no liability to the sellers. Held, on a case stated, that even if the provisional invoice constituted

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a notice of appropriation, yet, as it was not received by the buyers within the contract time, the sellers had not satisfied the contract, since despatch within that time was not a compliance with the condition that the notice should be given to the buyers within that time. Semble, the provisional invoice was not a notice of appropriation. Decision of Wright, J. (44 *The Times* L.R., 10), affirmed.—COMPAGNIE CONTINENTALE D'IMPORTATION v. HANDELSVERTRETUNG DER UNION DER S.S.R. IN DEUTSCHLAND [C.A.] 297

Sale of goods—"Note or memorandum in writing"—Action originally founded on previous contract—Plea in defence in that action — "Earnest" — Undertaking to pay third party's debts—"Part payment"—Sale of Goods Act, 1893 (56 and 57 Vict., c. 71), s. 4 (1)].—Partners in a firm brought an action for damages for breach of a written contract for the sale of goods. In the defence, which was signed by counsel, the defendants pleaded that the firm had been converted into a limited company and that it had been orally agreed between that company and the defendants that, in consideration of the company's undertaking to pay certain debts owing to the defendants by the firm and to perform the obligations of the firm under the written contract, the defendants would supply to the company the goods sold under the written contract. Subsequently the action was amended, the company being substituted as plaintiffs and the cause of action being expressed to be for the breach of the oral agreement. Held, that the plea in the original defence in which the oral agreement was set out was a "note or memorandum in writing . . . signed by the party to be charged or his agent in that behalf" of that oral contract within s. 4 (1) of the Sale of Goods Act, 1893. Held, further, that the undertaking to pay the firm's debts did not constitute the giving of "something in earnest to bind the contract" within s. 4 (1), being rather part of the consideration for the contract, but that the payment of those moneys was given "in part payment" within the subsection.—FARR, SMITH, AND CO., LIMITED v. MESSERS, LIMITED [Wright, J.] 48

See also SALE OF GOODS.

Wages agreement — Whether submission to an award].—By a Conciliation Board Agreement provision was made for the payment of a subsistence allowance to low-paid colliery workers in South Wales, and, the parties having failed to agree as to the amount and conditions of payment, the matter came before the independent chairman of the Board and he gave a decision. The parties failed to agree as to the interpretation of the decision, and the chairman gave a supplemental decision, but he declined to give any further interpretation. Representative workmen then brought an action against representative employers for declarations, (1) that on the true construction of the decision the subsistence allowance ought to be calculated for each shift separately, and

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(2) as to the method of reckoning overtime for the purpose of calculating subsistence allowance. The Judge in chambers, on the grounds that the wages agreement incorporating the conciliation agreement amounted to a submission to arbitration, and that the chairman's decisions were awards, made an order that the action be adjourned and that the awards be remitted to the chairman to deal with the two questions raised by the pleadings. Held, on appeal, that the chairman's decisions were not awards but had become parts of an agreement between employers and workmen which must be construed by the Court, and the order of the Judge must be set aside.—CHARLES AND OTHERS v. CARDIFF COLLIERIES, LIMITED [C.A.] 448

See also ARBITRATION.

COPYRIGHT — Advertisement—Preparation by advertising agent—Intention of parties—Ownership of copyright].—Where an advertisement agent prepares an advertisement on instructions and information given to him by the advertiser, the Court will, in the absence of evidence to the contrary, draw the inference that it was the intention of both parties that the copyright in the advertisement should belong to the advertiser.—HAROLD DRABBLE, LIMITED, AND ANOTHER v. HYCOLITE MANUFACTURING COMPANY AND OTHERS [Astbury, J.] .. 264

Broadcasting—Opera—Music—Performance in public—"Broadcasting" by wireless telephony—Grant by composer of right to perform—Assignment or licence—Whether grant determinable on death—Copyright Act, 1911 (1 and 2 Geo. V., c. 46), s. 1].—By an agreement dated March 23, 1905, the plaintiff granted to G. E. "the sole and exclusive right of representing or performing" in certain areas a play, of the music of which the plaintiff was the composer. G. E. died in 1915, and in 1920 his executors assigned to a limited company the benefits of copyright and other rights previously held by G. E. In October, 1926, the limited company agreed to permit the defendants to "broadcast" by wireless telephony a performance of the opera. The defendants "broadcast" the opera from their studio, to which the public was not admitted. In an action for breach of copyright the Judge held, (1) that the defendants gave a public performance of the opera within section 1 of the Copyright Act, 1911, and (2) that, as the agreement of March 23, 1905, was not an assignment by the plaintiff to G. E. of all his performing rights, but was a licence confined to ordinary performances at a theatre, and of such a personal character as to be determinable on the death of G. E., the defendants had acquired no lawful licence to perform the opera in public and were, therefore, liable in damages to the plaintiff. On an appeal by the defendants on the second point, Held, that the agreement of March 23, 1905, was not limited to performances at a theatre and was not a

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mere licence but was an assignment to G.E. of rights which either he or his executors could assign, and the defendants were protected, and therefore the action failed. Decision of McCardie, J. (43 *The Times* L.R., 818) reversed.—MESSAGER v. BRITISH BROADCASTING COMPANY, LIMITED [C.A.] .. 247

Original literary work — Phrase in advertisement — Beauty "a social necessity"—Copyright Act, 1911 (1 and 2 Geo. V., c. 46), s. 1].—The plaintiff, an electro-therapist, used in his advertisements of face treatment a phrase which he claimed to have invented—namely, that beauty was "a social necessity, not a luxury." The defendant, who carried on the business of a beauty specialist and was in the habit of advertising his beauty treatment, then began to use in his advertisements the words, "A youthful appearance is a social necessity." In an action for breach of copyright, Held, that the plaintiff's phrase was not an "original literary work" within s. 1 of the Copyright Act, 1911, and the action failed. Decision of Humphreys, J. (44 *The Times* L.R., 371), reversed.—SINANIDE v. LA MAISON COSMEO [C.A.] 574

Work of reference—Biographies—Supply of information—Meaning of "author"—Copyright Act, 1911 (1 and 2 Geo. V., c. 46), s. 5].—Where the compiler of a biographical book of reference receives from the biographees information to be used as material from which the book may be compiled, the persons supplying the information are not, for the purposes of the Copyright Act, 1911, the authors of the paragraphs containing the information.—A. AND C. BLACK, LIMITED v. CLAUDE STACEY, LIMITED [Tomlin, J.] 347

CORONER — Inquest — Coroner present during jury's deliberations—Misconduct—*Certiorari*—Inquisition quashed].—At the conclusion of the evidence in an inquest on the body of a man killed by a motor-car the jury retired and after some time sent for the coroner who went into the jury room and remained with the jury in private for a quarter of an hour. The jury returned a verdict of "accidental death," but added a rider censuring the driver of the motor-car. Held, that in going into the jury room during the deliberations of the jury, the coroner was guilty of misconduct, and the inquisition must be quashed and a fresh inquest held before the coroner for an adjoining district. *Reg., at the prosecution of O'Brien and Bourchier* (17 Ir. L.T., 34) and *In re Mitchelstown Inquisition* (22 L.R.Ir., 279) approved and followed.—REX v. WOOD—EX PARTE ANDERSON [Div. Ct.] 23

COUNTY COURT—Appeal—Dismissal—Costs—Appeal under Poor Persons Rules—Discretion to award costs against appellant].—The Court may award costs against an appellant who appeals under the Poor Persons Rules,

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if the appeal is entirely frivolous and vexatious and is an abuse of the process of the Court.—DRUMMOND v. HERVEY [Div. Ct.] 14

Appeal — Review of taxation — Claim less than £20—County Courts Act, 1888 (51 and 52 Vict., c. 43), s. 120].—There is no appeal without leave from a county court Judge's refusal to review a taxation of costs where the amount claimed is less than £20.—HIVES v. DAWSON [Div. Ct.] 37

See also COMPANIES—Winding-up.

CRIMINAL LAW—Bigamy—Foreign marriage—Evidence of validity].—On an indictment for bigamy the validity of a foreign marriage must be proved by the evidence of a professional lawyer or of a person who is to be deemed by reason of his office to be skilled in the law of the country where it was celebrated.—REX v. MOSCOVITCH [C.C.A.].. 4

Infanticide — "Newly-born child" — Child a month old—Infanticide Act, 1922 (12 and 13 Geo. V., c. 18), s. 1 (2)].—The appellant was charged with the murder of her child who had been born on August 19, 1927, and had been strangled by her on September 21, 1927. The Judge at the trial held that there was no evidence to go to the jury that the child was "newly-born" within s. 1 (2) of the Infanticide Act, 1922. Held, that that ruling was correct. Observations on the form of statements made by accused persons while under arrest.—REX v. O'DONOGHUE [C.C.A.] 51

Vagrancy—Incorrigible rogue—Previous conviction—"Shall be deemed a rogue and vagabond" — Vagrancy Act, 1824 (5 Geo. IV., c. 83), ss. 4, 5].—It is not necessary in order that a person may be dealt with as an incorrigible rogue under s. 5 of the Vagrancy Act, 1824, on a second conviction for any of the offences named in s. 4 of that Act, that the previous conviction should use the actual words "rogue and vagabond," since the statute itself provides that a person convicted of any of those offences "shall be deemed a rogue and vagabond."—REX v. TEESDALE [C.C.A.] 30

DEFAMATION — Libel — Defence that statement was not defamatory—Finding of jury to that effect — Refusal of new trial].—Observations on the circumstances in which the finding of a jury that an alleged libel was not defamatory is unassailable.—LOCKHART v. HARRISON [H.L.] 794

Libel — Privilege — Absolute privilege —Letter to solicitor from client].—Defamatory written statements made to a solicitor by a client for the purpose of obtaining professional advice and assistance are absolutely privileged, at all events where they are relevant to that purpose. Judgment of Swift, J. (44 *The Times* L.R., 546), affirmed.—MORE v. WEAVER [C.A.] 710

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Slander — Chauffeur giving "joy rides" in employer's motor-car — Verdict that words were not defamatory].—The plaintiff, a chauffeur formerly employed by the defendant, brought a slander action against the defendant, complaining that during his employment she had falsely alleged that he gave "joy rides" to women in her motor-car. The jury found that the defendant spoke the words but that they were not defamatory of the plaintiff. On an application for a new trial on the ground that the verdict was perverse and one which no jury could reasonably find, Held, (Russell, J., dissenting), that it was for the jury to say whether the words did or did not constitute a slander, and their verdict must stand.—BROOME v. AGAR [C.A.] .. 339

DENTISTS—Register—Erasure of name—Conviction—"Felony or misdemeanour"—Offence triable summarily—Dentists Act, 1878 (41 and 42 Vict., c. 33), s. 13—Dentists Act, 1921 (11 and 12 Geo. V., c. 21), s. 8].—The power given to the General Medical Council by s. 13 of the Dentists Act, 1878, as amended by s. 8 of the Dentists Act, 1921, to erase from the Dental Register the name of any dentist who has been convicted of "felony or misdemeanour," includes a power of erasure in the case of an offence triable summarily and not upon indictment.—PICKUP v. DENTAL BOARD OF THE UNITED KINGDOM [Div. Ct.] 544

Register — Retention of name — Annual fee — Non-payment — Regulation providing for removal of name — Whether *intra vires* — Dentists Act, 1921 (11 and 12 Geo. V., c. 21), s. 7].—By s. 7 of the Dentists Act, 1921, the Dental Board may make regulations as to keeping a register of dentists, as to removal from the register and restoration thereto, and as to prescribing a fee for retaining thereon in any year the names of persons registered after July 27, 1921, but the Act contained no provision for removing from the register the name of a person failing to pay the fee for retention. The Board made a regulation providing that an annual fee of £5 should be paid for retaining on the register the name of any person registered after the above date and that unless it was paid before December 31 the Registrar should remove the name from the register. Held, that as non-retention on the register was a necessary consequence of non-payment of the fee for retention the regulation was within the powers conferred by the Act.—TATTERSALL v. SLADEN [Astbury, J.] 237

DIVORCE — Application to expedite — Wife's petition—Expected birth of child of woman named in petition — Public policy — Refusal].—The Court, on the ground of public policy, refused an application by a wife, petitioning for a divorce on the ground of her husband's adultery, that the trial of the suit in the undefended list might be expedited so that the decree might be made

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absolute, and the respondent might marry the woman named in the petition, before the birth of a child expected to be born as the result of the respondent's relations with that woman.—P. v. P. [Lord Merrivale, P.] 114

Costs—Husband's petition for dissolution of marriage — Wife's admission of birth of child—No allegation by her that petitioner was the father—Denial of adultery with co-respondent—Security for costs].—On a husband's petitioning for divorce on the ground of his wife's alleged adultery with a named co-respondent, the paternity of a child being in dispute, the wife by her answer admitted the birth of the child, and she did not allege that the petitioner was the father, but she denied adultery with the co-respondent. It was urged on behalf of the petitioner that the pleadings showed that the wife had not a good ground for her defence so as to justify an order against her husband to secure her costs. In accordance with an offer made by the petitioner an order was made for security to be given without payment into Court.—S. v. S. AND P. [Lord Merrivale, P.] 52

Decree absolute for wife — Permanent maintenance — Husband's disposable income—Calculation of tax].—In estimating the disposable income of a divorced husband in order to ascertain the amount of permanent maintenance to be paid to his former wife, deductions in respect of income-tax and supertax, allowable from his gross income, are the normal amount of such taxes chargeable against him. An abnormal income-tax charge made in a particular year in respect of much greater earnings in a previous period cannot be deducted from the gross income for the purpose of calculating the disposable income *in futuro*. *Dayrell-Steyning v. Dayrell-Steyning* (38 *The Times* L.R., 898 ; [1922] P., 280) explained.—SHERWOOD v. SHERWOOD [Lord Merrivale, P.] .. 727

Judicial separation—Jurisdiction—Residence—Service—Respondent outside jurisdiction at commencement of suit—Matrimonial home—Statute of Citations, 1531 (23 Henry VIII., c. 9), s. 2—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 32].—Personal presence of the respondent in England at the date of the filing of a petition for judicial separation is not essential for the founding of such a suit, although the proceedings are governed by the principles and rules of the Ecclesiastical Courts. The real question is whether at the time when the petition, endorsed with the citation, is issued for service the respondent is resident within the jurisdiction. *Graham v. Graham* (39 *The Times* L.R., 139 ; [1923] P., 31) and *Armytage v. Armytage* (14 *The Times* L.R., 480 ; [1898] P., 178) distinguished.—RAEBURN v. RAEBURN [Lord Merrivale, P.] 384, 421

Judicial separation—Wife's petition—Alimony *pendente lite* — Interlocutory proceeding delayed—Decree of judicial separation—

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Court's refusal to proceed with petition for alimony *pendente lite*—Supreme Court of Judicature (Consolidation) Act 1925 (15 and 16 Geo. V., c. 49)—Matrimonial Causes Rules, 1924, Nos. 57-59 and 61].—After a wife has been granted a decree of judicial separation it is too late to proceed with her petition for alimony *pendente lite*, even though it may have been commenced before the decree was pronounced.—M. v. M. [Lord Merrivale, P.] 299

Judicial separation — Wife's petition — Husband's adultery—Powers of Court—Limited discretion to refuse decree—Matrimonial Causes Act, 1857 (20 and 21 Vict., c. 85), ss. 16, 31—Matrimonial Causes Act, 1923 (13 and 14 Geo. V., c. 19), s. 1—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), ss. 178, 185].—Where a wife petitions for judicial separation on the ground of adultery proved to have been committed by her husband since July, 1923, the Court has only a limited discretion to refuse a decree of judicial separation. Such a refusal must be based on some legal ground that constituted an absolute or discretionary bar according to the practice of the Ecclesiastical Courts, or upon the ground that the suit is not brought *bona fide* but merely for some collateral purpose. The Court's opinion that the relief to be granted should be dissolution of marriage and not judicial separation is not a legal ground for refusing the relief prayed for.—BLANCHARD v. BLANCHARD [Hill, J.] 313

Jurisdiction—Parties domiciled in England at time of and after marriage—Desertion of wife by husband—Decree of judicial separation granted to wife—Wife's suit for divorce—Husband's protest to jurisdiction—New domicile alleged—Wife's plea of estoppel].—A wife married in England to an Englishman, domiciled in England, was granted a decree of judicial separation on the ground of her husband's desertion. He afterwards took up his abode in France. Later she filed a petition for the dissolution of her marriage. The husband appeared under protest to the jurisdiction, on the ground that he had acquired a new domicile in France. An order was made by the Registrar for the question of domicile to be tried as a preliminary issue. The wife appealed against the order on the ground that the husband, having deserted his wife, could not be heard to say that he had changed his domicile for the purpose of ousting the jurisdiction in divorce of the English Court. Held, that jurisdiction in divorce in England depends upon domicile, and that the domicile is that of the husband ; that the apparent exception to this rule stated by Lord Gorell in *Armytage v. Armytage* (14 *The Times* L.R., 480 ; [1898] P., 178) and *Ogden v. Ogden* (24 *The Times* L.R., 94 ; [1908] P., 46, at p. 78) cannot be sustained on an examination of the authorities ; and that estoppel is a rule of evidence which cannot be invoked as a bar *in limine*,

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though such a plea may be considered at the trial of the issue of domicile.—H. v. H. (No. 2) [Lord Merrivale, P.] 711

Maintenance — Deed of separation — Covenant by husband to provide allowance —Covenant by wife not to sue for further support, alimony, or maintenance—Decree absolute for dissolution granted to wife on the ground of husband's adultery—Petition by her for maintenance—Covenant pleaded in bar—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 190].—A woman who in a deed of separation covenants in consideration of certain benefits not to claim from her husband in the future maintenance or alimony, and is afterwards granted a decree absolute of divorce, is not debarred from petitioning for maintenance after the dissolution of marriage, notwithstanding that the deed contained no provision for its termination on the marriage being dissolved. So held, *per* Lord Hanworth, M.R., Scrutton, Greer, and Sankey, L.JJ.—Lawrence and Russell, L.JJ., dissenting. Decisions of Hill, J. (44 *The Times* L.R., 466) and Lord Merrivale, P. (44 *The Times* L.R., 463), affirmed.—HYMAN v. HYMAN. HUGHES v. HUGHES [C.A.] 664

Nullity — Husband's petition — Ceremony of marriage in England — French decree dissolving wife's previous marriage — Decree not complete—Wife's order for restitution of conjugal rights—Appearance by husband — Estoppel].—If a man goes through the form of a ceremony of marriage in England with a woman who is not really free to marry owing to a foreign decree of divorce not having become effective at the time of the English ceremony, and if afterwards, with full knowledge of this fact, he does not raise the question of the validity of the English marriage when sued for restitution of conjugal rights, and thereupon a decree of restitution is granted in which the couple are declared "lawful man and wife," the man is estopped from impeaching the validity of his marriage, and a petition by him for a declaration of nullity of marriage will be dismissed.—WOODLAND v. WOODLAND (OTHERWISE BELIN) [Hill, J.].. 495

Permanent maintenance — Calculation of amount — Wife's ownership of valuable jewellery — Whether to be taken into account].— In fixing the amount of permanent maintenance for a wife who has obtained a decree of divorce the Registrar is entitled to take into consideration the fact that she is the owner of valuable jewellery which could be sold so as to produce an income.—LYSAGHT v. LYSAGHT [Lord Merrivale, P.] 723

Permanent maintenance — Husband's remarriage — Increased income — Settlement on second wife—Order for increased maintenance — Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 190 (2) (*b*)].—A man

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who had been divorced by his wife and whose means subsequently increased remarried and settled by ante-nuptial settlement on his second wife certain interests from the income of which he benefited by way of a joint establishment. He also had an income of £1,500 a year which was not the subject of the settlement. On an application by his former wife for increased maintenance, Held, that it was not right to proceed on the footing that the man's income was £1,500 a year plus the income settled on the second wife, and award the former wife a third of the combined amount, but in making the award account should be taken not only of the £1,500 a year of which he had the free disposition but also of the pecuniary advantages accruing to him from the enjoyment of the joint establishment with the second wife.—N. v. N. [Lord Merrivale, P.] 324

Practice — King's Proctor's rights — Powers of the Court — Intervention by King's Proctor before decree *nisi*—Collusion not charged—Matrimonial Causes Act, 1857 (20 and 21 Vict., c. 85), s. 29—Matrimonial Causes Act, 1860 (23 and 24 Vict., c. 144), s. 7—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), ss. 178, 181].—It is open to the King's Proctor by direction of the Court to intervene during the progress of a divorce suit with new evidence before decree *nisi*, subject to the direction of the Attorney-General, not only when collusion is in question but when other matters are in question. It was held that the Attorney-General was entitled, in the circumstances, to direct the King's Proctor to present new evidence.—SLOGGETT v. SLOGGETT [Lord Merrivale, P.] 394

Practice — Wife's undefended petition for dissolution — Temporary separation — Evidence of husband's association with a known woman — Charge of adultery at a hotel with woman unknown — Evidence based on hotel incidents].—Held, that the petition must be dismissed because his Lordship was not satisfied as to the fact of the adultery alleged to have occurred at a hotel. It was one of the class of cases that cast a great reproach on the administration of justice in the Divorce Division. His Lordship would not sanction the practice of resorting to hotels to establish a *prima facie* case for dissolution of marriage.—AYLWARD v. AYLWARD [Lord Merrivale, P.] 456

Wife's petition—Husband's adultery—Conduct conducing—Wife's refusal of marital intercourse—Grant of decree *nisi*.—PLOWS v. PLOWS [Lord Merrivale, P.] 263

ECCLESIASTICAL LAW—Church Assembly—Legislative Committee — Prohibition—*Certiorari*—Whether writs will lie].—Neither the Legislative Committee of the Church Assembly nor the Church Assembly itself is a body to which a writ of *certiorari* or of

prohibition will issue, as neither of them is a body which is under a duty to act in a judicial capacity.—REX v. LEGISLATIVE COMMITTEE OF THE CHURCH ASSEMBLY AND THE CHURCH ASSEMBLY—EX PARTE HAYNES SMITH [Div. Ct.] 68

Disused churchyard — Erection of electric transformer chamber — Whether a "building" — Refusal of sanction—Disused Burial Grounds Act, 1884 (47 and 48 Vict., c. 72), s. 3].—By s. 3 of the Disused Burial Grounds Act, 1884, "After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting-house, or other places of worship." By reason of this enactment the Board refused to sanction an agreement for the construction, by an electric lighting company, of a transformer chamber in a disused churchyard, holding that the proposed structure, although not substantially raised above the ground level, would be a building "erected upon" the churchyard and therefore came within the prohibition. *In re St. Nicholas Cole Abbey* ([1893] P. 58) not followed. Decision of the Court of Arches (44 *The Times* L.R. 241; [1928] P. 102) affirmed.—RECTOR AND CHURCHWARDENS OF ST. NICHOLAS ACONS v. LONDON COUNTY COUNCIL [P.C.] .. 656

EDUCATION — Local education authority — Education committee — Powers—Delegation to sub-committee — Provided schools—Dismissal of teachers by sub-committee — Whether delegation *ultra vires* — Education Act, 1921 (11 and 12 Geo. V., c. 51), ss. 4, 148 (1)].—The plaintiffs were employed by the defendants, a local education authority, as assistant teachers in provided schools and were subject to a month's notice. Owing to financial difficulties the defendants, considering the matter to be urgent, appointed a sub-committee with plenary powers to carry out measures of economy, and the education committee of the defendants handed over their powers in the matter of economy to this sub-committee. A month's notice was given to the plaintiffs by the sub-committee, and they brought actions against the local education authority and each moved for an interlocutory injunction restraining the defendants from attempting to enforce the notice. The ground on which the plaintiffs moved was that under s. 4 of the Education Act, 1921, the defendants had acted *ultra vires* in delegating their powers under the Act to the sub-committee. Held, that under s. 4 of the Act both the local education authority and their education committee had a right to delegate their powers, and the motions failed.—RICHARDSON v. ABERTILLERY URBAN DISTRICT COUNCIL. THOMAS v. SAME [Eve, J.] .. 333

School attendance — Employment — Refusal of exemption — Non-attendance — Extenuating circumstance — Education Act, 1921 (11 and 12 Geo. V., c. 51), Part IV.]—Where an education authority has refused an

application for exemption from school attendance on the ground of employment the fact of such employment can be neither a "reasonable excuse" for non-attendance, nor an extenuating circumstance entitling the justices under the Probation of Offenders Act, 1907, to dismiss a summons against the parent.—THOMAS v. HUGHES [Div. Ct.] .. 818

School—Attendance—Withdrawal of child for one hour weekly—Music lesson—"Under efficient instruction in some other manner"—Education Act, 1870 (33 and 34 Vict., c. 75), s. 74—Education Act, 1921 (11 and 12 Geo. V., c. 51), s. 49—Surrey County Council By-laws, No. 2].—By by-law No. 2 of the by-laws made by the Education Committee of the Surrey County Council under s. 74 of the Education Act, 1870, as amended by the Education Acts, 1876 to 1902, (which is now replaced by s. 49 of the Education Act, 1921), "The parent of every child of not less than five nor more than 14 years of age shall cause such child to attend school, unless there be a reasonable excuse for non-attendance. Any of the following reasons shall be a reasonable excuse, namely: (*a*) that the child is under efficient instruction in some other manner. . . ." Held, that these words mean that the child is receiving the whole of its instruction in some other manner, and do not entitle a parent to withdraw a child for one hour a week for the purpose of attending private lessons in a subject not approved by the Board of Education for elementary schools.—OSBORNE v. MARTIN [Div. Ct.] 38

ELECTIONS — Corrupt practices — Expenses incurred by unauthorized person — Three candidates—Opposition to one—No invitation to vote for particular candidate — Representation of the People Act, 1918 (7 and 8 Geo. V., c. 64), s. 34 (1)].—By s. 34 (1) of the Representation of the People Act, 1918, "A person other than the election agent of a candidate shall not incur any expenses on account of holding public meetings or issuing advertisements, circulars or publications for the purpose of promoting or procuring the election of any candidate at a Parliamentary election, unless he is authorized in writing to do so by such election agent." Held, that where there are three candidates and a person other than an election agent incurs such expenses without written authority for the purpose of opposing one of the three candidates but does not specifically invite voters to vote for a particular candidate, he nevertheless contravenes the sub-section since "any candidate" must be construed as including "any candidates" and such action must be deemed as having been intended to promote or procure the return of a candidate other than the one opposed.—REX v. HAILWOOD. REX v. HAILWOOD AND ACKROYD, LIMITED [C.C.A.] 343

ELECTRICITY—Local authority—Monopoly in area—Exception—Supply by person not having primary business of supplying elec-

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tricity — Application of the expression "primary business" to the particular facts—Electric Lighting Act, 1909 (9 Edw. VII., c. 34), s. 23].—The plaintiffs, a local authority empowered to supply electricity within a certain area, sought an injunction under s. 23 of the Electric Lighting Act, 1909, to restrain the defendant from supplying electricity to certain consumers in the area. By that section the plaintiffs had a monopoly in the area, subject to the proviso that "this section shall not prevent any company or person from affording a supply of electrical energy to any other company or person where the business of the company or person affording the supply is not primarily that of the supply of electrical energy to consumers." Held, on the facts, that as the supply of electrical energy was not the defendant's primary business, the action failed.—CAERPHILLY URBAN DISTRICT COUNCIL v. GRIFFIN [Russell, J.] 132

Special order — Revocation — Electricity Supply Act, 1919 (9 and 10 Geo. V., c. 100), s. 26]. — The power conferred by s. 26 of the Electricity Supply Act, 1919, to amend or revoke by special order any provisional order made under the Electric Lighting Acts and confirmed by Parliament does not include a power to amend or revoke a special order by another special order.—REX v. MINISTER OF TRANSPORT—EX PARTE LEICESTERSHIRE AND WARWICKSHIRE ELECTRIC POWER COMPANY [Div. Ct.] 823

Supply—Company—Special Act—Application by local authority to take over supply—Whether consent of company required—Yorkshire Electric Power Act, 1901 (1 Edw. VII., c. cxvi.), s. 49].—The Yorkshire Electric Power Company were by the Yorkshire Electric Power Act, 1901, empowered to supply energy within an area including the urban district of Silsden. Section 49 of the Act provided: "Nothing in this Act shall prejudice any application which is now being or may hereafter be made by any local authority company or person for a Provisional Order under the principal Acts for power to supply energy within the area of supply under this Act and in any Provisional Order to be granted by the Board of Trade [now the Electricity Commissioners] authorizing any local authority company or person so to supply energy provision may be made as to the taking over of any supply then given by the company for use exclusively within the area of supply defined in such Order." The Silsden Urban District Council having applied to the Commissioners for a Special Order (taking the place of the former Provisional Order) for power to supply energy within their urban district, and to take over the supply given by the Yorkshire Electric Power Company, the company sought to prohibit the Commissioners from proceeding with the consideration of the Draft Special Order, on the ground that the consent of the company was required. Held, that s. 49 clearly contemplated proceedings *in invitum* and that the consent of the company was not necessary, and that the Commissioners were not usurping jurisdiction in proceeding to consider the Draft Order.—REX v. ELECTRICITY COMMISSIONERS—EX PARTE YORKSHIRE ELECTRIC POWER COMPANY [Div. Ct.] .. 26

EXECUTION — Evidence—Bankers' books—Account of person other than the debtor—Bankers' Books Evidence Act, 1879 (42 Vict., c. 11), s. 7].—Where, under s. 7 of the Bankers' Books Evidence Act, 1879, an order is made for the inspection of a judgment debtor's account with a banker, the Court has power to make the order extend to the banking account of a person other than the debtor if the account of that other person was controlled by the debtor and was used by the debtor for his or her own purposes].—IRONMONGER AND CO. v. DYNE [C.A.] .. 579

EXECUTORS—Debt due to testator—Executor one of joint and several makers of promissory note—Right to sue co-makers—Release of debt by appointment of executor].—A testator made his will appointing the plaintiff executor thereof. The plaintiff and the defendant and two others subsequently made a joint and several promissory note whereby they promised to pay the testator £100. The note was unpaid at the death of the testator. Held, that the plaintiff, as executor, could not sue his co-debtors, since his appointment as executor released the debt at common law, and even if he would have been liable in equity the debt was deemed to be paid at probate.—JENKINS v. JENKINS [Div. Ct.] 483

FACTORIES — Dangerous machinery—Fencing—Guard provided by employer not replaced by workman—Fatal accident—"Neglect" to observe provisions of Act—Factory and Workshop Act, 1901 (1 Edw. VII., c. 22), ss. 10 (1) (*c*), 136, 141].—The duty to fence securely dangerous machinery under s. 10 of the Factory and Workshop Act, 1901, is absolute, and it is no answer to a charge under s. 136, where a person has been killed or injured in consequence of the neglect to observe that provision, that the occupier provided proper guards and placed on the workmen the responsibility of using them. "Neglect to observe" does not import any element of wilfulness: mere non-observance is "neglect" within the section, and the occupier is liable unless he has recourse to the provisions of s. 141 (1), and brings the actual offender before the Court.—THOMAS v. THOMAS BOLTON AND SONS, LIMITED [Div. Ct.] 640

GAMING—Contract—Entry of horse for race—Money prize—Entrance fee—Forfeiture of fee in event of horse not running—Wagering contract — Unenforceability—Gaming Act, 1845 (8 and 9 Vict., c. 109), s. 18].—A contract between the Jockey Club and a racehorse owner that he will pay

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an entrance fee for the privilege of running a horse in a race for a money prize, and that if the horse does not run he will forfeit the entrance fee or part of it, is a contract by way of wagering and is unenforceable by reason of s. 18 of the Gaming Act, 1845.—LORD ELLESMERE AND OTHERS v. WALLACE [Clauson, J.] 798

Dealings in foreign currency — Obligation to deliver].—Observations upon what constitutes a transaction a gaming or wagering contract.—IRONMONGER AND CO. v. DYNE [C.A.] 497

Whist-drive — Charge for admission — Prizes—Offence—Betting Act, 1853 (16 and 17 Vict., c. 119), s. 1].—The holding of a whist-drive, with a charge for admission and the offer of prizes, is an offence against s. 1 of the Betting Act, 1853.—BENNETT v. EWENS [Div. Ct.] 545

HABEAS CORPUS—Successive applications—To different Courts or to different Judges of same Court].—Although since the Supreme Court of Judicature Act, 1873, the several Superior Courts have been combined in one High Court of Justice each Judge of that Court still has jurisdiction to entertain an application for a writ of *habeas corpus* in term time or in vacation and is bound to hear and determine such an application on its merits, notwithstanding that some other Judge has already refused a similar application ; and the same principle applies in the case of the Judges of the Supreme Court of Nigeria.—ESHUGBAYI ELEKO v. NIGERIA GOVERNMENT OFFICER AND ANOTHER [P.C.] 632

HACKNEY CARRIAGES—Omnibus—Number of passengers—By-law—Whether applicable to motor-omnibuses].—NEAL v. GUY [Div. Ct.] 578

See also METROPOLIS.

HIGHWAY — Main road through tunnel — Tunnel out of repair—Annual payment by Council towards cost of repair — Local Government Act, 1888 (51 and 52 Vict., c. 41), ss. 11 (2), 97].—The Reigate Corporation were liable for the repair of all the highways within their district repairable by the inhabitants at large. Tunnel-road was a main road running through a tunnel. It was necessary to repair the tunnel, and the question was whether the cost of the repair was part of the cost of repair of the road towards which the Surrey County Council was bound to make an annual payment within s. 11 (2) of the Local Government Act, 1888. Held, that the walls and roof of the tunnel were necessary to keep the road open, and might properly be said to be part of the road, and that even if the walls and roof were not part of the road yet their repair and maintenance were necessary to the repair and maintenance of the road, and the costs of such repair and maintenance

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were costs within the meaning of s. 11 (2) of the Local Government Act, 1888.—REIGATE CORPORATION v. SURREY COUNTY COUNCIL [Russell, J.] 308

Road maintenance — Obligation imposed by private Act — Increase of traffic —Extent of obligation—Manchester Corporation Waterworks and Improvement Act, 1875 (38 and 39 Vict., c. clxi.), s. 14 (ii.)].—The plaintiffs were empowered by statute to make a road in accordance with the provisions of the Act and to the reasonable satisfaction of the defendants' predecessors. The road was duly made and completed in 1878, in accordance with the Act and to the satisfaction of the defendants' predecessors, but the traffic and cost of maintenance had of late years greatly increased, and the road had fallen into disrepair. Eve J. held, following *Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. Attorney-General* (31 *The Times* L.R., 254 ; [1915] A.C., 654) that the plaintiffs were only liable to repair the road according to the standard of requirement of 1878, but that as that standard would not last long under the strain of modern traffic it would be wasteful to order them to do it, and there must be an inquiry as to what contribution the plaintiffs should make towards the cost of durable repairs. Held, on appeal, that the Judge had correctly estimated the plaintiffs' liability, but that there was no jurisdiction to make any other order or to direct the proposed inquiry. Decision of Eve, J. (44 *The Times* L.R., 88 ; [1928] 1 Ch., 127) affirmed with a variation.—MANCHESTER CORPORATION v. AUDENSHAW URBAN DISTRICT COUNCIL [C.A.] 628

HOUSING—Notice to repair premises—Service on owner of fee simple—Notice not complied with — Statutory charge — Priority to fee farm rentcharge previously reserved—Housing Act, 1925 (15 Geo. V., c. 14), s. 3 (3)].—A charge conferred on a local authority in respect of repairs by section 3 of the Housing Act, 1925, is a charge on the whole of the proprietary interests of the premises, and therefore obtains priority over a fee farm rentcharge previously reserved on the grant of the fee simple. *Paddington Borough Council v. Finucane* ([1928] W.N., 100) followed.—BRISTOL CORPORATION v. VIRGIN AND OTHERS [Div. Ct.] 546

HUSBAND AND WIFE—Divorce costs—Wife guilty of adultery—Defence of divorce proceedings — Employment of solicitors—Pledging husband's credit—No authority at common law].—At common law a wife who has been guilty of adultery has no authority to pledge her husband's credit by employing solicitors to defend divorce proceedings. Her solicitors, therefore, cannot proceed against the husband for their costs after the decree, unless they have obtained from the Divorce Court an order for costs or for security for costs.—ARNOLD AND WEAVER v. AMARI [Sankey, J.] 221

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Maintenance—Order—Refusal by justices—Wife's appeal—Application against husband for security for wife's costs—Summary Jurisdiction (Married Women) Act, 1895 (58 and 59 Vict., c. 39—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 and 16 Geo. V., c. 51)].—A wife who has failed in her application before justices for a maintenance order on the ground of her husband's desertion is not entitled to an order against her husband for the security of the costs of her appeal against the justices' decision.—FLETCHER v. FLETCHER [Lord Merrivale, P.] 13

Maintenance—Order refused by magistrate—Wife's appeal—Separation deed—Covenant for maintenance—Husband's bankruptcy—Wife proves for capitalized value of provision in deed—Fractional dividend—Bankruptcy Act, 1914 (4 and 5 Geo. V., c. 59)—Summary Jurisdiction (Married Women) Act, 1895 (58 and 59 Vict., c. 39)—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 and 16 Geo. V., c. 51)].—A bankrupt is not relieved of his common law liability to support his wife by the discharge of his liability, on being adjudged bankrupt, under a separation deed to maintain his wife, whether she has proved in the bankruptcy for the capital value of the weekly sums which he covenanted under the deed to pay or whether she has not proved in the bankruptcy. On the extinction of the husband's liability under the deed by the bankruptcy, the wife's common law right is revived.—DEWE v. DEWE. SNOWDON v. SNOWDON [Lord Merrivale, P.] 274

See also DIVORCE.

INDIA—Allahabad—Indian Penal Code].—The appellant was tried for murder by intentionally causing the death of another native. He was convicted by the Additional Sessions Judge and four assessors of culpable homicide not amounting to murder, and was sentenced to a term of rigorous imprisonment. The Government applied for a revision of the judgment, and the High Court altered the conviction to one of murder and sentenced the appellant to death. Held, that on an application for revision, as distinguished from an appeal, the High Court had no jurisdiction to convert the finding of an acquittal of murder into one of conviction and to sentence the man to death.—KISHAN SINGH v. THE KING-EMPEROR [P.C.] 690

INDUSTRIAL SOCIETY—Rules—Amendment—Validity].—A rule of a society registered under the Industrial and Provident Societies Act, 1893, originally provided: "Individual members shall hold at least one share for every 20 acres or fraction of 20 acres farmed by them up to 500 acres, and at least one share for every 40 acres or fraction of 40 acres above 500. . . ." By successive amendments the words "one share" were altered to "shares of the nominal value of £5." The respondents had become members

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of the society before the date of the last amendment, and they took no steps for the purpose of dissenting from it. On the society going into liquidation a summons was taken out by the liquidator for the determination of the question whether, in settling the list of contributories, the amended rule was to be taken as binding on the respondents. Held, applying *Biddulph and District Agricultural Society, Limited v. Agricultural Wholesale Society, Limited* (42 *The Times* L.R., 761; [1927] A.C., 76), that the rule as amended was binding on the respondents.—IN RE WILTS AND SOMERSET FARMERS, LIMITED [Romer, J.] 577

INSURANCE (ACCIDENT)—Death—Exception—Assured not to be in charge of any vehicle—Bicycle—Whether a vehicle].—The Court held that a bicycle was a "vehicle" within the meaning of that word in an accident insurance policy containing the condition that at the time of the accident the assured should not be in charge of any vehicle.—HANSFORD v. LONDON EXPRESS NEWSPAPER, LIMITED [Rowlatt, J.] 349

INSURANCE (INDUSTRIAL)—Child under six years of age—Assurance of payments on death exceeding £10—Offence—Time for institution of proceedings—Friendly Societies Act, 1896 (59 and 60 Vict., c. 25), s. 62—Industrial Assurance Act, 1923 (13 and 14 Geo. V., c. 8), s. 4 (1)—Friendly Societies Act, 1924 (14 and 15 Geo. V., c. 11), s. 2 (1)].—A child was born on November 12, 1921, and shortly after his birth the respondents, an industrial assurance company, issued three policies of assurance in respect of him; each policy contained a table showing the amount payable in the event of the child's death at various dates before maturity, and on October 18, 1926, while he was still under six years of age, the total amount assured under the three policies was £15 10s. Each policy contained the proviso: "The provisions of the Act of Parliament enacting that no greater amount than a sum of £6 shall be paid on the death of a child under the age of five years or than the sum of £10 on the death of a child under the age of ten years shall apply to this policy." These limits had since been altered by statute so as to permit a maximum of £10 in the case of a child under six, and £15 in the case of a child under ten. Held, (1) that to assure a child for more than the permitted amount was an offence, no less than to pay more than the permitted amount; (2) that the proviso in the policies did not protect the respondents, as it had no legal effect, since the statute applied of its own force and not by agreement between the parties; (3) that there was an assurance of the child with each acceptance of a premium, and that therefore the date of the last acceptance of a premium was the date from which the time for taking proceedings began to run.—HARKER v. BRITANNIC ASSURANCE COMPANY, LIMITED [Div. Ct.] 243

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Transfer—Holder of several policies in both old and new societies—Transfer of one policy only—Industrial Assurance Act, 1923 (13 and 14 Geo. V., c. 8), ss. 26 (1), 39].—The provisions of s. 26 (1) of the Industrial Assurance Act, 1923, with reference to the transfer of members of, or persons assured with, a collecting society or an industrial assurance society, apply whether the transaction involves transfer of the whole membership or interest of the assured, or of only one policy out of several, and whether the transferee is or is not already a member of, or a person assured with, the new society. *Pearl Life Assurance Company, Limited v. Scottish Legal Life Assurance Society, Limited* (17 *The Times* L.R., 238; [1901] 1 K.B., 528) and *Salvation Army Life Assurance Society, Limited v. British Legal Life Assurance Company, Limited* (45 Sc.L.R., 843) applied.—BELL AND ANOTHER v. HARKER [Div. Ct.] .. 33

INSURANCE (LEAKAGE)—Certificate—Issue under alleged policies—Time limit for claim—Limit in policies—No limit in certificate—Volatility of thing insured—Bulk dependent on temperature—Whether "leakage" confined to loss of contents].—The plaintiffs had an interest in a certificate of insurance on 100 barrels of turpentine shipped from Florida to Rotterdam. This certificate had been issued under what were said to be policies of insurance subscribed by the defendants. The policies provided for payment for "leakage" in excess of 1 per cent., and, as the practice was to measure, but not to weigh, the amount shipped, and to weigh, but not to measure, the amount delivered, and as, owing to the volatility of turpentine, the weight of a gallon depended on the temperature, it was provided that the conversion of kilograms into American gallons should be on the basis of 3.25 kilograms to the gallon. The alleged policies contained a condition that no claim under them could be maintained unless brought within a year, but in the certificate there was no such condition. When the turpentine was discharged, the weight was short, as compared with the weight calculated from the number of gallons shipped, but the defendants declined to pay in the absence of injury to the barrels or some clear sign of leakage. The action was brought on the certificate but not within the year. Held, that the contract was to pay for loss of weight or bulk, even if this was caused by change of temperature and not by loss of some of the contents of the barrels, and that, as the certificate was the actual insurance, and as, in the circumstances, the clause as to limitation of time could not be read into it, the plaintiffs were entitled to recover. Decision of MacKinnon, J. (44 *The Times* L.R., 95), affirmed.—DE MONCHY AND OTHERS v. PHŒNIX INSURANCE COMPANY OF HARTFORD AND ANOTHER [C.A].. 364

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INSURANCE (LIFE)—Condition against suicide—Exception in favour of "third party" assignee—Assignment of policy to insurers—Suicide of assured—Whether insurers included in "third party"].—An owner of leasehold premises demised them by way of mortgage to the plaintiffs, an insurance company, and assigned to them a policy of insurance effected with them upon his life. The policy provided:—"The policy shall be void if the life assured dies by suicide or by the hand of justice. . . . The policy shall remain in force to the extent of the pecuniary interest of third parties *bona fide* acquired for valuable consideration, provided notice thereof in writing shall have been received and admitted by the directors at least one month prior to the date of death." While the policy was in force the assured committed suicide. In an action by the insurance company against the assured's legal personal representative, Held, that the insurers were not included in the expression "third party" and therefore the policy was void and they were not bound to satisfy themselves out of it but were entitled to enforce their security against the leasehold premises.—ROYAL LONDON MUTUAL INSURANCE SOCIETY, LIMITED v. BARRETT [Tomlin, J.] 363

Policy for one year—Assignment—Renewal for three months—Death of assured during renewal period—Policy money—Whether belonging to testator's estate or to assignee].—The plaintiffs' testator took out an insurance policy on his life for 12 months and assigned the benefit of it to the defendant absolutely. Before the expiry of the policy he renewed it for a further period of three months, and the policy was altered by endorsement, no new policy being issued and no fresh stamp duty being paid. While the further period of three months was running, the testator died. Held, that as the intention was to continue and extend the original contract but not to rescind it, the renewed policy enured for the benefit of the defendant, and not for the benefit of the testator's estate.—ROYAL EXCHANGE ASSURANCE v. HOPE [C.A.] 160

INSURANCE (LOSS)—Clause in policy but not in slip—Warehouse to warehouse clause—Loss "reasonably attributed to fire"].—The respondents, who were cork growers and had a factory and a warehouse near Algeciras, sent from the factory to Algeciras quantities of cork for shipment and allowed it to accumulate on the jetty till there should be enough for a cargo. While an accumulation on the jetty was awaiting shipment the respondents effected with the appellants an insurance by a slip. Before the policy was issued a fire broke out on the jetty, and to prevent its spreading to the cork the authorities jettisoned part of the cork and threw sea-water on the rest, with the result that a large portion was lost or damaged. The policy, when issued, contained a free of capture and seizure clause and a warehouse to warehouse clause and provided for payment of any loss "which may reasonably be attributed to fire," and a clause in the margin provided

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that shore risk against fire was not covered where the assured had fire insurance. The marginal clause was not in the slip. The respondents, who had another insurance against fire, claimed under the insurance effected with the appellants, and in an arbitration an award was given in the respondents' favour. Held, (1) that as the goods at the time of the loss had reached the jetty in the ordinary course of transit they were covered by the warehouse to warehouse clause, (2) that the goods were lost by a peril insured against, (3) that the underwriters were not relieved from liability by the f.c. and s. clause, and (4) that the question whether the policy, so far as it contained a fire insurance clause, was or was not contrary to the usual form of marine insurance on goods, must be referred back to the abritrator. Decision of Roche, J. (44 *The Times* L.R., 392), varied.—SYMINGTON AND CO. v. UNION INSURANCE SOCIETY OF CANTON, LIMITED [C.A.] .. 635

INSURANCE (MARINE)—General average—Accident — Repairs — Items recoverable — York-Antwerp Rules, 1924].—The respondents insured the claimant's steamer by a policy providing that general average was to be adjusted according to the York-Antwerp Rules of 1924. The ship was chartered to go to Bordeaux to load for Cardiff, the charterparty also providing that average, if any, should be settled according to those Rules. During loading at Bordeaux the foremast broke, and damage was done to the ship. For the purpose of repair she was moved to another dock within the port and the shipowners incurred expenses as follows: (1) Wages and provisions of crew; (2) cost of handling and discharging cargo for the purpose of repairs; (3) cost of coal consumed in going in and out and keeping steam up; and (4) expense of towing in and out and mooring and port expenses, and cost of coal consumed in shifting the vessel. While staying at Bordeaux the ship was in no danger. On completion of repairs and loading she left for Cardiff, and while she was at sea she fouled some wreckage without any negligence of those on board her and though there was no immediate danger she was made unfit to encounter the ordinary perils of the sea, and the master put into Cherbourg, as a port of refuge, and had repairs effected. The expenses at Cherbourg were similar to those at Bordeaux. On a case stated by an arbitrator, Held, (1) that the cost of repairs in each case was recoverable as particular average; (2) that the other expenses at Bordeaux could not be claimed as general average, since no danger was in operation there; and (3) that the other expenses at Cherbourg could be claimed as general average since, though there was no immediate danger, the vessel was not fit, without repair, to encounter the perils of the sea.—VLASSOPOULOS v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED [Roche, J.] 725

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Particular average damage — Ship in collision — Both to blame — Amount recoverable from insurers].—The defendants insured the plaintiffs' steamer against the usual marine risks, the steamer being valued in the policy at £4,000. During the currency of the policy the steamer collided with another steamer. The ship was repaired at the cost of the plaintiffs, and a collision action by the plaintiffs against the owners of the other steamer was settled on the basis of both ships being to blame. The owners of the other steamer then paid over to the plaintiffs £2,500 as being half the damages, and for the purpose of the argument of the present case the amount of the damages was assumed to be £5,000. The plaintiffs brought this action against their marine insurers to recover whatever amount the Court might hold to be due to them under the policy, and the plaintiffs contended that as the balance of their loss was £2,500 they were entitled to recover this amount, it being less than the value of £4,000 put on the steamer in the policy. The defendants contended that they were liable only for £1,500, being the difference between £4,000 and £2,500, the amount recovered by the plaintiffs from the owners of the other ship. Held, that the contention of the defendants was correct.—GOOLE AND HULL STEAM TOWING COMPANY, LIMITED v. OCEAN MARINE INSURANCE COMPANY, LIMITED [MacKinnon, J.] 133

Total loss — "Immediate consequence" — Chain of causation].—The plaintiffs, having undertaken the reinsurance of a risk under a marine policy, reinsured their own risk with the defendants, the policies being subject to the following conditions: "In the event of the vessel not being at the place of destination on the date of the expiration of the policy the insurance shall continue in force till the end of the day when the vessel arrives at her first place of destination. If the insured object is in a damaged condition at the time when the insurance expires . . . the risk shall continue for the immediate consequence of such damage until the object without unnecessary delay has been repaired or sold." On the date of the expiration of the original policy the vessel was on a voyage and had not reached her first place of destination, and after that date and before reaching such place she grounded on a reef, but got off and proceeded. When she reached her first place of destination, it was found that she was badly damaged. There were no local facilities for repair, but temporary repairs were effected to enable her to proceed on her voyage to a place where she could be repaired. She then proceeded, but began to leak badly and had to be run ashore to prevent sinking, and was subsequently sold as a wreck. The original insurers paid as for a total loss, and the plaintiffs, having paid them, claimed against the defendants. Held, that the loss was an "immediate consequence" of the damage caused by the original stranding and as the risk continued until the vessel was repaired with no unnecessary delay the plaintiffs were

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entitled to recover. Decision of Rowlatt, J. (44 *The Times* L.R., 312), reversed.—MERCHANTS' MARINE INSURANCE COMPANY, LIMITED v. LIVERPOOL MARINE AND GENERAL INSURANCE COMPANY, LIMITED [C.A.] .. 512

See also COMPANIES—Winding-up.

INSURANCE (UNEMPLOYMENT)—Domestic servants — Employment in hostel — Connexion of hostel with educational institution—Non-insurability—Unemployment Insurance Act, 1920 (10 and 11 Geo. V., c. 30), Sched. I., Part II. (*b*)].—Domestic servants employed in a hostel which is so connected with an educational institution as to be part and parcel of that institution are not insurable under the Unemployment Insurance Act, 1920.—IN RE MACKAY. IN RE ROWLAND AND ANOTHER. IN RE BARRY AND ANOTHER [Roche, J.] 688

Relief work—Temporary worker—Work provided by local authority—Arrangement with Poor Law authority—Work in alternate weeks — Non-insurability of worker—Unemployment Insurance Act, 1920 (10 and 11 Geo. V., c. 30), s. 47 (1) (*b*)—Unemployment Insurance Act, 1927 (17 and 18 Geo. V., c. 30), Sched. IV.].—The Court held under the Unemployment Insurance Act, 1920, that a man employed by a local authority by arrangement with the guardians of the poor, under a scheme by which he was given work each alternate week from Thursday to Wednesday, for a full period of 48 hours, at the district rate of wages, was not employed full time within the meaning of section 47 (1) (*b*) of the Act of 1920, as amended by the Fourth Schedule to the Unemployment Insurance Act, 1927, and was not, therefore, insurable.—IN RE LEEDS CORPORATION AND CHADWICK [Roche, J.] .. 797

INTERNATIONAL LAW—Diplomatic privilege —Action to recover rent—Entry of appearance under protest—Plea of privilege by defendant—Consular secretary attached to German Embassy — Intervention of Attorney-General on behalf of Foreign Office].—In an action for arrears of rent due under a lease of a dwelling-house the defendant entered a conditional appearance under protest, and pleaded that being an official of the German Embassy he was protected by diplomatic privilege. It appeared that he was a "consular secretary" formerly working at the German Consulate, but that he had been transferred to the German Embassy. The Attorney-General upon the instructions of the Foreign Office appeared and informed the Court that the defendant was recognized by the Foreign Office as being on a list comprising the suite of the German Ambassador. Held, that the statement of the Attorney-General on the instructions of the Foreign Office as to the status of a person claiming diplomatic privilege was conclusive. Decision of the Court of Appeal (43 *The Times* L.R., 685 ; [1928] 1 K.B., 90) reversed.—ENGELKE v. MUSMANN [H.L.] 731

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Foreign judgments — Impeachability — Contrary to natural justice — Evidence required]. — Observations on the evidence required to impeach a foreign judgment between the same parties where it is set up in answer to the plaintiff's claim.—JACOBSON v. FRACHON [C.A.] 103

Foreign receivers—*Chose in action*—Right by foreign law to sue—Right in this country].—Foreign receivers or assignees in bankruptcy, who have, according to the law of the country in which they have been appointed, a right to sue in their own names for a *chose in action* due to a person in respect of whose property they have been appointed, have a similar right of action here.—MACAULAY v. GUARANTY TRUST COMPANY OF NEW YORK [Clauson, J.] .. 99

INTOXICATING LIQUOR — Licence—Special removal — Refusal — Appeal to quarter sessions—Finality of decision—No power to state a case—Licensing (Consolidation) Act, 1910 (10 Edw. VII. and 1 Geo. V., c. 24), s. 29 (5)].—The licensee and owners of refreshment rooms applied to the licensing justices under the Licensing (Consolidation) Act, 1910, for a special removal of the licence. The justices refused the application, and the applicants appealed to quarter sessions, the justices being the respondents. Quarter sessions allowed the appeal, but stated a case. The applicants took a preliminary objection that by reason of s. 29 (5) of the Act quarter sessions had no power to state a case. That subsection provides that on an appeal against the refusal of a special removal "the judgment of the Court of Quarter Sessions shall be final and conclusive for all intents and purposes." Held, that quarter sessions had no power to state a case.—PIPER AND OTHERS v. MARYLEBONE LICENSING JUSTICES [Div. Ct.] 510

Tied house — Increase of duty — Apportionment by Commissioners of Customs and Excise — Tenancy entered into after the Act — Finance (1909-10) Act, 1910 (10 Edw. VII., c. 8), s. 46].—Held (Lord Blanesburgh dissenting), that section 46 of the Finance (1909-10) Act, 1910, which provides for the apportionment between landlords and tenants of "tied" houses of the increased licence duties imposed by that Act, does not apply to tenancies entered into after the Act came into force. Decision of the Court of Appeal (43 *The Times* L.R., 772 ; [1928] 1 K.B., 523) affirmed.—REX (ON THE PROSECUTION OF PEGLER) v. COMMISSIONERS OF CUSTOMS AND EXCISE [H.L.] 775

See also LICENSING.

JUDGMENT—*Res judicata*—Contract for erection of bungalow "in a good and workmanlike manner"—Breach—Action in County Court giving particulars of defects—Recovery of judgment — Subsequent action on same contract alleging different defects].—The plaintiff contracted with the defendant, a

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builder, for the erection of a bungalow "in a good and workmanlike manner." He subsequently brought an action in the County Court alleging that the bungalow was not completed in a good and workmanlike manner, and giving particulars. In this action the plaintiff recovered £24 damages. He subsequently commenced a second action in the same Court, alleging the same contract, but with new particulars. The defendant *inter alia* pleaded *res judicata*. The County Court Judge held that the plea succeeded so far as the damages claimed in the second action were known to, or ascertainable by, the plaintiff at the date of the first action, but gave judgment for the plaintiff for the balance of his claim. Held by the Divisional Court, allowing the appeal of the defendant, that the cause of action was the same in both actions, and that the plea of *res judicata* was sufficient. To sustain a second action on the same contract or the same facts there must be a distinct cause of action, not merely different damages.—CONQUER v. BOOT [Div. Ct.] .. 486

JUSTICES—Case stated—Death of justice after hearing in police court—Case signed by two surviving justices — Validity — Summary Jurisdiction Act, 1857 (20 and 21 Vict., c. 43), s. 2].—The Summary Jurisdiction Act, 1857, s. 2, provides: "After the hearing and determination by a justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way . . . either party to the proceeding before the said justice or justices may, if dissatisfied with the said determination, as being erroneous in point of law, apply in writing . . . to the said justice or justices to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon of one of the superior courts of law. . . ." The effect of this section is not to oust the jurisdiction of the High Court to entertain an appeal by case stated where the case is signed by only two of the three justices who heard the complaint in the police court, the reason for the absence of the signature of the third justice being that he has died between the determination of the complaint and the statement of the case.—MARSLAND v. TAGGART [Div. Ct.] 543

See also SUMMARY JURISDICTION.

LANDLORD AND TENANT—Covenant by lessee — Insurance against fire — Named office—Alternative—Other responsible office to be approved by lessor].—Held (Lord Blanesburgh dissenting), that a covenant by a lessee to insure the demised premises in the joint names of the lessee and the lessor, "in the Law Fire Office or in some other responsible insurance office to be approved by the lessor," does not confer upon the lessee an alternative to be exercised at his volition; and under this covenant the lessee cannot properly tender an office which is not approved by the lessor. Decision of the

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Court of Appeal (44 *The Times* L.R., 17; [1928] Ch., 59) reversed.—LORD TREDEGAR v. HARWOOD AND OTHERS [H.L.] 790

Covenant by tenant to repair—Breach—Notice — Service — Requisites — Law of Property Act, 1925 (15 Geo. V., c. 20), s. 196 (3)].—Under s. 196 (3) of the Law of Property Act, 1925, a notice of a breach of covenant is properly served on the tenant if it is left with some person on the premises and if there are reasonable grounds for supposing that that person will, if possible, pass it on to the tenant. — CANNON BREWERY COMPANY, LIMITED v. SIGNAL PRESS, LIMITED, AND OTHERS [Humphreys, J.] 486

Lease — Assignment — Consent of lessor—Refusal—Lessee's breach of covenant to repair —Whether a justification].—Where a lease contains a covenant by the lessee to repair and a provision that the lessor's consent to an assignment by the lessee is not to be unreasonably withheld, the mere fact that the lessee is committing a continuing breach of the covenant to repair does not necessarily entitle the lessor to refuse his consent to an assignment, at all events where the amount of disrepair is not very serious.—FARR v. GINNINGS [Clauson, J.] 249

Lease — Construction — Rates paid in excess of fixed sum in any year of tenancy — Covenant by landlord to refund — Covenant by tenant duly and punctually to pay rates—Three half-years' rates paid in single year of tenancy—Construction of landlords' covenant to refund].—The lease of a flat beginning at midsummer at a rent of £400 per annum, payable in advance at the rate of £100 on each quarter day, contained a covenant by the lessors that in case the total sum paid by the tenant in any one year of the term in respect of rates and taxes should exceed £125, the lessors would, on production of the relative receipts, refund to the tenant the difference between the total sum paid by him as aforesaid and £125. If this difference were not refunded by the lessors within fourteen days of demand the tenant was to be at liberty to deduct such difference from the next instalment of rent. The lease contained a covenant by the tenant that he would duly and punctually pay and discharge all rates, taxes, duties, charges, assessments, and outgoings payable in respect of the demised premises. The tenant in a year of the tenancy between midsummer and midsummer paid three half-years' rates, amounting in all to over £125, and having demanded the refund of the excess from the landlords and having failed to get payment of the same within 14 days of the demand, deducted it from his next instalment of rent. Held (Scrutton, L.J., dissenting), that, under the landlords' covenant to refund, the tenant was entitled to make the deduction. Decision of the Divisional Court (44 *The Times* L.R., 501) affirmed.—SOWERBY AND ANOTHER v. LINDSAY (WHITELOCK AND ANOTHER, THIRD PARTIES) [C.A.] 714

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Rent in arrear — Forfeiture — Judgment for rent and possession—Subsequent agreement by tenant to yield up possession at end of quarter—Application by tenant for relief against forfeiture—Effect of agreement—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 46].—The rent of certain premises being in arrear, the landlord obtained judgment against the tenant for possession of the premises. Subsequently a document was signed by the tenant which provided that if the landlord would withhold the writ of possession, he, the tenant, would pay the rent and give up possession of the premises at the end of the quarter. Held, that the document was not inconsistent with the tenant's right to obtain relief against forfeiture under s. 46 of the Supreme Court of Judicature (Consolidation) Act, 1925.—NANCE v. NAYLOR [C.A.] 11

Restrictions — Covenant — Breach — Action for possession — Counter-claim for renewal of lease — House within Rent Restrictions Acts — Costs — Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 17 (2)].—BRANCH AND OTHERS v. BENNETT'S DAIRIES, LIMITED, AND OTHERS [MacKinnon, J.] 605

Restrictions — Decontrol — Dwelling-house — Rent less than two-thirds of rateable value —Tenant in occupation on July 31, 1923 —Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 12 (7) — Rent and Mortgage Interest Restrictions Act, 1923 (13 and 14 Geo. V., c. 32), s. 2 (1)].—A tenant of a dwelling-house under a 98 years' lease at a rent which was less than two-thirds of the rateable value of the house was in possession of the house at the passing of the Rent and Mortgage Interest Restrictions Act, 1923. Held, that the tenant was not to be deemed the landlord within the meaning of s. 2 (1) of the Act of 1923, and as the true landlords were never in possession the house remained one to which the Act of 1920 applied. Decision of the Divisional Court (44 *The Times* L.R., 94; [1928] 1 K.B., 441) affirmed.—BROOKS AND OTHERS v. LIFFEN [C.A.] 350

Restrictions — Decontrol — Whole dwelling-house decontrolled—Part subsequently let—Whether decontrolled—Rent and Mortgage Interest Restrictions Act, 1923 (13 and 14 Geo. V., c. 32), s. 2 (1)].—Where a dwelling-house becomes decontrolled by reason of the landlord's coming into possession of the whole of it, and where the landlord subsequently lets part of that dwelling-house, the part so let remains decontrolled. *Cohen v. Gold* (43 *The Times* L.R., 376; [1927] 1 K.B., 865) and *Lloyd v. Cook* (44 *The Times* L.R., 455) not followed. *Prout v. Hunter* (40 *The Times* L.R., 868; [1924] 2 K.B., 736) and *Finey v. Gougoltz* (42 *The Times* L.R., 501; [1926] 2 K.B., 322) applied.—RATKINSKY v. JACOBS [Div. Ct.] 548

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Restrictions — Dilapidations — Transfer of burden to tenant — Non-occupation by tenant — Subletting of part furnished — Assessment of dilapidations — Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 2 (3)].—The plaintiff was the lessor and the defendant was the lessee of a flat consisting of ground floor and basement, the lease exempting the lessee from liability for loss arising from fair wear and tear. When the lease expired in 1921 the plaintiff granted to the defendant a fresh lease but the above exemption was withdrawn. The defendant never occupied the flat but sublet the ground floor furnished and the basement unfurnished. When the lease expired both the ground floor and the basement were vacant and the defendant gave up the premises. In an action for dilapidations, Held, (1) that non-occupation by the tenant did not take away the protection given to the tenant by s. 2 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as regards the transfer of a liability for cost of repairs, (2) that the subletting of the ground floor furnished, which had come to an end, did not take any part of the premises outside the Act, so far as a claim for dilapidations was concerned, and (3) that the defendant was liable only for damages on the basis of the exemption contained in the earlier lease.—EBNER v. LASCELLES [Div. Ct.] 460

Restrictions — Dwelling-house — Decontrol —Possession by "landlord" — Subsequent letting of part — Whether part so let controlled — Grant of lease to tenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 12 (2), (7)—Rent and Mortgage Interest Restrictions Act, 1923 (13 and 14 Geo. V., c. 32), s. 2 (1), (2)].—The term "landlord," in section 2 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, is not to be construed as requiring a contract of tenancy; it must be construed in the looser sense of "owner," or in the sense of a person who, at a later stage, is going to appear in legal proceedings as landlord contesting with the tenant the terms of his tenancy. *Cohen v. Gold* (43 *The Times* L.R., 376; [1927] 1 K.B., 865) overruled. Where a dwelling-house has been decontrolled under section 2 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, every part of the dwelling-house is decontrolled—*i.e.*, the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, ceases to apply to the whole dwelling-house, so that a subsequent letting of the dwelling-house, or any part of it, does not revive control. Decision of the Divisional Court in *Lloyd v. Cook* (44 *The Times* L.R., 455) on this point reversed. *Ratkinsky v. Jacobs* (44 *The Times* L.R., 548) approved. The words "the tenant" in section 2 (2) of the Rent and Mortgage Interest Restrictions Act, 1923, refer to the sitting tenant—*i.e.*, to the particular person who is the tenant when the lease referred to in the subsection is granted,

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and to no other person. Decision of the Divisional Court in *Bartram v. Brown and Others* (44 *The Times* L.R., 572) affirmed.—LLOYD v. COOK. GOUDGE v. BROUGHTON. SIMSON v. MIATT. BARTRAM v. BROWN AND OTHERS. BARKER v. HUTSON [C.A.] .. 761

Restrictions — Non-occupation by tenant — Whole premises sub-let by tenant — Claim for order for possession against tenant — Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 5 (1) (5)]. —Where there has been no default by a tenant within section 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 [as re-enacted by section 4 of the Rent and Mortgage Interest Restrictions Act, 1923], no order for possession or ejectment can be made in respect of premises protected by the Act, so long as they are lawfully occupied ; and, therefore, the fact that a tenant, who has sub-let the whole of the premises and is not in occupation of any part thereof himself, has received notice to quit is not a ground for an order for possession being made against the tenant. *Gidden v. Mills* ([1925] 2 K.B., 713) explained and followed.—WEST WALES JOINT BOARD FOR THE MENTALLY DEFECTIVE v. EVANS AND ANOTHER [Div. Ct.] 565

Restrictions — Rates paid by owner instead of occupier — Nine-tenths only of full rate payable — Claim to increase rent by full rate — Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 2 (1) (*b*)].—In 1927 the Sheffield City Council, by virtue of section 56 of the Sheffield Corporation Act, 1920, passed a resolution to the effect that from October 5, 1927, the owner and not the occupier of premises where the rateable value did not exceed £10 should be rated to the consolidated rate on a basis of nine-tenths of the full consolidated rate. There was thus a difference of 10 per cent. of the full consolidated rate between the full rate previously payable by the occupier and the rate now payable by the owner. The landlords of certain premises, within the rateable value limit fixed by the resolution, claimed the right to increase their tenant's rent under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, by the full consolidated rate as previously paid by the tenant, and not by the amount, equal to nine-tenths of that rate, now payable by the landlords. Held, that section 2 (1) (*b*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, was applicable to the facts of the case, and that there had been an " increase " in the amount for the time being payable by the landlords in respect of rates over the corresponding amount paid in respect of the period including August 3, 1914 ; but that the landlords could only increase the rent by the amount of nine-tenths of the full consolidated rate, and not by the amount of the full rate previously paid by the tenant.—HODGKINSON AND ANOTHER v. HEWITT [Div. Ct.] .. 694

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Restrictions — Rent — Increase — Repairs — Landlord's responsibility for the whole — Question for determination — Application to county court — Decision final — Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 2 (6)].—The landlords of a cottage gave the tenant notice of an increase of 25 per cent. in the rent under s. 2 (1) (*d*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, on the ground that they were responsible for the whole of the repairs. The tenant disputed the increase on the ground that he was partly responsible for repairs, and the landlords applied to the county court under s. 2 (6) to determine, (1) whether the notice of increase was valid, and (2) whether they were responsible for the whole of the repairs. The deputy county court Judge answered both questions in the affirmative. On an appeal by the tenant the landlords took a preliminary objection that by s. 2 (6) the decision of the county court was final. The tenant contended that the sole question was as to the construction of the terms of the tenancy and that this question did not arise under s. 2 (1), (2) or (3), and that therefore the decision was not made final by s. 2 (6). Held, that the county court had jurisdiction to determine the questions on the application and its decision was final, and therefore the appeal must be dismissed.—ELVINGTON TENANTS, LIMITED v. HATTON [Div. Ct.] 453

Restrictions—Statutory tenant—Right to sublet—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 15 (1)].—A "statutory tenant" (*i.e.*, a tenant who after the expiration of his tenancy at common law holds over under the Rent Restriction Acts against the will of the landlord, or any other person who is protected from eviction by the Acts) has a right to sublet a portion of the premises occupied by him to a sub-tenant, if he was not forbidden to sublet in his original contract of tenancy. Decision of the Divisional Court (44 *The Times* L.R., 177) reversed.—ROE v. RUSSELL [C.A.] 278

Restrictions—Weekly tenancy—Determination —Agreement by tenant to purchase house — Rescission of agreement — Position of tenant — Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. V., c. 17), s. 12 (7)].—By an agreement in writing dated August 28, 1926, the defendant, who was the weekly tenant of a house to which the Rent Restrictions Acts applied, agreed to buy it from the plaintiff, the landlord, for £900. The agreement also provided that the defendant acknowledged owing the plaintiff £63 10s. arrears of rent and that the plaintiff would accept £50 in settlement ; that, until certain mortgages had been transferred from the plaintiff to the defendant, the plaintiff should remain in absolute ownership of the premises ; and that, until the completion of the conveyance, the defendant, who was to remain

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in possession, should pay to the plaintiff interest on the £950 at the rate of 6 per cent. with interest on interest dating from September 1, 1926. The defendant also agreed to pay certain deposits, the plaintiff, on failure of such payments, to be entitled to rescind the agreement and enter into possession of the house. The defendant agreed to maintain the house in a good state of repair and to pay rates, taxes, and insurance. On February 27, 1927, the plaintiff rescinded the agreement under the powers reserved in it and on the defendant's refusing to give up possession brought an action claiming, *inter alia*, possession. Held, (1) that the agreement of August 28, 1926, amounted to a surrender of the weekly tenancy previously held by the defendant, and (2) that the defendant was not protected by the Rent Restrictions Acts, because after the agreement of August 28, 1926, if the defendant remained in possession of the house as a tenant, she was a tenant at will at no rent and her tenancy came within s. 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, being at a rent less than two-thirds of the rateable value and by reason of that subsection must be ignored and the plaintiff had an unrestricted right to possession. Decision of the Divisional Court (44 *The Times* L.R., 105) affirmed.—TURNER v. WATTS [C.A.] 337

LANDS — Compulsory acquisition — Compensation—Bridge—Construction under statutory powers — Interference with access to wharf — Compensation obtainable by wharf-owners].—A county council was authorized by statute to construct a bridge over a navigable river giving access to a wharf resorted to by sea-going vessels and used for storage. The county council built the bridge and it interfered with access to the wharf, so that goods had to be transhipped into barges and the owners of the wharf had to acquire a new one. The freeholders and a mortgagee and the occupiers of the old wharf, the last-mentioned persons being tenants at will, claimed compensation as follows :—(1) Depreciation of freehold value of wharf, (2) cost of new wharf, (3) damage through loss of traffic at old wharf, (4) damage by reason of extra cost of handling traffic at new wharf, (5) damage to river sailing barge traffic, (6) damage from stoppage of dumb craft with goods for oversea, and (7) damage from loss of storage rents. Held, that the wharf-owners were entitled only to compensation under the first head and not under any of the other heads.—HEWETT AND OTHERS v. ESSEX COUNTY COUNCIL [Div. Ct.] 373

LEGITIMACY—Petition—Application for hearing *in camera* — Jurisdiction — Legitimacy Declaration Act, 1858 (21 and 22 Vict., c. 93)—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 188—Legitimacy Act, 1926 (16 and 17 Geo. V., c. 60)].—A petition filed under

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the Legitimacy Act, 1926, for the legitimation of a person who was born illegitimate, but whose parents were married subsequently to his birth, is not a proceeding which entitles the petitioner to a hearing *in camera*. There is no ground for departing from the general rule of judicial administration, specifically recognized in *Scott v. Scott* (29 *The Times* L.R., 520 ; [1913] A.C., 417), that justice in this country is to be administered publicly unless the Legislature shall otherwise direct.—GREENWAY v. ATTORNEY-GENERAL (GREENWAY AND OTHERS CITED) [Lord Merrivale, P.] 124

LICENSING—Intoxicating liquor—Redundancy—Same justices acting as licensing justices and as compensation authority—Offer to licensing justices of payment to compensation fund—Extraneous consideration—Effect on decision of compensation authority].—A question arose which of two adjacent licensed houses should be granted a renewal of its licence, and which should be suppressed. The owners of each house submitted to the licensing justices plans of proposed alterations, and the owners of one of the two houses offered to pay £1,250 to the compensation fund if the alterations were sanctioned. The same licensing justices sat as compensation authority to consider the question of redundancy, and decided to renew the licence of the house whose owners had offered the contribution, it appearing from the evidence that this house, when altered, could be made the better of the two. They then, as licensing justices, approved the alterations to this house. Held, that in considering the question of the contribution offered to the compensation fund the licensing justices had taken extraneous matter into account, and that this must be held necessarily to have affected their minds as compensation authority, and their decision must be quashed. *Per* AVORY, J.—It is contrary to the spirit of the Licensing Acts, though it may be within the letter of them, that the powers of the compensation authority should be delegated to the licensing committee so that the two bodies are identical. It was clearly intended that they should be separate and independent bodies.—REX v. SHEFFIELD JUSTICES—EX PARTE T. RAWSON AND CO., LIMITED, AND ANOTHER [Div. Ct.] 43
See also INTOXICATING LIQUOR.

Ordinary removal — Refusal on ground that monopoly value ought to be paid for a new licence—Jurisdiction—Licensing (Consolidation) Act, 1910 (10 Ed. VII., and 1 Geo. V., c. 24), s. 26].—Though licensing justices have no jurisdiction to make the grant of an ordinary removal of a licence subject to any condition as to payment of monopoly value, they are entitled to refuse the removal upon the sole ground that it would confer a great pecuniary gain upon the applicant, and that he ought therefore to apply for a new licence and pay monopoly value. Dictum of Lord Alverstone, C.J., in *Rex v. Drinkwater* (21 *The*

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Times L.R., 514; [1905] 2 K.B., 469) approved and followed.—REX v. CONFIRMING COMMITTEE OF THE COUNTY OF SOUTHAMPTON —EX PARTE SLADE [Div. Ct.] 804

Supply of liquor otherwise than during the permitted hours — Unauthorized act of errand boy—Non-liability of licensee —Licensing Act, 1921 (11 and 12 Geo. V., c. 42), s. 4 (*a*)].—A boy of 16, employed by the holder of an off-licence solely as an errand boy, supplied two bottles of whisky to a customer in his employer's absence, at a time when the premises were not open for business, and outside the permitted hours. He had never at any time been authorized to sell to or supply customers. Held, that he was not a servant or agent of the employer within the meaning of s. 4 (*a*) of the Licensing Act, 1921, so as to make the employer liable under that section for supplying intoxicating liquor otherwise than during the permitted hours.—ADAMS v. CAMFONI [Div. Ct.] 822

See also INTOXICATING LIQUOR.

LIMITATIONS (STATUTE OF)—Counterclaim —Calculation of period—Date to be taken—Whether issue of writ or delivery of counterclaim—Limitation Act, 1623 (21 Jac. I., c. 16), s. 3].—Section 3 of the Limitation Act, 1623, bars a counterclaim on a cause of action which arose more than six years before the delivery of the counterclaim, though less than six years before the issue of the writ in the action.—LOWE v. BENTLEY [MacKinnon, J.] 388

Lunatic — Funds in Court — Administration — Escheat — Payment out — Indemnity — Mistake of fact — Petition of right to recover — Lapse of time—Droits of the Crown—Limitation Act, 1623 (21 Jac. I., c. 16)].—In 1799 and 1801 the Crown made an *ex gratia* grant of certain funds in Court, which were claimed as *bona vacantia*, and took an indemnity in respect of the funds so granted. These funds represented the residuary estate of the father of a female lunatic, and she was entitled to them at the date of her death in 1798. In 1794 the Master had reported that she had no heir-at-law or next-of-kin. In July, 1926, a petition of right was presented by persons alleging that it had recently been established that the lunatic did in fact leave next-of-kin surviving her, and that they represented the next-of-kin, and they sought to recover from the Crown the personal estate of the lunatic. Held, that as the Crown had not created a trust in favour of any person the claim of the suppliants was barred by the Limitation Act, 1623. Decision of Romer, J. (44 *The Times* L.R., 225; [1928] 1 Ch., 385), affirmed.—IN RE PETITION OF RIGHT OF MASON AND OTHERS [C.A.] 603

Written acknowledgment of debt — Debentures of company — Statement in company's accounts — Whether a sufficient acknowledgment — Civil Procedure Act, 1833 (3 and 4 Wm. IV., c. 42), ss. 3, 5].—A limited company at various dates between 1890 and 1902 issued debentures payable within two years but paid no part of the principal or interest. The company's published accounts habitually referred to the debenture debt as outstanding, and in 1925 the accounts, which were signed by two directors and the secretary, stated the amount of the arrears of interest. Held, that the statement in the accounts was a written acknowledgment within s. 5 of the Civil Procedure Act, 1833, and therefore an action to recover the principal and interest was not barred by the 20 years limitation fixed by s. 3 of that Act. —VISCOUNT BURNHAM v. ATLANTIC AND PACIFIC FIBRE IMPORTING AND MANUFACTURING COMPANY, LIMITED [Clauson, J.] 702

LOCAL GOVERNMENT — Unsuccessful action against local authority — Costs as between solicitor and client — *Quia timet* action — "Act done"—Public Authorities Protection Act, 1893 (56 and 57 Vict. c. 61), s. 1].—Section 1 of the Public Authorities Protection Act, 1893, which directs that a successful defendant shall be entitled to costs as between solicitor and client in an action in respect of "any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority," applies to a *quia timet* action, where the act of the defendant is anticipated, but has not been actually completed. —GRAIGOLA MERTHYR COMPANY, LIMITED v. SWANSEA CORPORATION [C.A.] 175

LUNACY—Intestacy—Settlement of property—Directions of Court—Discretion to modify rights of Crown—Benefit of lunatic—Power to provide for expenditure—Lunacy Act, 1890 (53 and 54 Vict., c. 5), s. 117 (1)—Law of Property Act, 1925 (15 Geo. V., c. 20), s. 171 (1)].—IN RE GREENE AND OTHERS [C.A.] 449

Receiver of lunatic's estate — Order to pay to creditors — Death of lunatic before drawing up of order—Cesser of jurisdiction in lunacy].—An order was made in lunacy for the payment of £1,800 out of the lunatic's assets to certain of his creditors. The lunatic died three days after the order was made and before it was drawn up. Held, that the death of the lunatic operated as a cesser of the jurisdiction in lunacy, and therefore the order ceased to be operative, and the executors of the lunatic were entitled to ask to have all his assets transferred to them. The creditors could not claim that they had any charge in respect of the proposed payment; for the order was made at the instance of the receiver, as a matter concerning the management of the lunatic's estate only, and the persons receiving the £1,800 would have had no interest or right in that sum until payment was actually made to them.—IN RE WHEATER [C.A.] 156

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MASTER AND SERVANT—Compensation for injury by accident——Arising out of and in the course of the employment—Assault—Special risk of the employment—Whether "arising out of"].—When the appellant, a porter employed by the respondents, who were upholsterers, was engaged in carrying furniture from the respondents' premises to a railway company's van, an altercation arose between the appellant and the carter in charge of the van and the latter assaulted the appellant with the result that the appellant's eye was so injured that it had to be removed. On an application for compensation the Judge found that the assault, which he assumed to have been unprovoked, though an accident arising in the course of the employment, did not arise out of it, as the appellant was not exposed by his employment to the risk of being assaulted and it was not his employment that brought that risk upon him. The Judge therefore made an award in favour of the respondents. Held, that as the Judge had found that no special risk of being assaulted attached to the employment and that it was not the employment that brought the risk upon the appellant, and as these were questions of fact, the Judge's award must be affirmed.—LEE v. S. AND J. BRECKMAN, LIMITED [C.A.] 235

Compensation for injury by accident — Basis — Average earnings for 12 months — Break in employment — Workmen's Compensation Act, 1925 (15 and 16 Geo. V., c. 84), s. 9 (2)].—The appellant, who was employed by the respondents as a riveter on piecework, received notice, on September 3, 1926, owing to the coal strike of that year, that there was no more work available for him. He accordingly ceased to work till December 8, when he was re-employed by the respondents. On January 11, 1927, he met with an accident causing total incapacity. On an application for compensation, the county court Judge held that the interruption was a normal incident and that there was no break in the employment, and he awarded compensation on the basis of the appellant's earnings for the 12 months prior to the accident. Held, that on the facts the interval was not one of the incidents of a discontinuous employment, and there was therefore a break in the employment, and the case must go back to the Judge to assess compensation on this basis.—GARDNER v. VICKERS, LIMITED [C.A.] 563

Compensation for injury by accident —Commercial traveller killed by falling tree while cycling on employers' business—Accident arising "out of . . . the employment"].—A commercial traveller, motor-cycling along a road in the course of his employment, was struck by a falling tree and killed. The fall of the tree was caused by a violent wind which was blowing at the time. Compensation was awarded to the widow. On an appeal upon the ground that the accident occurred by reason of the gale, and did not arise out of his employment, Held, by Sankey and

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Russell, L.JJ. (Lord Hanworth, M.R., dissenting), that as the deceased's employment brought him into a zone of danger the accident arose out of that employment, and the question what caused the fall of the tree was immaterial and irrelevant.—LAWRENCE v. GEORGE MATTHEWS (1924), LIMITED [C.A.] 812

Compensation for injury by accident —Reduction to lower grade by reason of partial incapacity—Ability to perform lower-paid work — Inability to obtain it owing to state of labour market — Workmen's Compensation Act, 1906 (6 Edw. VII., c. 58), Sched. I. (1) (*b*), (3)—Workmen's Compensation Act, 1923 (13 and 14 Geo. V., c. 42), s. 16].—Held (Lord Shaw of Dunfermline and Lord Blanesburgh dissenting), that a skilled workman who would, if uninjured, have continued to be employed as a skilled workman, but who, as the result of an accident arising out of and in the course of his employment, has been reduced to the grade of an unskilled workman and driven to seek work in such lower grade, and who, though he has recovered sufficiently to be able to perform such unskilled work, is, in fact, unable to obtain such unskilled work solely on account of labour conditions, is nevertheless, for the purpose of the calculation of compensation, to be treated as "able to earn" the wages of a worker in such lower grade.—BEVAN v. NIXON'S NAVIGATION COMPANY, LIMITED [H.L.] 805

Compensation for injury by accident —"Trainee" at instructional centre —Whether a "workman"].—The Court held that a "trainee" at a Government Instructional Centre was not a workman within the Workmen's Compensation Acts.—WATSON v. BIRMINGHAM GOVERNMENT INSTRUCTIONAL CENTRE [C.A.] 576

Compensation for injury by accident — Weekly payment — Alleged recovery of workman — Stoppage — Application by employers for review — Denial of liability — Payment into Court of amount up to date fixed for hearing—Alleged breach of statutory duty — Tribunal to determine question of incapacity — Workmen's Compensation Act, 1925 (15 and 16 Geo. V., c. 84), ss. 12, 21].—The plaintiff, a workman in the employment of the defendants, was injured by an accident, and the defendants admitted liability and made a weekly payment of compensation. Ultimately a doctor reported that the plaintiff had recovered, and the defendants stopped the weekly payment and applied to the county court for a review thereof, and, when a date had been fixed for the hearing, they paid into Court, with a denial of liability, the amount of all the weekly payments up to that date. While the county court proceedings were still pending, the plaintiff brought an action, alleging that he had not recovered from his injury, and claiming (1) a declaration that under section 12 of the Workmen's Compensation Act, 1925, the defendants had committed a

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breach of their duty by stopping the weekly payment otherwise than in pursuance of an agreement or arbitration, and (2) an injunction restraining a continuance of the breach. Held, (1) that there was no enforceable obligation on the employers to continue the weekly payment when the issue raised by them was that the workman was no longer incapacitated, and (2) that as under section 21 of the Act the only tribunal to determine the question of incapacity was the county court, and as that question had not yet been determined by that tribunal, the plaintiff could not show that his incapacity was continuing since the date when the defendants stopped the weekly payments, and therefore the action failed. Decision of Clauson, J. (44 *The Times* L.R., 130), affirmed.—CATTON V. ASHWELL AND NESBIT, LIMITED [C.A.] 422

Compensation for injury by accident — "Workman" — Exception — Employment in non-manual labour — Remuneration exceeding £350 a year — Part of salary agreed to be for expenses—Workmen's Compensation Act, 1925 (15 and 16 Geo. V., c. 84), ss. 3 (2), 10 (iv.)].—The appellant, a traveller employed by the respondents, who were distillers, had been engaged at a salary of £450 a year, but subsequently the respondents by a letter agreed at his request to show his remuneration as being £150 salary and £300 for expenses. The appellant met with an accident and applied for compensation under the Workmen's Compensation Act, 1925. The County Court Judge found that the agreement in the letter was a thing done for income-tax purposes and that the appellant's earnings must be treated as £450 a year, and that therefore he was not a workman within the meaning of the Act. Held, that as there was no evidence as to what the appellant's expenses in fact were, the County Court Judge's decision was right.—SKIDMORE V. BULLOCK, LADE, AND CO., LIMITED [C.A.] 575

Minimum wage — Trade board — Employment both on work of "specified trade" and on other work — Claim for wages at minimum rate during whole time of employment — Trade Boards Act, 1918 (8 and 9 Geo. V., c. 32), s. 8].—The plaintiff was employed by the defendants as "working manager" of a branch shop. During about half of the business hours he was employed in working at a trade for which minimum rates of wages had been fixed under the Trade Boards Acts, 1909 and 1918. During the rest of those hours he was engaged in cleaning the shop, keeping the books, selling goods by retail and performing under his contract of service other duties for which no minimum wage had been fixed. Held, that the plaintiff was not, by s. 8 of the Trade Boards Act, 1918, to be deemed to have been employed during all the business hours on work for which a minimum rate of wages had been fixed, since the defendants had proved that he was present on their premises during those hours for some purpose (*a*) unconnected with the

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work for which a minimum rate of wages had been fixed, and (*b*) other than that of waiting for work to be given to him to perform. Judgment of MacKinnon, J. (44 *The Times* L.R., 126; [1928] 1 K.B., 457) affirmed.—FRANCE V. J. COOMBES AND CO. [C.A.] 397

Servant's negligence—Journey not on master's business—No liability on master].—The first defendant, who had the second defendant in his employment as a van-driver, lent him his private motor-car, after the day's work was finished, to take friends to a theatre. The second defendant by his negligent driving injured the plaintiff. Held, that as the journey was not on the master's business and the master was not in control he was not liable for his servant's act.—BRITT V. GALMOYE AND NEVILL [Shearman, J.] 294

METROPOLIS—Stage carriage—"Plying for hire"—Motor omnibus—Seats available only to ticket-holders—Tickets bought at least ten minutes before arrival of omnibus at booking office—Passengers picked up at several booking offices—Antecedent contract—Metropolitan Public Carriages Act, 1869 (32 and 33 Vict., c. 115), s. 7—London Cab and Stage Carriage Act, 1907 (7 Edw. VII., c. 55)].—A motor omnibus belonging to the appellants, which was not licensed to ply for hire within the Metropolitan Police district, picked up at three points within that district passengers who had taken tickets for seats for journeys to destinations outside the district. These tickets were obtained by the passengers at the several offices of the appellants at least ten minutes before the arrival of the omnibus there. Held, that, as the passengers did not necessarily enter into their contracts of carriage before the vehicle started on its journey, but in some cases did so when it had been travelling for some time, the vehicle was plying for hire within the Metropolitan Police district. *Sales v. Lake* (38 *The Times* L.R., 336; ([1922] 1 K.B., 553) distinguished.—GREYHOUND MOTORS, LIMITED V. LAMBERT [Div. Ct.] 39

See also RATING.

MINES — Coal-mine—Checkweighers—Minority and majority checkweighers—Co-existence—Whether possible—Coal Mines Regulation Act, 1887 (50 and 51 Vict., c. 58), s. 14 (1)—Coal Mines (Weighing of Minerals) Act, 1905 (5 Edw. VII., c. 9), ss. 1, 3].—Under the Coal Mines Regulation Act, 1887, and the Coal Mines (Weighing of Minerals) Act, 1905, the co-existence of a minority checkweigher and of a majority checkweigher, even if possible under the Acts, is no defence to a claim by a duly appointed majority checkweigher against a weight-paid worker for a proportion of the majority checkweigher's wages. But, *Semble*, the statutes do not contemplate such co-existence, and the appointment of a minority checkweigher is

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terminated by the subsequent due appointment of a majority checkweigher.—BELL AND ANOTHER v. BENNETT [Div. Ct.] .. 424

Coal-mine — Working facilities — Ancillary right — Carrying away coal — Conveyance over land outside lease—Jurisdiction to sanction — Aerial ropeway — Mines (Working Facilities and Support) Act, 1923 (13 and 14 Geo. V., c. 20), ss. 1, 2, 6].—The Court held that under ss. 1, 2, and 6 of the Mines (Working Facilities and Support) Act, 1923, the Railway and Canal Commission had jurisdiction to sanction a scheme for an aerial ropeway for the conveyance of coal from the Tilmanstone colliery to Dover Harbour, on the ground that the scheme was in the national interest. Decision of the Railway and Canal Commission (43 *The Times* L.R., 795) affirmed.—IN RE APPLICATION OF TILMANSTONE (KENT) COLLIERIES, LIMITED [C.A.] 167

MONEYLENDERS—Agent or canvasser—Prohibition against acting as such—Illegality of transaction — Employment by moneylender —Whether necessary to be proved—Moneylenders Act, 1927 (17 and 18 Geo. V., c. 21), s. 5 (3) (6)].—By s. 5 (3) of the Moneylenders Act, 1927, "No moneylender or any person on his behalf shall employ any agent or canvasser for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a moneylender, and no person shall act as such agent or canvasser, or demand or receive directly or indirectly any sum or other valuable consideration by way of commission or otherwise for introducing or undertaking to introduce to a moneylender any person desiring to borrow money." By s. 5 (6), "Where it is shown that a money-lending transaction was brought about by a contravention of any of the provisions of this section, the transaction shall, notwithstanding that the moneylender was duly licensed under this Act, be illegal, unless the moneylender proves that the contravention occurred without his consent or connivance." Held, that the above provisions apply not merely where the person said to be an agent or canvasser is employed as such by the moneylender, but are intended to prevent any transaction brought about by touting, provided that the moneylender consents to or connives at the touting; and to prove the illegality of the transaction it is not necessary to show that the moneylender gave any authority to the tout.—VERNER-JEFFREYS v. PINTO [Clauson, J.] 699

MORTGAGE — Redemption — Receipt of payment—Authority of mortgagee's solicitor—Receipt of interest—Whether an implication of authority to receive principal].—An authority to receive the interest on a mortgage does not imply an authority to receive the principal.—BONHAM v. MAYCOCK [Roche, J.] 387

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Redemption — Shares in company — Non-payment of interest — Retention of shares by mortgagee for long period but without foreclosure—Subsequent increase in value of shares and payment of dividends—Summons to redeem—Delay—Laches—Claim for dividends received in excess of mortgage interest—Relief granted on summons—Rules of the Supreme Court, Order LV., r. 5 *a*].—In 1900 B. mortgaged shares in a company to L. to secure a loan with interest, the shares being afterwards registered in the mortgagee's name, and further shares being added to them. Dividends were received by L. sufficient to clear the interest up to 1908, when they ceased, and the shares became of little value, L. retaining them, without foreclosing. In 1916 dividends were resumed, and they and the value of the shares increased enormously, so that by 1921 L. had received dividends sufficient to pay off the loan and interest. L. died in 1923, and in 1926 the plaintiffs, who were entitled to the equity of redemption in the shares, took out a summons claiming redemption, and also repayment of the excess of the amount of dividends received by L. or his executors over and above the amount due under the mortgage. Held, affirming a decision of Russell, J. (44 *The Times* L.R., 457), that equity would not deprive a mortgagor of his right to redeem if the debt had been or could be repaid, the security was still available, and the position of the mortgagee had not been altered to his prejudice by the delay; also that the limit of twelve years applicable by the Real Property Limitation Act, 1874, in the case of a mortgage of realty would not, by equitable principles, be extended so as to support a plea of delay and laches and be made applicable to a mortgage of personalty. Held, further, reversing the decision of Russell, J. (*supra*), that an order for payment of the excess claimed against the mortgagee could, by the provisions of Order LV., r. 5 *a*, be obtained upon originating summons.—WELD v. PETRE [C.A.] 739

MOTOR-CARS—Tractor and trailer—No person on trailer—Brakes — Trailer brake independent of tractor brakes—Brakes operated by driver of tractor—Locomotives on Highways Act, 1896 (59 and 60 Vict., c. 36), s. 7—Motor Cars (Use and Construction) Order, 1904, Art. III. (3)].—By Article III. (2) of the Motor Cars (Use and Construction) Order, 1904, every vehicle exceeding 2cwt. in weight unladen drawn by a motor-car is required to have an efficient brake, and by paragraph (3) of the same Article is required to "carry upon the vehicle a person competent to apply efficiently the brake. Provided that it shall not be necessary to comply with this condition if the brakes upon the motor-car by which the vehicle is drawn are so constructed and arranged that neither of such brakes can be used without bringing into action simultaneously the brake attached to the vehicle drawn; or if the brake of the vehicle drawn can be applied from the motor-car by a person upon the motor-car

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independently of the brakes of the latter." The appellants appealed against a conviction by the Stipendiary Magistrate of the Staffordshire Potteries District for an offence under this Article. They had a motor-tractor and trailer in charge of one man. The trailer had an independent brake operated by hand by the driver of the tractor, which had also a foot brake and a hand brake, neither of which was connected with the trailer brake. The lever controlling the trailer brake was on the opposite side of the driver from the lever controlling the hand brake of the tractor. The driver could apply simultaneously the foot brake of the tractor and the trailer brake, or the two brakes of the tractor. He could not apply simultaneously the hand brake of the tractor and the trailer brake without abandoning the steering-wheel. Held (without deciding whether the "person" on the motor-car to control the trailer brake under the second proviso to Art. III. (3) must always be a person other than the driver of the motor-car) that the Stipendiary Magistrate had not misdirected himself in holding that the driver in this case was not able "to apply efficiently" the brake of the trailer.—ROBINSONS, LIMITED v. RICHARDS [Div. Ct.] 507

NEGLIGENCE—Architect—Building contract—Interim certificates].—The plaintiffs, a local authority, made a contract with builders under which the defendant was the architect. Clause 29 provided: "No certificate of the architect, except for the final balance, shall be considered conclusive evidence of any works or materials to which it relates nor of the value thereof, nor shall it relieve the contractor from his liability to make good any defects as provided by these conditions, nor shall it in any way prejudice the employers in the final settlement of the accounts in any case where the contractor has been overpaid during the progress of the works." The Ministry of Health had the right to require the use of materials which the Disposals Board had for sale. While the houses were in course of erection the defendant gave interim certificates, and he also gave documents under which the plaintiffs paid the Board for articles supplied by the Board. Under these certificates and documents the plaintiffs had to pay both the builders and the Board for the same material. In an action by the plaintiffs to recover the amount from the defendant on the ground of negligence the defendant contended that he was a *quasi*-arbitrator and therefore not liable, and that the matter could be rectified under his final certificate which had not yet been given. The trial Judge held that the defendant was not, in giving the interim certificates, acting as an arbitrator or *quasi*-arbitrator, but was merely acting as agent for the plaintiffs, and was liable to pay the amount claimed. Held, that as the certificates were only interim certificates, and as the defendant on going into the figures with the plaintiffs had indicated to them that the amount paid to

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the Disposals Board was to be deducted from the final balance due to the contractors, the defendant had not been guilty of negligence, and the action failed. Decision of Sankey, J. (43 *The Times* L.R., 739; [1927] 2 K.B., 556), reversed.—WISBECH RURAL DISTRICT COUNCIL v. WARD [C.A.] 62

Bare licensee — Obvious danger in road — Road not a public highway — Injury to licensee—No liability on owners of road].—The defendants, a local authority, were engaged in making, in connexion with a building estate of theirs, a road which was a *cul-de-sac* and was not a public highway and was still unlighted at night. People were in the habit of using the road to gain access through a hole in the fence to the defendants' land for the purpose of making a short cut to a golf links, and the defendants had done nothing to stop them. The plaintiff went along the road in daylight to reach the short cut to the golf links, and he failed to notice that there was across the road an open trench which had been made for the purpose of laying an electric main. In returning after dark the plaintiff was injured by falling into the trench, which was unlighted and unfenced. In an action for damages, Held, that the plaintiff's position could not be put higher than that of a bare licensee, and, as he entered the road on the first occasion in daylight and the trench was obvious and the road was obviously unfinished, there was no evidence of the defendants' having exposed the plaintiff to a danger which was not obvious or not reasonably to be expected, and the action failed.—COLESHILL v. MANCHESTER CORPORATION [C.A.] 258

Duty to adjoining owner — Ancient wall]. — The defendants were the owners, but not the occupiers, of a part of the ancient city wall of Exeter, which also formed the back wall of an ancient inn owned by the plaintiffs. The portion of the wall belonging to the defendants collapsed, demolishing the plaintiffs' inn. In an action for damages the Judge held that, though the ancient wall was not a thing essentially dangerous within *Rylands v. Fletcher* (L.R., 3 H.L., 330), yet on the principle of *Todd v. Flight* (9 C.B., N.S., 377), the defendants, being owners, though not occupiers, were under a duty to prevent the wall from causing damage to adjoining property. He therefore gave judgment for the plaintiffs. Held, (1) that the doctrine of *Rylands v. Fletcher* (*supra*) had never been applied to affect the liability of an owner who was out of possession at the time when the injury took place; though the defendants did not erect the wall, they took it over when they bought the property as the boundary and retaining wall for their property and they were only using that property in the ordinary ways in which property is used, so that they were outside the authority of that case; (2) that there was no reason to suppose that when they let the property to their tenant it was in a ruinous condition or that in the

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exercise of a reasonable diligence they should have ascertained that it was in a ruinous or dangerous condition. In these circumstances the plaintiffs failed to bring their case within the principles of the decision in *Todd v. Flight* (*supra*). Decision of Acton, J. (44 *The Times* L.R., 479), reversed.—ST. ANNE'S WELL BREWERY COMPANY v. ROBERTS AND OTHERS [C.A.] 703

Gas explosion — Search for escape of gas by two persons — Agency — Control of proceedings — Joint tortious enterprise].—The landlord of a shop where the tenant carried on business lived on adjoining premises communicating internally with the shop. The tenant had requested the landlord to visit the shop occasionally at night to see that everything was secure. The landlord and a lodger of his entered the shop one night, believing that there was an escape of gas. In the shop was a gas-pipe running down from the ceiling to the floor. The landlord lit a burner at the lower end of the pipe, and nothing untoward occurred. The lodger, who was a much younger man than the landlord, then got on to the counter of the shop and began to examine the upper part of the pipe with a naked light. An explosion followed, and the tenant's goods on the premises were damaged. In an action by the tenant against the landlord, Held, that the landlord was liable on the grounds (1) that the lodger was his agent, (2) that the landlord was in control of the proceedings, and (3) that the proceedings constituted a joint tortious enterprise. *The Koursk* (40 *The Times* L.R., 399; [1924] P., 140) applied. Held, further (*per* Talbot, J.), that the landlord was liable also on the ground that, having undertaken the examination, he was under a duty to take reasonable care to avoid damage resulting from it, and could not escape liability by getting another person to make the examination or part of it for him, whether that person was an agent or contractor or a mere voluntary helper.—BROOKE v. BOOL [Div. Ct.] 531

Practice — Personal injuries — Defendant insured — Statement of that fact to the jury — Discharge of jury — Discretion of Judge].—On the trial by a Judge and jury of an action for personal injuries alleged to have been caused by negligence the jury should not be informed by or on behalf of the plaintiff that the defendant is insured. If this rule is violated, the Judge has a discretion to order the jury to be discharged.—GRINHAM AND ANOTHER v. DAVIES [Div. Ct.] 523

Railway company — Escalator — Accident — No evidence of defect in design].—ALEXANDER v. CITY AND SOUTH LONDON RAILWAY COMPANY [Div. Ct.] 450

Vessel in dock — Condition as to sole risk of owners of vessel — Injury in lock through negligence of dock-owners' servants

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—Whether dock-owners protected by condition—Whether lock included in "dock"].—The defendants, who were the owners of Chelsea Dock and of a lock connecting it with the River Thames, received the plaintiffs' barge into the dock on the condition that "All barges or vessels while in Chelsea Dock are at the sole risk of owners or persons bringing or causing the same to be brought into the dock." While the barge was in the lock on its way out from the dock to the river, it was damaged through the negligence of the defendants' servants. Held, (1) that the words of the condition were adequate to exempt the defendants from liability for the negligence of their servants, and (2) that the word "dock" in the above condition must be interpreted as including the lock, and therefore the defendants were exempt from liability. Decision of Avory, J. (43 *The Times* L.R., 769), reversed.—FORBES, ABBOTT, AND LENNARD, LIMITED v. GREAT WESTERN RAILWAY COMPANY [C.A.] 97

See also CONTRACT—Carriage of goods by sea, MASTER AND SERVANT, and SHIP.

PARTNERSHIP — Dissolution by death of partner—Provision in articles for salaries—Share of net profits payable to executors—Whether survivor entitled to deduct salary for himself].—The appellant and one H. entered into a partnership as barristers and solicitors, the articles providing that each partner was entitled to a salary and half the "net profits" during the term of the partnership, and that if either partner died the surviving partner was for five years to pay to the executors a third of the "net annual profits." H. died and the partnership was thereby dissolved. Held, that the expression "net profits" was not necessarily to be interpreted as having the same meaning in every part of the articles, and that the appellant, in calculating the share of the net profits payable to the executors, was not entitled to deduct any salary for himself.—WATSON v. HAGGITT AND OTHERS [P.C.] 90

PENSIONS — Widow — Statutory conditions — Husband's entry into insurance — Subsequent payment of 104 contributions — Whether "entry" means "last entry"—Widows', Orphans', and Old Age Contributory Pensions Act, 1925 (15 and 16 Geo. V., c. 70), s. 5].—The expression "entry into insurance" in s. 5 of the Widows', Orphans', and Old Age Contributory Pensions Act, 1925, means "last entry into insurance."—WADSWORTH v. MINISTER OF HEALTH [Div. Ct.] 159

POOR LAW—Relief by way of loan—Information against person relieved—Jurisdiction of magistrate—Poor Law Act, 1927 (17 and 18 Geo. V., c. 14), s. 46 (1)].—A court of summary jurisdiction is not "a court for the

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recovery of small debts" within s. 46 (1) of the Poor Law Act, 1927.—EVANS v. MORGAN [Div. Ct.] 544

Relief granted by way of loan — Time for recovery — "Complaint" — Poor Law Amendment Act, 1834 (4 and 5 Will. IV., c. 76), s. 59 — Summary Jurisdiction Act, 1848 (11 and 12 Vict., c. 43), s. 11].—An application for an order under s. 59 of the Poor Law Amendment Act, 1834, that an employer should pay to the poor law guardians wages due to a man to whom the guardians have granted relief by way of loan is a "complaint" within the meaning of the Summary Jurisdiction Act, 1848. Such a loan does not become due and payable until application for repayment is made to the person relieved, and therefore the period of six months limited by s. 11 of the Summary Jurisdiction Act, 1848, does not begin to run till the date of such application. *Quaere* whether it begins to run till there is actually an employer against whom an order can be made.—ASHBY-DE-LA-ZOUCH GUARDIANS v. SUMMERS AND ANOTHER [Div. Ct.] 406

PRACTICE—Action—Costs—Order for stay of proceedings—Action ultimately settled upon terms that defendants pay plaintiffs' costs—Costs incurred by plaintiffs between stay and settlement—Whether premature—Costs incurred before issue of writ—Whether incurred usefully — Discretion of Taxing Master].—An order in an action for stay of proceedings does not necessarily mean that all activities should be stayed. Therefore, if one of the parties during a stay incurs costs for some useful purpose, as, for instance, the taking of the evidence of seamen before they become dispersed, and afterwards becomes entitled to his costs of the action, the costs incurred during the stay may be allowed. It is a matter within the discretion of the Taxing Master to say whether costs so incurred were incurred prematurely, or whether the outlay was advisable and useful for the purposes of litigation still liable to take place. In his discretion the Master may even allow costs incurred before issue of the writ in the action, provided that he is satisfied of the advisability of incurring them.—SOCIÉTÉ ANONYME PÊCHERIES OSTENDAISES v. MERCHANTS MARINE INSURANCE COMPANY, LIMITED [C.A.] 270

Arbitration — Acquisition of land — Injurious affection — Award of official arbitrator — Statement in form of special case—Whether to be entered in the Crown Paper or in the Special Paper — Acquisition of Land (Assessment of Compensation) Act, 1919 (9 and 10 Geo. V., c. 57), s. 6].—An award made by an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919, in the form of a special case, is rightly entered in the Crown Paper.—HEWITT v. ESSEX COUNTY COUNCIL [Div. Ct.] 111

Judgment summons — Divorce damages and costs — Judgment summonses against co-

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respondent in respect of both—Priority].—Where damages and costs are awarded against a co-respondent and the petitioner takes out two judgment summonses against him, one in respect of the costs and the other in respect of the damages, an order will go in respect of the payment of costs first.—IN RE WINTER—EX PARTE WILLIAMS [Clauson, J.] 41

Payment into Court — Action for negligence by three plaintiffs — Separate causes of action — General payment into Court by defendant — Validity — Verdict against one plaintiff — Verdict for two plaintiffs — Damages — Inadequacy — R.S.C., Order XVI., r. 1, Order XXII., r. 1].—A general payment into Court by a defendant with a denial of liability, under Order XXII., is not a good payment in, in the case of an action brought against the defendant by several plaintiffs each having a separate cause of action. *Benning v. Ilford Gas Company* (23 *The Times* L.R., 485; [1907] 2 K.B., 290) overruled.—SMITH AND OTHERS v. SCHILLING [C.A.] 109

Postponement of action — Application — Dismissal with costs — Appeal — Competency — Interference with Judge's discretion — Rules of the Supreme Court, Order XXXVI., r. 34—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 27 (1)].—Where a Judge dismisses with costs an application under Order XXXVI., r. 34, to postpone a trial, his decision is, at all events by leave, subject to appeal under s. 27 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, and, though the Court of Appeal will be slow to interfere with the exercise of his discretion, it will do so if it comes to the conclusion that justice would not result from the decision appealed from.—MAXWELL v. KEUN, JOHN LANE, THE BODLEY HEAD, LIMITED, AND BUTLER AND TANNER. MAXWELL v. KEUN, JONATHAN CAPE, LIMITED, AND BUTLER AND TANNER [C.A.] 100

Single issue — Application for separate disposal — Refusal of order].—In a libel action the defendants pleaded justification and that the plaintiff had, in return for payment, undertaken in writing to indemnify them against any actions for libel. The plaintiff in his reply disputed his signature and said that he was not bound by the alleged undertaking. The plaintiff then applied for an order that the issue as to the alleged undertaking and its construction should be tried separately before the other issues. Held, that when a plaintiff asked for an order that one issue should be disposed of before the trial of the other issues the order should be made only when there were special circumstances justifying it, and as there were none in the present case the order must be refused.—BOTTOMLEY v. HURST AND BLACKETT, LIMITED, AND HOUSTON [C.A.] 451

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Subpœna duces tecum — Setting aside—Procedure — Whether by way of rule *nisi*—Rules of the Supreme Court, Order LII., r. 2].—By reason of Order LII., r. 2, of the Rules of the Supreme Court, the procedure by rule *nisi* cannot be used by a proposed witness in an action for the purpose of setting aside a *subpœna duces tecum* as being oppressive and an abuse of the process of the Court.—REX v. INVESTORS' REVIEW, LIMITED—EX PARTE WHEELER [Div. Ct.] 724

Trial—Cause partly heard—Death of Judge — Continuance of trial by another Judge — Reading notes of evidence already given — Witnesses not recalled — Request of parties—Precedent not to be followed].—*Per* Scrutton, L.J. : Where on a trial with a jury, after some of the witnesses have been called, the Judge dies, another Judge ought not, even at the request of the parties, to continue the trial after reading the shorthand notes of the evidence already given, but the witnesses ought to be recalled.—COLESHILL v. MANCHESTER CORPORATION [C.A.] .. 258

See also NEGLIGENCE.

PRINCIPAL AND AGENT — Agent's commission—Sale of business—Claim for commission from purchaser—Concurrent findings of Courts below].—Although commissions on sales are usually paid by the vendor, an express bargain may throw the commission upon the purchaser. Where an agent is employed to make inquiries about a particular business with a view to his employer's acquiring it, on the terms of his being paid by the purchaser a commission on the purchase price if business is transacted, and where the parties are brought together through his agency, he is entitled to commission, even where the actual purchase is ultimately effected through the intervention of another agent, provided that his services are really instrumental in bringing about the transaction. In an action by an agent for a claim for commission from the purchaser on the sale of a business, the Lord Ordinary found on the facts that the agent had earned his commission and his decision was affirmed by the First Division of the Court of Session in Scotland. Held (Lord Phillimore and Lord Blanesburgh dissenting), that the concurrent findings of the Courts below ought not to be disturbed.—BOW'S EMPORIUM, LIMITED v. A. R. BRETT AND COMPANY, LIMITED [H.L.] 194

PRIVATE STREET WORKS — Objection — Ratio of apportionment — No evidence by objectors — Birmingham Corporation (Consolidation) Act, 1883 (46 and 47 Vict., c. lxx.), ss. 46 to 50].—The Birmingham Corporation proposed to execute certain private street works under ss. 46 to 50 of the Birmingham Corporation (Consolidation) Act, 1883, which was substantially identical in these provisions with the Private Street Works Act, 1892. The Corporation duly complied with

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the formalities required and made a provisional apportionment on the respondents, being the frontagers on the street in question, according to their respective frontages. The respondents objected that the works were unnecessary. On the hearing of this objection the respondents called no evidence. The stipendiary magistrate held that some works were necessary, but was of opinion that the estimated expenses were too heavy. He reduced the estimate and ordered that one respondent should pay one-half and each other respondent two-thirds of the respective sums named in the provisional apportionment. Held, that inasmuch as the Corporation had not resolved that the apportionment should be on any basis other than frontage, the stipendiary magistrate could not direct an apportionment on any other basis. Subject to that limitation, he must consider and determine, upon evidence, whether the proposed works were in any, and what, respect unnecessary, and must have regard to any alternative proposals (if the respondents made any and supported them by evidence) and to the cost thereof.—BIRMINGHAM CORPORATON v. MOTHER-GENERAL OF THE CONVENT OF THE SISTERS OF THE CHARITY OF ST. PAUL AND OTHERS [Div. Ct.] 31

PROBATE — Evidence — Lost will — Parol evidence of revocation clause—Earlier wills revoked by revoked last will—Intestacy—Wills Act, 1837 (1 Vict., c. 26].—Parol evidence is admissible to show that a will, presumed to have been destroyed *animo revocandi*, contained a revocation clause revoking all anterior wills, thereby creating an intestacy.—BARKWELL v. BARKWELL [Lord Merrivale, P.] 207

Practice — Costs — Will propounded in solemn form by co-executors — Benefit to solicitor executor's daughter—Allegations by defendants of lack of knowledge and non-disposing mind of testator — Will duly executed and pronounced for excepting residuary clause—Executors' right to costs out of estate curtailed—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V., c. 49), s. 31 (1) (*h*)—Rules of the Supreme Court, Order LXV., r. 1].—A solicitor who knowingly and for his own purpose involves his own interests with those of his client, where there is doubtful capacity and no competent proof of a capable consent, disregards his fiduciary obligations, and affords the Court ground for an order impugning his *prima facie* right as executor propounding a will to claim his costs of the action out of the testator's estate. This *prima facie* right of an executor is absolute, as laid down by the Court of Appeal in *In the Estate of Plant* (42 *The Times* L.R., 443 ; [1926] P., 139), unless it is "lost or curtailed by such inequitable conduct as may amount to a violation or culpable neglect of his duty" (*per* Sir George Jessel, M.R., in *Turner v. Hancock*, 20 Ch.D., 303). An innocent executor may be involved in

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liability for costs arising from the action of his co-executor (*In the Estate of Barlow*, 35 *The Times* L.R., 326 ; [1919] P., 131).—THOMAS AND ANOTHER v. JONES AND ANOTHER [Lord Merrivale, P.] 467

Practice — Settled land — Tenant for life — Special executors — Grant of probate, limited to settled land, to surviving executor of settlor as trustee of the settlement—Settled Land Act, 1925 (15 Geo. V., c. 18), ss. 7, 30 (1) (3)—Administration of Estates Act, 1925 (15 Geo. V., c. 23), ss. 1 (1) (2) (3), 2 (1) (2), 3 (2) (4), 22 (1) (2), 55 (xxiv.)—Probate Rules (Non-Contentious Business), 116 and 118].—If land is settled upon a person for an interest not ceasing on his death, when that event occurs the trustee of the settlement is, by the Administration of Estates Act, 1925, s. 22, entitled as special executor to a grant of probate of the will of the deceased.—IN RE GIBBINGS [Lord Merrivale, P.] 230

Will — Construction — "I leave all my money to X."].—In the case of a will the operative part of which consisted solely of the words "I leave all my money to Alfred George Cabell," on an application by Cabell for a grant of administration with the will annexed, Lord Merrivale, P., held (44 *The Times* L.R., 353 ; [1928] P., 128) that the bulk of the deceased's estate passed to Cabell, including cash in the house, a credit on current account at the bank, and stocks and shares, but that the equity of redemption in certain freehold houses and the furniture in the deceased's house passed to the next-of-kin, and as there was no executor named in the will, and the deceased had died since January 1, 1926, leaving his property not wholly disposed of, the persons entitled under an intestacy took, in accordance with the Probate Rules (Non-Contentious Business), rule 119, a grant of administration with the will annexed, in priority to the legatee, Cabell. Certain additional assets were discovered after the date of the judgment. On appeal that part of the order of the President which concerned the construction of the will was discharged by consent so that, in the event of there being no settlement, the construction of the will might be determined *de novo* in the Chancery Division.—IN THE ESTATE OF GATES, DECEASED [C.A.] 634

See also CONFLICT OF LAWS and WILL.

RATING—Metropolis—Quinquennial valuation—Appeal to quarter sessions—Congestion of business—Impossibility of hearing before date fixed by statute—Parties not ready—Discretion of quarter sessions to adjourn hearing—Valuation (Metropolis) Act, 1869 (32 and 33 Vict., c. 67), s. 42 (13)].—By s. 42 (13) of the Valuation (Metropolis) Act, 1869, "The justices may hold the assessment sessions at any time after the 1st of February in the same year, which will enable them to determine all appeals (except where

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a valuation list or a valuation is ordered) before the ensuing 31st March." Held, that when it is impossible for the justices to dispose of their list by March 31 they have jurisdiction after that date to hear an appeal of which notice was given at the proper time, and, if the parties are not ready for trial as soon as the justices are able to hear the appeal, the justices have a discretion to postpone the hearing so that they may have proper materials before them.—REX v. JUSTICES OF THE COUNTY OF LONDON—EX PARTE LOCKE, LANCASTER AND W. W. AND R. JOHNSON AND SONS, LIMITED, AND OTHERS [Div. Ct.] 728

Valuation list — Return demanded from occupier—Particulars required—Licensed premises — Gross takings — Tenant's remuneration and capital — Invalidity of form—Rating and Valuation Act, 1925 (15 and 16 Geo. V., c. 90), s. 40].—The Court granted a declaration that the defendants, a rating authority, had no right under s. 40 of the Rating and Valuation Act, 1925, and the Rating and Valuation Act (Return) Rules, 1926, to require the plaintiff, who was the licensee and occupier of licensed premises, to make for the purposes of valuation a return stating the gross takings for the last three years, the outgoings for the last three years, tenant's remuneration, wages and equivalents, breakages and depreciation, lighting, heating, &c., and tenant's capital, since these particulars were, upon the evidence, not such as in the words of s. 40 could be "reasonably required" for the purposes of the Act.—GRANT v. KNARESBOROUGH URBAN DISTRICT COUNCIL [Astbury, J.] 224

REPLEVIN—Distress for non-payment of rates—No beneficial occupation of premises—Jurisdiction of justices to issue warrant—Maintainability of action].—Up to March 31, 1926, the plaintiffs, as education authority, had managed as an industrial school certain premises within the parish of which the defendants were the overseers of the poor. On that day the premises were closed and the plaintiffs' furniture, stores, documents, and other equipment were removed, with the exception of some furniture which was left in two rooms for a caretaker and of a few articles which were regarded as of so little value as scarcely to be worth removing. The caretaker remained on the premises with his family as a mere caretaker. Repairs to the premises were executed from time to time. The future use of the premises was in doubt until March, 1927, when plans were made which necessitated the erection of entirely new buildings, and work on them was started after April, 1927. The defendants rated the plaintiffs in respect of the premises for the half-years ending September 30, 1926, and March 31, 1927. Held, that during the periods in question the plaintiffs were not in beneficial occupation of the premises in the sense that their occupation

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was of benefit or advantage to them in the performance of their public duties, and they were therefore not rateable. When the plaintiffs refused to pay the rates the defendants seized a tramway-car belonging to the plaintiffs under a distress warrant issued by justices for the non-payment of the rates. Held, that the plaintiffs could not recover damages for the seizure in an action of replevin because the jurisdiction of the justices to issue the distress warrant depended not on beneficial occupation of the premises by the plaintiffs, but simply on occupation within the parish.—LONDON COUNTY COUNCIL v. HACKNEY BOROUGH COUNCIL [Wright, J.] 592

RESTRAINT OF TRADE—Price maintenance agreement—Validity].—The defendant, who was a wholesale and retail dealer, purchased from the plaintiffs 12 gross of Palmolive soap tablets and signed an agreement that he would not sell the plaintiffs' soap at less than 6d. a tablet. The defendant then sold the soap at 5d. a tablet, and, in an action to restrain him from breaking the agreement, he contended that it would be robbing the public to sell at 6d. a tablet and that the agreement was in restraint of trade and illegal. Held (Sargant, L.J., dissenting), that the agreement was valid and enforceable and the plaintiffs were entitled to the injunction claimed.—Decision of Astbury, J. ([1927] 2 Ch., 333), affirmed.—PALMOLIVE COMPANY (OF ENGLAND), LIMITED v. FREEDMAN [C.A.] 86

See also CONTRACT—Breach.

REVENUE—Betting duty—Returns—Default—Information by Attorney-General—Judgment for penalties—Whether a "conviction"—Order disqualifying from holding certificate—Finance Act, 1926 (16 and 17 Geo. V., c. 22), s. 17 (3)].—By s. 17 (3) of the Finance Act, 1926, "Any Court before which a bookmaker is convicted of any offence under this Part of this Act or otherwise in connexion with his business as a bookmaker, may order him to be disqualified for holding a bookmaker's certificate for such period as the Court may think fit. . . ." Held, that a judgment for penalties on an information by the Attorney-General in the High Court under s. 17 (1) for failure to make returns of bets is a "conviction" within the meaning of s. 17 (3).—ATTORNEY-GENERAL v. STILL AND ANOTHER [Rowlatt, J.] 102

Betting duty — Totalisator — *Pari mutuel* — Management by proprietor of club—Transactions by members — Whether bets — Whether proprietor a bookmaker—Finance Act, 1926 (16 and 17 Geo. V., c. 22), ss. 15, 18].—The defendant company owned a club and managed on the premises a totalisator and a *pari mutuel* by means of which members could back horses running in races. The amount staked by backers of losers formed the fund for paying the backers of winners, the defendant company deducting 10 per cent. for expenses. Held,

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that the transactions constituted bets within s. 15 of the Finance Act, 1926, and the defendant company was a bookmaker within s. 18 and was liable to pay betting duty thereon.—ATTORNEY-GENERAL v. LUNCHEON AND SPORTS CLUB, LIMITED [Rowlatt, J.] .. 389

Bookmaker's certificate — Clerk of bookmaker — Carrying on the business — Requirement of certificate—Finance Act, 1926 (16 and 17 Geo. V., c. 22), ss. 15 (1) (*b*), 17 (1) (*b*), 18].—LAKE v. CRONIN [Div. Ct.] 819

Estate duty — Succession duty — Foreign disposition — Settlement of property situate in Hong-kong by testator domiciled there — Appointment of English trustees of settlement—Applications to English Courts by trustees—Trust funds abroad—No direction in disposition to establish trust in England—Original succession not changed—Succession Duty Act, 1853 (16 and 17 Vict., c. 51), s. 2—Finance Act, 1894 (57 and 58 Vict., c. 30), s. 2 (2)].—Under the will made in English form of a testator domiciled in Hong-kong his residuary property, which mainly consisted of investments in local companies and real estate in Hong-kong, was left, subject to an annuity to his widow, upon trust for his son for life, with remainder to the son's two infant children. The testator died in 1905. The tenant for life desiring to borrow money, the lenders insisted on English trustees being appointed, and by a deed of appointment made in 1911 he appointed English trustees of the settlement along with himself. Later, it having been discovered that the tenant for life, while sole trustee, had drawn upon the capital of the trust funds, various applications were made, against his wish, to the English Court in the Chancery Division for directions regarding the administration of the trust, and orders were made thereon, and his sons were made wards of Court. The trust property remained in Hong-kong. The tenant for life died in 1922. The Crown having claimed succession and estate duty upon the property, Rowlatt, J., held under section 2 of the Succession Duty Act, 1853, that a trust was established in this country as a result of a foreign disposition, and therefore estate duty was payable, although the trust was not so established here as a result of any directions in the disposition, but that no succession duty was payable, as section 24 of the Finance Act, 1925, was not retrospective. On appeal, as to estate duty, Held, that the succession was originally a foreign succession, having been established by the death of the testator abroad in 1905, and that it could not be changed into an English succession or settlement by any acts of the successors not amounting to an entirely new disposition, and that as there was no direction in the testator's will directing that any trust should be established in England, it remained a succession under the laws of Hong-kong, and the property was not liable to estate duty. Statement of Lord Cranworth in *Wallace v. Attorney-*

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General (L.R., 1 Ch., 1) applied. *Attorney-General v. Campbell* (L.R., 5 H.L., 524) and *Attorney-General v. Jewish Colonization Association* (17 *The Times* L.R., 106; [1901] 1 K.B., 123) distinguished. *Dictum* of Bacon, V.-C., in *Thompson v. Birch* ([1876] W.N., 177) overruled. Decision of Rowlatt, J. (43 *The Times* L.R., 669) reversed.—ATTORNEY-GENERAL v. BELILIOS [C.A.] 214

Income-tax — Award by Royal Commission—Government user of patented invention—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched D].—The Court held that income-tax was payable on certain sums awarded by the Royal Commission on Awards to Inventors, it appearing that the sums in question were not a capital payment made for the Crown's acquisition of a patented invention but were sums paid for the user thereof.—MILLS v. JONES [Rowlatt, J.] 351

Income-tax — Carrying on trade—Successive adventures — Additional assessment—When made—Time limit—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 125 (2), Schedule D].—During the "boom" in the Lancashire cotton trade in 1919, the appellant, in company with other persons, engaged in the operation known locally as "turning over" a cotton mill—*i.e.*, acquiring a controlling interest in the mill, organizing its administration and finances, and reselling it to a new company. The operation was successful and the appellant was asked to join and did join other syndicates, composed partly, but not entirely, of the same persons engaged in "turning over" three other mills. In each case a profit resulted to the appellant. On March 24, 1923, the Additional Commissioners for the Division in which the appellant resided signed the book containing an estimated assessment upon the appellant to income-tax under Schedule D for the year 1919-20. The book was not delivered to the General Commissioners until April 18, 1923; notice was given to the appellant on May 5, 1923, and the assessment was signed by the General Commissioners on September 5, 1923. Held, that though each adventure of "turning over" a mill, taken singly, was not a trade, but a capital transaction, yet the succession of such adventures, in each of which the appellant took part, might constitute the carrying on of a trade, and the Special Commissioners on an appeal against the assessment were not estopped by their previous decisions from reconsidering the whole of the facts, and finding that the appellant in so doing was carrying on a trade on the profits of which he was liable to income-tax and excess profits duty on the profits. Held also, that the assessment was made in time, having been made when it was signed by the Additional Commissioners within the three years allowed by s. 125 (2) of the Income Tax Act, 1918. The subsequent steps need not be within that time.—PICKFORD v. QUIRKE. PICKFORD v. INLAND REVENUE COMMISSIONERS [C.A.] 15

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Income-tax — Charity — Exemption — Agricultural society—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 37 (1) (*b*)].—The appellants, an agricultural society, founded mainly for the purpose of promoting and holding an annual agricultural show, had also among their objects the improvement of live stock and poultry and of machinery and appliances used in agriculture, and agricultural education and scientific research, and they claimed exemption from income-tax upon the dividends from their investments on the ground that they were a society established for charitable purposes only. The Special Commissioners found that the society was established for charitable purposes only, and they held that the claim should be allowed. Held, that there was evidence on which the Special Commissioners could so find, and their decision must be affirmed.—INLAND REVENUE COMMISSIONERS v. YORKSHIRE AGRICULTURAL SOCIETY [C.A.] 59

Income-tax — Charity — General Medical Council — Whether entitled to exemption — Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 37].—The General Medical Council is not a body established for charitable purposes only, and therefore is not entitled, under s. 37 of the Income Tax Act, 1918, to exemption from income-tax on the income from its funds. Decision of Rowlatt, J. (44 *The Times* L.R., 117), affirmed.—GENERAL MEDICAL COUNCIL v. COMMISSIONERS OF INLAND REVENUE. ENGLISH BRANCH COUNCIL OF THE GENERAL MEDICAL COUNCIL v. COMMISSIONERS OF INLAND REVENUE [C.A.] 439

Income-tax — Company — Residence — Real business abroad — Whether resident in this country — Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. D, Cases IV. and V.].—A company which is registered in this country but carries on its real business abroad does not necessarily reside in this country, so as to be liable to income-tax, because it is obliged by law to perform in this country certain duties which cannot be performed abroad, such as having a registered office and keeping a register of shareholders. For income-tax purposes a company resides where its real business is carried on. Decision of the Court of Appeal (43 *The Times* L.R., 275; [1928] 1 K.B., 152) reversed.—EGYPTIAN DELTA LAND AND INVESTMENT COMPANY, LIMITED v. TODD [H.L.] 747

Income-tax—Deduction—Child receiving full time instruction — Educational establishment.—Finance Act, 1920 (10 and 11 Geo. V., c. 18), s. 21 (1)].—A teacher's house, where he gives to individual pupils private lessons and directions for home study and practice, is not an educational establishment where a pupil receives full-time instruction, so as to entitle the father to a deduction from income-tax under s. 21 (1) of the Finance Act, 1920.—HEASLIP v. HASEMER [Rowlatt, J.] 112

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Income-tax — Deduction — Guarantee given in hope of obtaining orders — Trade expense — Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. D, Cases I. and II., Rule 3].—The respondents, who were asphalters, subscribed to the guarantee fund of the British Empire Exhibition at Wembley, solely, as the General Commissioners found, in the hope of obtaining preferential treatment in the allocation of contracts for asphalting work within the Exhibition grounds. They did not in fact obtain any contract at all from the Exhibition authorities. Having been called upon to pay a considerable part of the amount guaranteed, they sought to deduct the sum so paid from their profits assessable to income-tax as a trade expense. Held, that it was not an allowable deduction.—MORLEY v. LAWFORD AND CO. [Rowlatt, J.] 716

Income-tax — Deductions from profits — Railway investments — Effect of grouping — Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. D., Case I.].—The appellants, an insurance company, had investments in British railway stocks, and it was admitted by the Crown that any loss suffered by the appellants on such investments was deductible from the appellants' profits for purposes of income-tax. The result of the Railways Act, 1921, was that the appellants received in exchange for their various railway holdings stocks in the four amalgamated railway companies created by that Act. The market value of these new stocks was less than the original cost to the appellants of the old stocks, and the appellants claimed that the loss so occasioned to them should be allowed as a deduction from their profits for 1922 and 1923 in computing their income-tax liability under Case I. of Schedule D. Held, that as the effect of what had happened was that the old investments had been closed and realized and new investments had been begun, the appellants were entitled to the deduction claimed.—ROYAL INSURANCE COMPANY, LIMITED v. STEPHEN [Rowlatt, J.] 630

Income-tax — Estate duty — Payment — Surrender of Victory Bonds — Valuation—Accrued but unpaid interest taken into account—Whether interest subject to income-tax—Finance Act, 1917 (7 and 8 Geo. V., c. 31), s. 34 (4)—Finance Act, 1918 (8 and 9 Geo. V., c. 15), s. 42].—Where Victory Bonds are surrendered in payment of estate duty and the accrued but still unpaid interest is taken into account in the valuation of the bonds, the interest is not subject to income-tax.—MONKS v. FOX'S EXECUTORS [Rowlatt, J.] 115

Income-tax — Excess profits duty — Non-resident—Trade exercised within United Kingdom—Assessability of British agents—Receipts of profits or gains—Income Tax Act, 1842 (5 and 6 Vict., c. 35), s. 41—Finance (No. 2) Act, 1915 (5 and 6 Geo. V., c. 89), s. 31].—The House affirmed three decisions of the Special Commissioners of Income Tax that the several appellants, who acted in this country as agents of foreign shipping companies, were assessable to income-tax on the principal company's profits, and a fourth decision that the appellants in the fourth case were in similar circumstances assessable to excess profits duty. Decisions of the Court of Appeal (42 *The Times* L.R., 704, and [1927] 1 K.B., 780) affirmed.—TARN v. SCANLAN. NEILSEN, ANDERSEN, AND CO. v. COLLINS. WILLIAM H. MULLER AND CO. (LONDON), LIMITED v. LETHEM. WILLIAM H. MULLER AND CO. (LONDON), LIMITED v. INLAND REVENUE COMMISSIONERS [H.L.] 53

Income-tax — Excess profits duty — Profits of trade — Syndicate for development of patented invention — Agreement with foreign company for grant of licence and option of purchase—Exercise of option of purchase for sum in cash—Whether a profit of trade or the realization of a capital asset —Finding of Special Commissioners affirmed —Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. D, Case I].—A syndicate formed to work and develop a group of English and foreign patents carried on business mainly by granting licences to manufacturers at royalties. Certain foreign manufacturers, however, refused to take licences unless they were also given an option of purchase exercisable within a given period. The syndicate entered into a contract with an American company to grant it a licence to use and work the syndicate's American patents, with an option of purchase thereof. The company exercised its option of purchase and paid to the syndicate the sum of £15,898 for the purchase of the American patents out and out. The syndicate having been assessed to income-tax and excess profits duty upon this sum, the Special Commissioners found that the profits made on the sale of the patents were profits of the syndicate's trading. Held, that as the Special Commissioners had not misdirected themselves in law and had in effect found the sum received for the patents to be a receipt of the syndicate's business in contrast to the realization of a capital asset, and as there was evidence to support this finding, their decision must be affirmed. Decision of the Court of Appeal (43 *The Times* L.R., 796) reversed.—DUCKER v. REES ROTURBO DEVELOPMENT SYNDICATE, LIMITED. INLAND REVENUE COMMISSIONERS v. SAME [H.L.] 307

Income-tax — Exemption, abatement and relief — Will — Direction to trustees to accumulate fund—Payment to beneficiary 20 years after death of testatrix—"Benefit . . . contingently on his attaining some specified age"—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 25].—Section 25 of the Income Tax Act, 1918, provides that: "Where in pursuance of the provisions of any will or settlement any income arising from any fund is accumulated for the benefit of any person contingently on his attaining some specified age or marrying, and the

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aggregate amount in any year of assessment of that income and the income from any other fund subject to the like trusts for accumulation and of the total income of that person from all sources (hereinafter referred to as 'the aggregate yearly income') is of such an amount only as would entitle an individual either to total exemption from tax or to relief from tax, that person shall . . . be entitled . . . to have repaid to him on account of the tax which has been paid in respect of the income during the period of accumulation a sum equal to the aggregate amount of relief to which he would have been entitled if his total income from all sources for each of the several years of the said period had been equal to the aggregate yearly income for that year. . . ." "Specified age" in this section means an age expressed by a definite number of years and not an age which can be ascertained only by reference to some other occurrence as, for instance, the death of a testatrix who has directed that an accumulated fund shall be paid to a beneficiary 20 years after her death.—WHITE v. WHITCHER [Rowlatt, J.] 113

Income-tax — Exemption — Hospital — Convalescent home — Maintained by unregistered friendly society for its members —No payment by patients—Accommodation for small proportion of total membership—Eleemosynary character—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. A, No. VI., Rule 1 (*c*)].—Rule 1 of No. VI. of Schedule A of the Income Tax Act, 1918, provides :—"The following further allowances shall be made under this Schedule :— . . . (*c*) the amount of the tax charged on any hospital, public school, or almshouse, in respect of the public buildings, offices, and premises belonging thereto. . . ." An unregistered friendly society, of which there were over two million members, had for its principal objects the relief of distressed members and the widows and orphans of members and the promotion of social intercourse and recreation in its lodges. Members of the society paid a small subscription, which was divided and allocated to various benevolent funds. A house and grounds were bought by the society for use as a convalescent home by its members. The purchase price was paid partly by the society and partly by contributions by its members. The home was maintained by the society and was furnished to accommodate 20 or 30 members. No expense was incurred by a member during his residence at the home, and medical men gave their services to it gratuitously. Held, that the home was a hospital within Rule 1 (*c*) of No. VI. of Schedule A, and the society was, therefore, entitled to be allowed the amount of tax charged in respect of the premises of which the home was composed.—GRAND COUNCIL OF THE ROYAL ANTEDILUVIAN ORDER OF BUFFALOES v. OWENS [Rowlatt, J.] .. 122

Income-tax — Exemption — "Resident" — "Ordinarily resident" — Meaning of expressions — Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 46 ; Sched. C, Rule 2 (*d*)].—Consideration of the meaning of the expression "ordinarily resident" in Rule 2 (*d*) of Schedule C of the Income Tax Act, 1918, and of the expression "resident" in s. 46 of the same Act. One decision of the Court of Appeal (43 *The Times* L.R., 337 ; [1927] 2 K.B., 38) affirmed, and another decision of the Court of Appeal (43 *The Times* L.R., 337 ; [1927] 2 K.B., 55) reversed.—LEVENE v. INLAND REVENUE COMMISSIONERS. INLAND REVENUE COMMISSIONERS v. LYSAGHT [H.L.] 374

Income-tax — Farmer — "Seller of milk" — Assessment under Schedule B — Additional assessment under Schedule D — Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. D, Case III., r. 4].—By rule 4 of the rules applicable to Case III. of Schedule D of the Income Tax Act, 1918, "If the Commissioners find that lands which have been charged under Schedule B on the assessable value and which are occupied by a dealer in cattle or a dealer in or a seller of milk are insufficient for the keep of the cattle brought on to the lands, so that the assessable value affords no just estimate of the profits, they may require a statement of the profits to be delivered, and charge such further sum thereon as, together with the charge under Schedule B, will make up the full sum wherewith the dealer or seller ought to be charged in respect of the like amount of profits charged according to rule 2 of the rules, applicable to this Case." Held, that a farmer may be a "seller of milk" within the above rule even though he merely sells, by wholesale, the milk produced on his farm ; and it is not necessary that, to come within the rule, he should own some outside trading organization for the disposal of the milk.—H. AND C. STEPHENSON v. WALLER [Rowlatt, J.] 155

Income-tax—Income accumulated for benefit of a person contingently — Beneficiary having only a life interest — Claim to relief — Meaning of "benefit" — Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 25].—By s. 25 of the Income Tax Act, 1918 :—"Where in pursuance of the provisions of any will or settlement any income arising from any fund is accumulated for the benefit of any person contingently on his attaining some specified age or marrying, and the aggregate amount in any year of assessment of that income and the income from any other fund subject to the like trusts for accumulation and of the total income of that person from all sources (hereinafter referred to as 'the aggregate yearly income') is of such an amount only as would entitle an individual either to total exemption from tax or to relief from tax, that person shall, on making a claim for the purpose within three years after the end of the year of assessment in which the contingency happens, be entitled . . . to have repaid to him [a sum calculated as therein mentioned]." Held, that the words "for the benefit of" include a case where the accumulations of income are added to the capital of a trust fund in which the

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beneficiary has only a life interest and where therefore the accumulations never pass to the beneficiary. Decision of Rowlatt, J. (43 *The Times* L.R., 481 ; [1927] 2 K.B., 491), affirmed.—DALE v. MITCALFE [C.A.] 21

Income-tax — Insurance of timber against fire — Money received by insured — Whether an ordinary trading receipt].—Where a timber merchant insures his timber against fire and the timber is destroyed by fire, the amount received by him from the insurance companies, in respect of the timber so destroyed, is to be taken, for the purpose of income-tax, as an ordinary trading receipt, and it is not sufficient to value the timber destroyed at cost or market value, whichever may be the lower, and to enter that amount in the profit and loss account and to put to reserve the balance of the money received from the insurance companies. Decision of Rowlatt, J. (44 *The Times* L.R., 153 ; [1928] 1 K.B., 475), affirmed.—GREEN v. J. GLIKSTEN AND SON, LIMITED [C.A] .. 418

Income-tax — Profits and earnings of employment — Solicitor-trustee—Power to charge — Remuneration by percentage of trust funds — Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. D, Case II.]—Case II. of Schedule D of the Income Tax Act, 1918, provides that income-tax "shall extend to every employment by retainer in any character whatever, whether such retainer shall be annual or for a longer or shorter period, and to all profits and earnings of whatever value arising from employments, and shall be computed on the full amount of the balance of the profits, gains, and emoluments of the professions, employments or vocations upon a fair and just average of three years. . . ." A solicitor-trustee was empowered by clauses in the instruments creating the trusts to charge for work done by him in connexion with the trusts. By agreement between himself, his co-trustees, and the beneficiaries his remuneration was calculated as a percentage of the annual income of the trust funds, which income had already been brought into charge to tax. Held, that this remuneration was chargeable to income-tax on the solicitor under Sched. D, Case II., of the Income Tax Act, 1918, as his profits or earnings arising from an employment and was not constituted of annual payments payable wholly out of profits or gains brought into charge to tax within Rule 19 of the General Rules applicable to All Schedules of the Income Tax Act, 1918. *In re White* (14 *The Times* L.R., 503 ; [1898] 2 Ch., 217) ; *In re Brown* ([1918] W.N., 118) ; and *Baxendale v. Murphy* (40 *The Times* L.R., 784 ; [1924] 2 K.B., 494) distinguished.—JONES v. WRIGHT [Rowlatt, J.] 128

Income-tax — Profits or gains — Receipt on behalf of beneficiary by another person—Obligation on receiver to deliver statement—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), ss. 103, 107.]—ATTORNEY-GENERAL v. NATIONAL PROVINCIAL BANK, LIMITED [Rowlatt, J.] 701

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Income-tax — Trading profits — Deduction — Multiple shops — Shops closed and opened as demanded by business as a whole — Difference between cost of new fittings in new shops and price realized for old fittings—Capital or income expenditure —Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Schedule D, Case I.].—A trading company with a number of branch shops controlled by a head office followed a policy of opening and closing their branches in accordance with the local demands and the probabilities of profit or loss. Held, that the difference between the cost of new fixtures, fittings, and utensils for the new shops, and the receipts from the sales of equivalent second hand fixtures, &c., from the shops that were closed was a capital expenditure, and was not a revenue expenditure which could be debited to the trading account of the company in ascertaining the profits which were assessable to income-tax. Decision of Rowlatt, J. (43 *The Times* L.R., 549), affirmed.—EASTMAN'S, LIMITED v. SHAW [C.A.] 42

Income-tax — Voluntary pension — Lump sum in lieu thereof — Whether recipient assessable—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), Sched. E].—The respondent had been the managing director of a company and after his retirement the directors paid him a voluntary pension and subsequently stopped the pension, and instead thereof gave him a lump sum as a personal gift. The respondent was assessed to income-tax on the amounts so paid to him. Held, that as the payments were merely gifts moved by remembrance of past service already sufficiently remunerated, the respondent was not liable to be assessed upon them.—BENYON v. THORPE [Rowlatt, J.] 610

Income-tax — Water authority — Interest on stock and debentures — Deduction and retention of tax — Whether interest paid out of profits not brought into charge—Liability to account for tax—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), All Schedules Rules, Rules 19, 21].—The profits of the Metropolitan Water Board are assessable under Schedule A. No. III., Rule 3, of the Income Tax Act, 1918, by reference to the profits of the year preceding the year of assessment. The accounts of the Board for the year ending March 31, 1922, showed a loss, and therefore no assessment was made on the Board under Schedule A, No. III., for the year ending April 5, 1923. The accounts for the year ending March 31, 1923, showed a profit of over two millions, out of which the Board paid over one million interest on water stock and debentures, deducting and retaining the income-tax thereon. On an information claiming that under Rule 21 of the All Schedules Rules the Board was liable to account to the Commissioners of Inland Revenue for the amount of the tax so deducted, the Board contended that the interest paid for the year 1922-23 was payable out of profits brought

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into charge for 1922-23 within Rule 19 of the All Schedules Rules and was in fact paid out of the profits for 1922-23, and that, although the income-tax for 1922-23 was to be measured by the profits of the preceding year, the profits for 1922-23 were profits "brought into charge," and Rule 21 did not apply. Held, that as the Board had been assessed at zero under Schedule A for 1922-23, the interest had not been paid out of profits brought into charge, and the Crown was entitled to succeed. Decision of Rowlatt, J. (43 *The Times* L.R., 656), affirmed.—ATTORNEY-GENERAL v. METROPOLITAN WATER BOARD [C.A.] 135

Legacy duty — Chattels settled on persons in succession — Ultimate vesting in person with absolute interest—Valuation—Whether duty payable on value at date of testator's death or at date of vesting—Legacy Duty Act, 1796 (36 Geo. III., c. 52), s. 14].—A testator bequeathed chattels to trustees upon trust to allow them, so far as the rules of law and equity would permit, to go and be enjoyed with his mansion house. The testator died in 1846, and after divers intermediate life interests the defendant became, in 1909, tenant in tail male in possession of the mansion house, and in 1924, on attaining the age of 21 years, he became absolutely entitled to the chattels, with power to sell or dispose of them. They had greatly increased in value since 1846. No legacy duty had been payable in respect of them before 1924. Held, that legacy duty was payable on the value of the chattels in 1924, not on their value in 1846.—ATTORNEY-GENERAL v. RUDGE [Rowlatt, J.] 708

Mechanically propelled vehicles — Duty —Petrol-electric vehicle — Electrical propulsion — Generation of electricity by internal combustion engine on vehicle—Rate of duty—Finance Act, 1926 (16 and 17 Geo. V., c. 22), Sched. I. (5)].—A vehicle propelled by electricity generated by an internal combustion engine on the vehicle is not an electrically propelled vehicle within clause 5 of the First Schedule to the Finance Act, 1926, and is therefore subject to the higher duty imposed upon a vehicle mechanically propelled otherwise than by electricity. So held by Lord Hanworth, M.R., and Sankey, L.J.—Russell, L.J., dissenting. Decision of Clauson, J. (44 *The Times* L.R. 516), reversed.—TILLING-STEVENS MOTORS, LIMITED v. KENT COUNTY COUNCIL AND ANOTHER [C.A.] 719

Supertax — Infant — Liability of trustees and guardian to make supertax returns — Representative assessments — Income Tax Act, 1842 (5 and 6 Vict., c. 35), s. 41—Finance (1909-10) Act, 1910 (10 Edw. VII., c. 8), ss. 66, 72—Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 7 ; All Schedules Rules, rule 4].—Representative assessments to supertax cannot be made upon the trustees or the guardian of an infant beneficiary, either in respect of the actual total income of the infant, or in respect of a total income

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limited, as regards the particular trustees or guardian, to that income with which the trust or guardianship is concerned. Decision of the Court of Appeal (43 *The Times* L.R., 835 ; [1928] 1 K.B., 118) affirmed.—INLAND REVENUE COMMISSIONERS v. COUNTESS OF LONGFORD. INLAND REVENUE COMMISSIONERS v. PAKENHAM AND OTHERS [H.L.] 410

Supertax — Principal shareholder in company — Scheme for transfer of shares to employees—Dividends to belong to principal shareholder till transfer — No transfer till total dividends amounted to par value—Liability to assessment — Income Tax Act, 1918 (8 and 9 Geo. V., c. 40), s. 27].—The appellant, who was the principal shareholder and held the controlling interest in a company, set aside a certain number of his shares for transfer to certain employees of the company on the terms that, until the actual transfer, he was to receive the dividends, and that when the total of the dividends on the shares set aside for an employee amounted to the par value of a share the share so paid for should be transferred to the employee. The appellant was assessed to supertax on the dividends received by him on the shares so set aside. Held, that since the dividends, as they accrued, were dividends of the appellant, although he might be under obligations with regard to them in the future, they formed part of his income for the purpose of assessment to supertax. Decision of Rowlatt, J. (41 *The Times* L.R., 572), affirmed.—COMMISSIONERS OF INLAND REVENUE v. PARSONS [C.A.] .. 420

SALE OF GOODS—Implied condition—Merchantable quality—Bottle of wine—Defect in bottle—Injury to purchaser in uncorking—Liability of seller—Sale of Goods Act, 1893 (56 and 57 Vict., c. 71), s. 14 (2)].—MORELLI v. FITCH AND GIBBONS [Div. Ct.] 737

Payment by instalments — Death of purchaser — No instalments ever paid —Resumption of possession of furniture by vendor — Claim against purchaser's executors for instalments].—By the terms of a lease of a house granted by the Crown the lessee agreed to pay six yearly instalments in respect of furniture on the premises which on completion of the instalments was to become his property, but *in interim* belonged to the Crown. The lessee died without paying any instalments and the Crown subsequently brought an information against his executors and his widow, to the latter of whom he had bequeathed his interest under the lease, claiming three instalments which had become due at the time when the widow had surrendered the lease, and, together with the executors, her sons, had vacated the premises owing to financial difficulties. When the defendants left the premises the Crown took charge of and dealt with the furniture in a manner prejudicial to the defendants' interests in it. Held, that there was an agreement for the sale of the furni-

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ture, payment to be made by instalments, the property not to pass until the price was fully and finally satisfied; and that by resuming possession of the furniture when it was abandoned by the defendants the Crown had disentitled itself to sue for a part of the purchase price. The proper course of action was to sue for damages for breach of agreement to purchase.—ATTORNEY-GENERAL v. PRITCHARD AND OTHERS [Swift, J.] 490

War — Goods sold to Turkish customers — Delivery of goods to customers after outbreak of war — Payment received in piastres by seller's agents — Claim by seller against his agents for sterling—Treaty of Lausanne, 1923, Art. 84—Treaty of Peace (Turkey) Order, 1924].—The defendant bank, a Turkish subject, was at the outbreak of war between this country and Turkey holder of sight bills drawn in sterling for the purchase price of goods consigned by the plaintiff from Manchester for his customers in Beirut which had arrived in Beirut before the outbreak of war and were subsequently delivered by the bank to the purchasers against payment to the bank in piastres. At the conclusion of the war the defendant bank claimed to be entitled to pay to the plaintiff an amount in sterling which represented the then depreciated value of the piastres which they had received in exchange for the goods. The plaintiff, on the other hand, claimed to be entitled to be paid the sterling amounts of the bills at sight. Held, that since the completion of the execution of the contracts, as between the plaintiff and his customers, required no intercourse between a British subject and the enemy, the contracts were not abrogated by the outbreak of war, and the plaintiff was entitled to recover from the defendant bank the amount of the bills in sterling. Appeal from decision of the Court of Appeal (43 *The Times* L.R., 369; [1927] 2 K.B., 254) allowed.—OTTOMAN BANK v. JEBARA [H.L.] 525

See also CONTRACT.

SAVINGS BANKS—Nomination—Invalidity of form—Receipt of payment by nominee—Right of administrator of nominator to recover amount—Post Office Savings Bank Regulations, 1921, regs. 65, 66, 87].—One P., who had money to his credit in the Post Office Savings Bank, signed a nomination form by which he left the money to the defendant. The name of a witness appeared on the form, but P. had not signed the form in his presence as required by reg. 66 (1) of the Post Office Savings Bank Regulations, 1921. After P.'s death, as the form appeared on the face of it to be valid, the Postmaster-General paid the money to the defendant. The plaintiff, having taken out letters of administration of P.'s estate, claimed the money from the defendant, as money received by him to the use of the plaintiff. Held, that the form was invalid, and the position of the defendant was the same as if he had received payment under a will

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afterwards held invalid, and the plaintiff was entitled to recover.—PEARMAN v. CHARLTON [Wright, J.] 517

SETTLED LAND — Vendor and purchaser — Land no longer settled land after death of tenant for life—Probate granted to executor of tenant for life—Title to convey—Special executors—Law of Property Act, 1925 (15 Geo. V., c. 20), s. 204 (1)—Administration of Estates Act, 1925 (15 Geo. V., c. 23), s. 22 (1), 37 (1)].—On January 1, 1926, A was tenant for life, under the Settled Land Act, 1925, under a settlement of land, which on A's death was devised on trust for sale. Probate of the will of A (who died in 1926) was granted to B, her sole executor, settled land not being excluded by the grant. In December, 1926, B contracted to sell part of the property. After the date of the contract B and another trustee were appointed trustees of the original settlement. The purchaser objected to the title on the ground that the legal estate was vested in the surviving Settled Land Act trustee of the original settlement, under s. 22 of the Administration of Estates Act, 1925, and that neither B nor the new trustees, after an assent by B, could convey the legal estate. Held, (1) that, so long as the general grant of probate remained unrevoked, B had power to convey the legal estate to the purchaser; (2) that, as on the death of the tenant for life the land ceased to be settled land, the persons who were immediately before the death trustees of the settlement were not special personal representatives under s. 22 of the Administration of Estates Act, 1925.—IN RE BRIDGETT AND HAYES' CONTRACT [Romer, J.] 222

SHIP—Bill of lading—Deviation clause—Loss by perils of the sea—Exceptions clause—Loss on usual route—Shipowners protected].—The plaintiff at Malaga shipped, on a steamer of the defendants, goods to be carried from Malaga to Liverpool. The bill of lading contained clauses excepting the shipowners from responsibility for (*inter alia*) loss, damage, or injury by perils and risks of seas or for any risk which might be an insurable one. It also contained a deviation clause: "with liberty to touch at any ports whatsoever although they may be outside the route without it being considered a deviation." For some years the defendants had been taking, from Malaga to Liverpool or other ports of this country, two distinct routes for the vessels of their line, one "*via* Levante," which meant going north-east up the coast of Spain with calls at various ports, and then coming back from the farthermost port down the Mediterranean and through the Straits to this country, and the other, "Directo," coming directly from Malaga to ports of this country. The plaintiff knew, when he delivered to the ship the goods to be carried under the bill of lading in this case, that the route for that particular ship would be "*via* Levante." In this case the ship on leaving Malaga went north-eastward with

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the intention of picking up cargo at Cartagena before going to Liverpool. Between Malaga and Cartagena the ship met with bad weather, and some of the plaintiff's goods were lost. The plaintiff claimed damages, but the defendants relied on the exceptions clauses in the bill of lading. The plaintiff answered that the steamer had deviated from the contract voyage and that therefore the exceptions clauses did not apply. Held, that no question of deviation arose, because at the time of the loss the ship was on one of the known and usual routes, and therefore on an agreed route, towards Liverpool. Accordingly, the defendants were protected by the exceptions clauses in the bill of lading. Decision of Rowlatt, J. (44 *The Times* L.R., 329), reversed.—FRENKEL v. MACANDREWS AND CO., LIMITED [C.A.] 580

Charterparty—Coal cargoes—Strike clauses—Coal strike of 1926—Embargo on coal exports—Frustration of adventure—Termination of charterparty].—By a charterparty dated March 24, 1926, the plaintiffs chartered the defendants' steamship to run consecutive voyages with cargoes of coal from one of the South Wales ports to one or other of specified Italian or Sicilian ports for a period of "twelve months as and from date of notice of readiness to load for first voyage." The charter was on the printed form of the Chamber of Shipping Welsh Coal Charter, 1896, and contained the ordinary clauses as to strikes and lock-outs, with the addition of the following written clause: "Steamer not to be ordered to any loading port at which there is a strike in force. Steamer to be free to interpose a substantially similar voyage if charterers unable forthwith to order steamer to another loading port stipulated in charter, free of strike." In May, 1926, the defendant shipowners, through their agents, and in accordance with the provisions of the charterparty, gave notice to the plaintiff charterers that the ship would be ready to load about the first week in June, and they asked for orders as to the port of loading. Meanwhile the coal strike had begun, resulting in a total prohibition of coal exports by the British Government, and on June 12 the charterers replied that they could not order the vessel to a port to load, and must leave the owners to make their own arrangements. Thereupon the owners, under the written clause in the charterparty, arranged to interpose two "similar" voyages, after which, as the strike was still proceeding, and as the charterers were still unable to order the ship to a loading port, the owners took independent action and chartered the vessel for voyages to America and back to Naples, Huelva, and Rouen. At the end of November, when the strike had become restricted in its operation (although the Government embargo upon the export of coal remained in force until December 17),

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the charterers notified the shipowners that the ship must be ready to carry out the charter within a reasonable time after the settlement of the strike. The shipowners replied that by reason of the prolonged strike and the Governmental embargo on coal exports the commercial venture had been frustrated, and the contract therefore became null and void. In these circumstances the charterers claimed damages for breach of contract. Held, that the total impossibility of any export of coal from the South Wales ports for a period of upwards of six months was a circumstance not contemplated by the parties which had prevented the performance of the charter according to its true intent, and that, the charterers not having been "ready and willing" to perform their obligations under the charterparty at the material times, the shipowners were justified in treating the contract as at an end.—THE PENELOPE [Lord Merrivale, P.] 597

Charterparty — Discharge of cargo — Meaning of "alongside"—Discharge on to quay and into lighters—Custom of Port of London—Respective obligations of shipowners and receivers].—The plaintiffs' steamer was chartered for the conveyance of a cargo of timber from Archangel to London, the charterparty providing, "The cargo to be brought to and taken from alongside the steamer at the charterer's risk and expense as customary." The defendants were indorsees of bills of lading which incorporated the terms of the charterparty. On arrival the plaintiffs discharged part of the cargo on to the quay and stacked it there and discharged part of it into lighters and stowed it in the lighters, and they brought this action, alleging that as the defendants did not take the cargo from alongside the steamer they (the plaintiffs) had had to incur the expense of stacking on the quay and of stowage in the lighters. The defendants pleaded that by the custom of the Port of London the shipowners were bound to bear the cost of unloading and stacking timber on the quay alongside the ship, and, in the case of overside discharge, the cost of delivery and stowage in the lighters. Held, that by the custom in question the shipowners were under an obligation to bear all costs of unloading and stacking on the quay and of delivery and stowage in the lighters, and as there was no inconsistency between the custom and the charterparty the action failed. Appeal from decision of Wright, J. (44 *The Times* L.R., 320), allowed.—SMITH, HOGG AND CO., LIMITED v. LOUIS BAMBERGER AND SONS [C.A.] 659

Collision — Action against owners — Writ — Acceptance of service—Appearance—Bail—Solicitors' undertaking—Alleged mistake as to their authority—Motion by them to set aside acceptance and undertaking.—Refusal.—THE GERTRUD [Hill, J.] 1

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Collision — Motion to stay proceedings].—A collision having occurred in Egyptian waters between a British steamship and a German steamship, an action in respect thereof was instituted by the owners of the British vessel in the Egyptian Courts against the German shipowners, who in due course put in bail. Subsequently the German shipowners also issued a writ in the Egyptian Courts against the British shipowners, but eventually they abandoned their proceedings in Egypt and issued their writ in the present action. On a motion by the British shipowners to set aside the writ and stay all subsequent proceedings on the ground that the action in this country was in the circumstances vexatious and oppressive, Held, that the fact that a plaintiff in the English Courts was a party, as defendant only, to proceedings elsewhere, was not a ground for depriving him of his undoubted right to sue in this country, and the motion must be refused.—THE JANERA [Hill, J.] .. 193

Collision — Tug and tow — Towage contract — Indemnity clause — Third party action].—The plaintiffs' keel, while at anchor, was damaged by collision with a lighter, which, with five other craft, was being towed by the defendants' steam tug. The collision was caused by the negligence of the defendants' servants. Proceedings were instituted by the plaintiffs against the defendant tug owners for the damage which their keel had sustained, and thereupon the defendants obtained leave to serve third party notices upon (1) the owner (who was also the master) of the lighter, and (2) the hirers of the lighter, claiming to be indemnified, under the conditions of the towage contract, in respect of any sum which they might be found liable to pay to the plaintiffs. The towage contract in question contained the following conditions :—"That on the hiring or employment of the steam tug, the master and crew thereof shall be held to become the servants of and identified with the vessel or craft being towed, and under the control of the person in charge of such vessel or craft during the performance of the contract. The steam tug owners are not responsible for the acts, neglect, or default of the masters, pilots, or crews of the steam tugs . . . or for any loss of life or injury to persons or for any damage or loss that may arise to any vessel or craft being towed, or about to be towed, or having been towed, or cargo on board of same, or any other ship or cargo . . . through collision or otherwise, whether such damage arise from or be occasioned by any accident, or by any omission, breach of duty, mismanagement, negligence, or default of the steam tug owners, or any of their servants or employees, or by any defect or imperfection in the steam tugs or their machinery or the towing gear . . . whether such defect or imperfection is in existence before or at the commencement of the towage or arises during or after the performance thereof . . . and the owners or persons interested in the vessels or craft so being towed, or about to be towed, or having been towed, or the cargo on board of the same, shall and do undertake to bear, satisfy and indemnify the steam tug owners against all liability for the above mentioned matters and against all costs and charges in respect of any law expenses or actions that may arise or be brought against the said tug owners in relation to any such loss or damage, actual or alleged." The hirers of the lighter, with whom the Court found that the towage contract had been made, contended, *inter alia*, that the towage conditions as worded were so ambiguous as to be inapplicable where a tug was towing more than one vessel or craft at the same time, *e.g.*, the master and crew of the tug could not be held to become the servants of and identified with all the vessels being towed, and under the control of the persons in charge of all such vessels ; and that the words "or persons interested in the vessels or craft so being towed" were not sufficiently clear and unambiguous to cover hirers of such vessels. Held, without deciding whether the whole of the phraseology used in the towage conditions was applicable in cases where a tug was towing more than one vessel, that the hirers of the lighter, as "persons interested" in the vessels being towed, had clearly undertaken to indemnify the tug owners in respect of the matter in question, and judgment must be given against them, with costs. Held, further, that under the towage contract the tug owners were entitled to recover from the hirers of the lighter their costs as between solicitor and client of defending the collision action from the date on which the hirers were joined as third parties.—THE RIVERMAN [Hill, J.] 140

Collision — War or marine risk — Meaning of "warlike operation"].—A steamer belonging to the claimants was requisitioned by the British Government during the War on the terms of a charterparty by which the Government undertook responsibility for loss of the vessel owing to a warlike operation, while the claimants remained responsible for loss by ordinary marine risks. In May, 1918, the claimants' vessel was in a convoy and was carrying from the United States to France steel billets for making shells, but the bulk of her cargo consisted of cereals for the French civilian population. Owing to a defect in her steering gear she collided with an American vessel, which was also in the convoy and was carrying war stores exclusively and was admittedly engaged in a warlike operation. The result of the collision was that the claimants' vessel sank. There was no negligence on the part of either vessel. The Government refused to pay for the loss on the ground that it had not been caused by a warlike operation. In an arbitration it was found by the arbitrator that the claimants' vessel was not engaged in a warlike operation. Held (Greer, L.J., dissenting), that as the question whether the claimants' vessel was engaged in a warlike operation was concluded by the finding of the arbitrator, and as the col-

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lision was caused by her sudden departure from her proper course, the American vessel being merely the instrument and not the cause of the loss, the loss was not caused by a warlike operation, and the British Government was not liable. Decision of Wright, J. (44 *The Times* L.R., 567), affirmed.—CLAN LINE STEAMERS, LIMITED v. BOARD OF TRADE [C.A.] 784

Collision — War or marine risk — Meaning of "warlike operation."].—During the War a steamer belonging to the appellants was requisitioned by the Shipping Controller under a charterparty providing that the Crown should be liable for all consequences of warlike operations but that the owners were to bear the marine risks. After the Armistice the steamer, when still under requisition, was on a voyage with a mercantile cargo of oats and collided at night with another steamer which had been requisitioned by the United States Government and which was taking mines back to America, probably in the belief that they were no longer required for the purposes of the War. The collision was caused by the negligent navigation of both steamers, and the appellants' steamer was off hire for 99 days as the result of the damage which she suffered. An arbitration took place and the arbitrator found that the collision was a consequence of warlike operations and that therefore the Crown was liable to compensate the appellants. Held, (1) that there was evidence on which the arbitrator could find that the steamer requisitioned by the United States Government was at the time of the collision performing a warlike operation, and (2) that the fact that the negligent navigation of the appellants' steamer contributed equally to the loss did not relieve the Crown from liability; and therefore the arbitrator's award must be affirmed.—Decision of Rowlatt, J. (44 *The Times* L.R., 344) reversed.—HAIN STEAMSHIP COMPANY, LIMITED v. BOARD OF TRADE [C.A.] 624

Damage by ship to electric cable in docks —Absence of negligence—Whether shipowners "answerable" to dock undertakers—Harbours, Docks, and Piers Clauses Act, 1847 (10 and 11 Vict., c. 27), s. 74—Pilotage Act, 1913 (2 and 3 Geo. V., c. 31), s. 15].—The defendants' steamship, while proceeding from one of the plaintiffs' docks to another, through a communication channel, fouled with her anchor and did damage to certain cables owned by the plaintiffs and used for electric lighting and power in the docks. The plaintiffs alleged negligence on the part of the defendants or their servants, but by an amendment of their pleadings also alleged that the damage complained of was damage done by a vessel to a dock or works connected therewith, and that in any event the shipowners were answerable therefor to the plaintiffs, as undertakers of the said dock or works, by reason of s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847, as amended by s. 15 of the Pilotage Act, 1913. Section 74 of the Act of 1847 provides :—

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"The owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith; and the master or person having the charge of such vessel or float of timber through whose wilful act or negligence any such damage is done shall also be liable to make good the same; and the undertaker may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same: provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of." The Pilotage Act, 1913, by s. 15, abolished the defence of compulsory pilotage and in effect repealed the proviso to s. 74 of the Act of 1847. Held (Viscount Dunedin and Lord Phillimore dissenting), that under s. 74 the plaintiffs did not require to prove negligence, but had only to show that the action which led to the damage was action attributable to human agency, and therefore that although negligence had not been proved the plaintiffs were entitled to recover. *River Wear Commissioners v. Adamson* (2 App. Cas., 743) explained. Decision of the Court of Appeal (42 *The Times* L.R., 710; [1927] P., 25) reversed.—THE MOSTYN [H.L.] 179

Damage caused by anchor — Obstruction in fairway of navigable river—Duty to buoy or mark anchor].—Persons who drop an anchor in a navigable river, where at a certain state of the tide it will form an obstruction in the fairway, owe a duty to warn other persons navigating up and down the said river of the presence of the obstruction, by buoying or otherwise marking the same, and if they fail in that duty they render themselves liable for any damage resulting therefrom.—THE HARKAWAY [Bateson, J.] 649

Damage to cargo — Bill of lading incorporating the Sea Carriage of Goods Act, 1924 (Australian statute)—Neglect or default in management of the ship—Surrender of statutory immunity].—Cargo, consisting of bales of opossum skins, was shipped at the port of Sydney, New South Wales, under bills of lading which, pursuant to s. 6 of the Australian Commonwealth Sea Carriage of Goods Act, 1924, contained the following :—"Paramount Clause.—This bill of lading is to be read and construed as if every clause therein contained which is rendered illegal or null and void by the Sea Carriage of Goods Act, 1924, had never been inserted therein or had been cancelled and eliminated therefrom prior to the execution thereof, and is issued subject to all the terms and provisions of and to all the exemptions from liability in such Act." By Art. IV., Rule 2, of the Schedule to the above Act, "Neither the carrier nor the ship shall be

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responsible for loss or damage arising or resulting from (*a*) act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship . . ." During the voyage a seaman, by using an iron rod for the purpose of clearing an obstruction in a lead pipe, which carried off waste water from the crew's wash-house to the ship's side, pierced or cracked the pipe, with the result that water leaked into the ship's strong-room and did damage to the opossum skins which were stored therein. Held, that the act of clearing the pipe of an obstruction was the management of an essential part of the crew's accommodation and therefore of the ship ; that the use of an iron rod with such force as to pierce or crack the pipe was negligence on the part of the seaman ; and that therefore the damage to the cargo was due to neglect in the management of the ship for which the carrier was exempt from liability. By Article V. of the schedule, "A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities under the Rules contained in any of these Articles, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper . . ." Inasmuch as the bills of lading expressly stated that "the carriers are not to be responsible for faults or errors of navigation," but no mention was made therein of responsibility for faults of management, it was contended by the cargo-owners that the carrier had impliedly surrendered the immunity in respect of faults of management. Held, that the surrender of a statutory immunity must be clearly stated and was not to be inferred from the needless repetition of another immunity.—THE TOURAINE [Hill, J.] 204

See also CONTRACT and SHIP.

Practice — Collision — Bail given to avoid arrest of ship—Additional bail demanded after judgment—Arrest of ship—Warrant of arrest set aside—Effect of giving bail].—The defendants in an action *in rem* for damage by collision gave bail in an amount specified by the plaintiffs in order to avoid the arrest of their ship. After judgment had been delivered in the action, pronouncing the defendants' ship alone to blame, the plaintiffs, who in the meantime had dry-docked their vessel and discovered further damage, demanded additional bail and arrested the defendants' ship. The defendants gave the additional bail under protest and moved to set aside the warrant of arrest. Held, that the effect of giving bail was to extinguish the plaintiffs' maritime lien and to release the defendants' ship altogether in that action, and the warrant of arrest must, therefore, be set aside.—THE POINT BREEZE [Bateson, J.] 390

Practice — Collision — Taxation of costs —R.S.C., Order LXV., r. 27 (29)].—A collision between the plaintiffs' barge and the defendants' steamship resulted in

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damage to the barge and the death of one of her crew. At the inquest on the deceased bargeman the owners of both vessels were represented. Subsequently the plaintiffs issued a writ claiming the damage occasioned by the collision, but after a final order had been made against them to file their preliminary act they discontinued their action. Liability for the collision mainly turned on the question whether the barge was exhibiting a proper light. Therefore, before the discontinuance of the plaintiffs' action the defendants' solicitors had incurred costs in taking statements from independent witnesses, in paying those witnesses for their time and trouble in coming to give their statements, and in attending before the coroner. On taxation the Assistant Registrar disallowed these items of the defendants' costs, on the ground that it was a well-settled principle of taxation that a party was only entitled as against his opponent to incur such costs or expenses as would enable him to conduct his case at the stage which the proceedings had reached, and not to incur expenses in anticipation of matters which, as events turned out, never arose. On appeal to the Judge in Chambers, Held, that a solicitor, in incurring costs, had to have regard not only to the ultimate trial of the action but to the necessity of being in a position to give proper advice to his clients and to place adequate instructions before counsel to settle the preliminary act, by which, in an Admiralty action, a party was bound ; that the costs and expenses in question had been reasonably incurred within the meaning of Order LXV., r. 27 (29), of the Rules of the Supreme Court, and the matter must go back to the Registry.—THE CHANNEL QUEEN [Bateson, J.] 505

Salvage — Contract — Breach — Damages — Foreign judgment — Obtention by fraud — Injunction against enforcement].—The plaintiffs' steamer stranded in the Black Sea, and the defendant L., who was a British subject, agreed to try to salve her on the terms (*inter alia*) that security for payment of his remuneration should be arranged in London and that he would not arrest the ship unless there was an attempt to remove her before the security had been given. Security was given in London in accordance with the salvage contract, and the ship was refloated and taken to Constantinople for temporary repairs. Before she was ready to leave, the defendant L. brought an action against the master in the Turkish Court on the ground that the ship was about to be removed without security having been given. By order of the Turkish Court the ship was arrested, and, as the master had no evidence of what had been done in London and L. took an oath that security had not been given, the Turkish Court awarded L. £23,890. L. then disposed of the ship, and the plaintiffs brought this action, (1) for damages for breach of contract, (2) for a declaration that the Turkish judgment was invalid, and (3) for an injunction to prevent the Turkish

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judgment from being enforced. Held, that the plaintiffs were entitled to damages including the value of the ship, and were not liable to be sued in England on the Turkish judgment; and that as the judgment had been obtained by a British subject by fraud there must be an injunction restraining the enforcement of it in any part of the world. Judgment of MacKinnon, J. (44 *The Times* L.R., 7), varied.—ELLERMAN LINES, LIMITED v. READ AND OTHERS [C.A.] 285

Shipping casualty — Court of inquiry in British Possession — Shipmaster censured—Appeal—Allowance of appeal—Costs—Shipping Casualties and Appeals and Re-hearings Rules, 1923, r. 20 (*i*)].—In allowing an appeal by a shipmaster from the finding of a Court of Inquiry at Singapore that he had been guilty of negligence causing the stranding of his ship the Divisional Court refused to make an order against the Board of Trade for the costs of the appeal but granted to the appellant an order against the Board for the costs of a previous argument of the question whether he had a right of appeal.—THE ROYAL STAR [Div. Ct.] 408

Shipping casualty — Court of inquiry in British Possession—Shipmaster censured—Rehearing—Right of appeal—Merchant Shipping Act, 1894 (57 and 58 Vict., c. 60), ss. 475, 478—Merchant Shipping Act, 1906 (6 Edw. VII., c. 48), s. 66].—A Court of Inquiry at Singapore, Straits Settlements, which sat to investigate the stranding of the London steamship Royal Star on some unidentified submerged object between Sumatra and the mainland, found the master of the vessel guilty of negligence and censured him, but declared that it did not deem it necessary to deal with his certificate. The shipmaster applied to the Board of Trade for a rehearing, which was refused. On appeal, Held, that whether or not a shipmaster whose certificate had been neither cancelled nor suspended had a right of appeal under ss. 475 and 478 of the Merchant Shipping Act of 1894, the matter was put beyond doubt by s. 66 of the Merchant Shipping Act of 1906, which was passed in order to enlarge the right of appeal; that the appellant, as a person who, having an interest in the investigation or inquiry, had appeared at the hearing and was affected by the decision of the Court, was entitled under s. 66 to appeal in the same manner and subject to the same conditions in and subject to which a shipmaster might appeal under ss. 475 and 478 of the Act of 1894 against the cancelling or suspension of his certificate.—THE ROYAL STAR [Div. Ct.] 163

SOLICITORS — Partnership — Covenant not to practise within defined area after termination—Acting as solicitor's managing clerk—Whether breach of covenant].—The Court held that a solicitor who had covenanted, upon termination of a partnership, not to practise within a certain borough for

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10 years, did not commit a breach of the covenant by acting as managing clerk to another solicitor within the prohibited area.—WAY v. BISHOP [C.A.] 571

SUMMARY JURISDICTION—Local authority—Information preferred by clerk — Case stated—Personal recognizance by clerk—Summary Jurisdiction Act, 1857 (20 and 21 Vict., c. 43), s. 3—Public Health Act, 1875 (38 and 39 Vict., c. 55), s. 259].—Where the clerk to a local authority takes proceedings in his own name under the power conferred by s. 259 of the Public Health Act, 1875, he is the informant, and on a case stated being asked for by him, he is the appellant and the proper person to enter into the recognizance required by s. 3 of the Summary Jurisdiction Act, 1857. It is immaterial that he may have been described in the information as "duly authorized," such words being mere surplusage. *Leyton U.D.C. v. Wilkinson* (43 *The Times* L.R., 326; [1927] 1 K.B., 853) distinguished.—LAWRENCE v. MARTIN [Div. Ct.] 621

See also JUSTICES.

TITHES—City of London—Rate prescribed by statute—Exemption from prescribed rate—Premises for which less paid before Act—Onus of proof—37 Henry VIII., c. 12].—By the Act 37 Henry VIII., c. 12, and a decree made in pursuance of it in the same year and having the force of a statute, the lessees of houses and all other hereditaments (with certain immaterial exceptions), situated in the City of London, are liable to pay a tithe of 2s. 9d. for every rent of 20s. by the year, "and so above the rent of 20s. by the year . . . by the rate aforesaid." The decree contained a proviso that in the case of premises in respect of which less sums had been accustomed to be paid for tithes before 1545, the date of the Act, the tithes should be paid only at the accustomed rate. In an action by the owners of tithes against the occupiers of premises in the City for tithe at the rate prescribed by the statute, Held, that the onus was on the defendants to prove that the tithe paid before 1545 in respect of the premises was less than the sum prescribed by the statute, and (Lord Atkin dissenting) that they had not discharged that onus, and the action succeeded. Appeal from decision of the Court of Appeal (43 *The Times* L.R., 367; [1927] 2 Ch., 33) allowed.—BUSBY AND ANOTHER v. AVGHERINO AND OTHERS [H.L.] 551

TRADE MARKS — Assignment—Registration—Goodwill — Territorial limits — Refusal to register—Trade Marks Act, 1905 (5 Edw. VII., c. 15), ss. 22, 33, 35].—If the Registrar of Trade Marks can satisfy himself that on the true construction of a document it appears to be, within the meaning of s. 22 of the Trade Marks Act, 1905, an assignment of trade marks in connexion with the goodwill, within the territorial limits to which the Act extends, of the business concerned

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in the goods for which the trade marks have been registered, he will adequately discharge his function under s. 33 of the Act and must register the assignees as proprietors.—IN RE APPLICATION OF CRANBUX, LIMITED. IN RE APPLICATION OF LINGNER-WERKE AKTIENGESELLSCHAFT [Clauson, J.] .. 409

TRADE UNION—Rules—Alleged invalid alteration—Action for injunction — Benefits—No right in member to sue—Internal affairs of union—No power in Court to interfere—Trade Union Act, 1871 (34 and 35 Vict., c. 31), s. 4].—COX v. NATIONAL UNION OF FOUNDRY WORKERS OF GREAT BRITAIN AND IRELAND [Astbury, J.] 345
See also CONSPIRACY.

TREATY OF PEACE — Debt incurred before outbreak of war—Austrian creditor—Action by creditor incompetent — Treaty of Peace Order, Art. 1 (X) (*ee*)].—The defendant, a Norwegian subject, living in England, incurred a debt to the plaintiffs, an Austrian company, before the outbreak of war. After the Treaty of Peace the plaintiffs sued the defendant for the amount. The Judge in chambers made an order striking out the claim, on the ground that the only right to sue for the debt was in the Administrator of Austrian Property. Held, that as the Treaty of Peace Order made the debt payable to the Administrator and transferred to him all the rights of the creditors the plaintiffs had no right to bring the action. Decision of the Court of Appeal (43 *The Times* L.R., 399) affirmed.—JOSEF INWALD AKTIEN GESELLSCHAFT v. PFEIFFER AND ANOTHER [H.L.] 352
See also ALIENS.

TRESPASS—Building contractor—Demolition of party wall—Limited licence by adjoining owner—Undertaking to make good damage to adjoining premises—Debris dropped on adjoining premises—Omission to clear away debris after completion of demolition operations—Duty to new occupier—Continuing trespass].—In March, 1926, the defendants carried out demolition work on premises adjoining other premises (described here as X) under a limited licence given by the owner of premises X. One of the conditions of the licence was that the defendants should make good all damage done to the premises X by reason of the demolition operations. In the course of these operations, the defendants allowed debris to drop on an inaccessible part of the roof of premises X and did not remove all the debris therefrom when the demolition work was completed. In July, 1926, the plaintiff became the occupier of premises X under a lease and carried on business there as a ladies' blouse and robe maker. In September, 1926, a heavy storm of rain washed the debris, which had been left by the defendants on the roof of premises X in the previous March, into the gutters on the roof, and a gulley was

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choked and the basement of premises X was flooded and some ladies' gowns which the plaintiff kept there were damaged. In an action by the plaintiff claiming damages for the defendants' negligence Mr. Justice Salter gave judgment for the plaintiff, holding that the act of the defendants in not removing the debris was an act of continuing negligence for which they were liable to the plaintiff. Held, that there could be no negligence as there was no duty on the part of the defendants towards the plaintiff, but that the act of the defendants in leaving the debris where they left it after the completion of the demolition work was a continuing trespass which gave the plaintiff a right of action.—KONSKIER v. B. GOODMAN, LIMITED [C.A.] 91

TRUST — Administratrix — Debts paid and estate cleared — Power of Court to confirm appointment of new trustees by administratrix].—An administratrix with the will annexed, having paid all the debts and cleared the estate, executed a deed appointing two trustees of the will in her place and asked the Court to confirm the appointment. Held, that the new trustees had been properly appointed by the deed.—IN RE PITT—PITT v. MANN AND OTHERS [Clauson, J.] .. 371

VENDOR AND PURCHASER—Contract for sale of land—Memorandum in writing—Auctioneer's signature—Law of Property Act, 1925 (15 Geo. V., c. 20), s. 40].—At an auction a freehold house was knocked down to the defendant as the highest bidder, but he afterwards refused to sign the contract because one of the conditions of sale required the purchaser to pay certain road-making charges. On the same day the auctioneer, as soon as he was informed of the defendant's refusal, signed the contract as the defendant's agent. Held, that since in the circumstances the auctioneer's signature could fairly be said to be part of the transaction of sale there was a memorandum in writing sufficient to satisfy s. 40 of the Law of Property Act, 1925.—CHANEY v. MACLOW [Maugham, J.] 700

Deposit — Work to be done by vendor — Extension of time — Work not completed — Rescission — Recovery of deposit—When time of the essence of the contract].—The plaintiff contracted to purchase from the defendant a lease of a house and garage, and paid a deposit of £50, and a further sum of £50 on account of a premium of £150, on October 28 and 29, 1926, respectively. The plaintiff, as the defendant knew, intended to use the premises for the business of a garage proprietor, and the defendant agreed to clear away the hedge and trees in front of the house before the time for completion, which was originally fixed as "on or about December 6, 1926," but was subsequently extended to December 15. On December 10, it being apparent that the defendant could not do the work he had

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undertaken by December 15, the plaintiff rescinded the contract and claimed the return of the money. Held, that in the circumstances time was of the essence of the contract, and the plaintiff was entitled to recover the money.—BERNARD v. WILLIAMS [Div. Ct.] 437

Lessees' option of purchase—Destruction of premises by fire — Subsequent exercise of option—Refusal of lessor to reinstate premises—Repudiation of contract by lessees—Claim to specific performance].—The defendant demised to the plaintiffs for three years a piece of land with a factory on it, and the plaintiffs were to keep the inside of the factory in repair. The agreement said nothing as to the repair of the outside and as to insurance, but gave the plaintiffs an option of purchase during the term. The defendant insured the factory against fire, and, on the occurrence of a fire which almost completely destroyed it, he received compensation from the insurance company. The plaintiffs then gave notice of the exercise of their option of purchase and paid a deposit, but the defendant declined to reinstate the walls and roof and alleged that in exercising the option the plaintiffs had to take the property as it was. In an action for a declaration that in these circumstances the plaintiffs were not bound to proceed with the purchase the defendant counterclaimed for specific performance. Held, that since at the date of the exercise of the option the plaintiffs, to the knowledge of the defendant, thought that he was going to re-erect the factory, the parties were never *ad idem* and the plaintiffs were entitled to a return of their deposit and the counterclaim for specific performance failed. Decision of Tomlin, J. (44 *The Times* L.R., 161), reversed. — LONDON HOLEPROOF HOSIERY COMPANY, LIMITED v. PADMORE [C.A.] 499

See also SETTLED LAND.

WATER—Supply—Premises consisting of two unconnected floors—Whether each floor a separate house—One communication pipe—Failure of one occupier to pay water rate—Cutting off water from both floors—South Shields Water Act, 1921 (11 and 12 Geo. V., c. xlvii.), s. 36].—By s. 36 of the South Shields Water Act, 1921, "The company shall not be bound to supply more than one house by means of the same communication pipe and they may if they think fit require that a separate pipe be laid from the main into each house supplied by them with water." Certain premises in South Shields consisted of a building of two floors wholly unconnected and let to separate occupiers, who had the common use of a yard with a washhouse and other conveniences. A single pipe brought water into the premises. Held, that as the common user of the yard was essential for the reasonable enjoyment of the premises they were not separate houses for the purposes of the section, and the water company was not entitled to cut off the

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supply to both floors if the occupier of either floor failed to pay his water rate.—SUNDERLAND AND SOUTH SHIELDS WATER COMPANY v. HILTON AND OTHERS [Wright, J.] .. 402

WEIGHTS AND MEASURES—False or unjust weight—Charge against principal—Actual offender—Right of principal to bring before the Court—Weights and Measures Act, 1878 (41 and 42 Vict., c. 49), s. 25—Sale of Food (Weights and Measures) Act, 1926 (16 and 17 Geo. V., c. 63), ss. 12 (5), 15 (1)].—By s. 12 (5) of the Sale of Food (Weights and Measures) Act, 1926, "Where an employer or principal is charged with an offence against this Act, he shall be entitled on information duly laid by him, and on giving not less than three days' notice of his intention to the prosecution, to have any other person whom he charges as the actual offender brought before the Court at the time appointed for hearing the charge, and, if after the commission of the offence has been proved, the employer or principal proves to the satisfaction of the Court that he had used due diligence to enforce the execution of this Act, and that the said other person had committed the offence in question without his consent, connivance or wilful default, the said other person shall be summarily convicted of the offence and the employer or principal shall be exempt from any penalty. . . ." Held, that as s. 15 (1) of the above Act provides that it is to be construed as one with the Weights and Measures Acts, 1878 to 1926, a defendant who is charged under s. 25 of the Act of 1878 with having a false or unjust weight for the sale of food may adopt the procedure provided for by s. 12 (5) of the Act of 1926.—HART v. HUDSON BROS., LIMITED [Div. Ct.] 820

WILL — Annuity — Super-tax—Annuity free of super-tax up to certain sum — Additional income of annuitant—Amount of super-tax payable by the trustees].—By his will a testator bequeathed to his wife an annuity of such a sum as, after allowing for income-tax at the highest rate for the time being and for super-tax, would yield her, free of all such tax, a cumulative net yearly sum of £3,500, and directed that there should be no apportionment of super-tax between the annuity and the rest of his wife's income, but that the whole of the super-tax payable by his wife up to but not exceeding super-tax on £3,500 a year, with the income-tax thereon added to it, should be attributed to the annuity and paid by his trustees. Held, that the trustees were not liable to repay to the annuitant out of residue a sum arrived at on the footing that the annuity was to bear the highest rates of super-tax payable on the annuitant's total income, but were liable for no more than what would be payable on a super-taxable sum of £3,500 with the income-tax added thereto—namely, at the present rate of income-tax, £4,200. With the present exemption, from super-tax, of the first £2,000 of the income the trustees

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would thus have to pay the super-tax payable on a total income of £6,200.—IN RE LORD ARMAGHDALE—CRAIG V. LADY ARMAGHDALE [Russell, J.] 239

Bequest to association — Validity — Objects of association—Whether shown to be unlawful].—The Board upheld the validity of a bequest to the Universal Negro Improvement Association for the African Redemption Fund on the ground that the objects of the association had not been shown to be unlawful.—UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION (INCORPORATED) AND OTHERS V. MORTER [P.C.] 331

Bequest — Validity — Charitable bequest — Animals' benevolent society].—The Court upheld the validity of a bequest for the maintenance of an animals' benevolent society, on the ground that a gift to prevent cruelty to the lower animals was a good charitable gift even though it included animals harmful to the human race.—IN RE GROVE-GRADY — PLOWDEN V. LAWRENCE [Romer, J.] 760

Construction — "All my stock or shares in the Great Eastern Railway Company" — Railway amalgamation—*Falsa demonstratio* —Purchase of stock in new company.—IN RE ANDERSON—PUBLIC TRUSTEE V. BIELBY [Russell, J.] 295

Construction — Bequest — Articles to be selected by donee—Death of donee without making selection—Failure of bequest].—A testator bequeathed to his wife such articles as she should within two months select from the articles in certain rooms in a house. Five days after the death of the testator his wife died without having made any selection. Held, that the right of selection did not pass to the wife's executors and therefore the bequest failed.—IN RE MADGE—PRIDIE V. BELLAMY [Russell, J.] 372

Construction — Devise of dwelling-house to life tenant — Direction to keep "in good repair and condition (reasonable wear and tear excepted)"—Failure by tenant for life to counteract natural decay—Liability].—Where in an instrument creating a tenancy for life or for years there is an obligation on the tenant to keep the premises "in good repair and condition (reasonable wear and tear excepted)," dilapidations do not come within the exception unless it is shown that they were caused by normal human use or normal action of the elements and also that they are reasonable in amount, having regard to the terms of the contract to keep the premises in good condition and to the other circumstances of the case. The exception does not mean that a tenant is not bound to do such repairs as may be required to prevent a defect originally proceeding from reasonable wear and tear from producing other results which such wear and tear would not directly produce. Where, therefore, a tenant for life under a will containing the above obligation and exception, during

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a residence in a dwelling-house which lasted for 42 years, while doing nothing actively to injure the premises, omitted almost entirely to repair it and did very little to counteract the natural process of decay, Held, that she was not protected by the exception but that her executors after her death were liable in damages to the trustees of the will creating her tenancy for life.—HASKELL V. MARLOW [Div. Ct.] 171

Legacy—Secret trust—Parol evidence—Admissibility — Acceptance of trust — Validity].—A testator made a codicil bequeathing £12,000 to five of his friends upon trust "for the purposes indicated" by him to them. One of the five friends prepared the codicil, upon the testator's oral instructions, and on the same day made a note of the terms of the trust in a written memorandum; those terms were communicated to all the other trustees and they accepted the trust. The testator's residuary legatees contended that parol evidence could not be given to explain the trust, as this was in fact an infringement of the provisions of the Wills Act, 1837, by which all testamentary documents must be in writing. Eve, J., held that by the decision in *In re Fleetwood—Sidgreaves v. Brewer* (15 Ch.D., 594) such evidence was admissible, and that the trust was valid. Held, on appeal, that the decision upon that particular point in *In re Fleetwood* (*supra*) had been affirmed by the Court of Appeal in *In re Huxtable—Huxtable v. Crawfurd* ([1902] 2 Ch., 793). The evidence was therefore admissible and the appeal failed.—IN RE BLACKWELL—BLACKWELL V. BLACKWELL [C.A.] 521

Mutual wills by husband and wife — Whether evidence of an agreement to constitute equitable interests].—The mere fact that two wills have been made simultaneously by husband and wife in identical terms does not of necessity imply any agreement beyond an agreement so to make them, and is no evidence of an agreement that after the death of one spouse the other will not revoke his or her will.—GRAY AND OTHERS V. PERPETUAL TRUSTEE COMPANY, LIMITED, AND ANOTHER. [P.C.] 654

Rule against perpetuities — "Period of restriction"—Validity].—A testator by his will, which was made in 1921, left his residuary estate to trustees to pay the income to certain of his issue during "the period ending at the expiration of 20 years from the day of the death of the last survivor of all the lineal descendants of her late Majesty Queen Victoria who should be living at his death." After the expiration of that period the capital was to be distributable. The testator died in 1926. Held, that as it would not be impracticable to obtain legal testimony so as to ascertain the period when the capital would become distributable the limitation was good.—IN RE VILLAR—PUBLIC TRUSTEE V. VILLAR [Astbury, J.] 485

See also PROBATE.

ERRATA.

Page 49, col. 2, line 7: For "defendants" read "plaintiffs."

Page 177, col. 2: In the second-last line of the second paragraph of the head-note for "ensure" read "enure."

Page 276, col. 2: In the 24th line from the bottom for "thus made" read "by this."

Page 278, col. 1: In the 9th line for "matrimonial" read "substitutional."

Page 333, col. 1: In the catch-words and head-note for "non-provided" read "provided."

Page 335, col. 1, line 15: For "non-provided" read "provided."

Page 397, col. 1: The first four lines of the second-last paragraph should read: "The King's Proctor was, before the Divorce Court existed, an officer of the Court, as a solicitor is now, with defined duties in the Ecclesiastical Courts having jurisdiction in Probate and in the Court of Admiralty."

Page 402, col. 2: In *Sunderland and South Shields Water Co. v. Hilton and Others* Mr. W. T. Monckton appeared for the plaintiffs, the water company, and Mr. W. Hedley for the defendants, the owners and occupiers.

Page 436, col. 2: In the third line of the last paragraph "difficult" should be "different."

Page 510, col. 1: In the second-last line of the head-note for "the justices" read "quarter sessions."

Page 599, col. 2: 4th line from the bottom, for "urgency" read "agency."

Page 602, col. 2: line 31, for "facts" read "fate."

Page 813, col. 1, after "Mr. Cave, K.C.," insert "Mr. R. H. Norris."